

# Select Constitutions

U.K., U.S.A., CANADA  
SWITZERLAND, U.S.S.R.  
CHINA JAPAN, PAKISTAN  
AND INDIA.

ANUP CHAND KAPUR

SELECT CONSTITUTIONS



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REPUBLIC OF CHINA, JAPAN, PAKISTAN AND INDIA]

By

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SEVENTH EDITION - 1971  
(Reprint)



1971

**S. CHAND & CO. (Pvt.) LTD.**

DELHI—NEW DELHI—JULLUNDUR—LUCKNOW—BOMBAY  
CALCUTTA—MADRAS—HYDERABAD—PATNA

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Published by S. Chand & Co. (Pvt.) Ltd., Ram Nagar, New Delhi-55  
and printed at Rajendra Printers, Ram Nagar, New Delhi-55

## PREFACE TO THE SEVENTH EDITION

For this Seventh edition of the **Select Constitutions**, I have endeavoured to make such changes as were necessitated by the rapidly developing circumstances in the countries under discussion, especially in India and Pakistan. The whole body of material has been brought up-to-date as in April, 1970. Almost all Chapters have benefited from the revision though certain sections required more work than others. No fundamental change, however, has been made in the approach and the patterns progressively developed through preceding editions.

Chandigarh,

June 10, 1970.

Anup Chand Kapur



## PREFACE TO THE FIRST EDITION

This book is an attempt to explain the working of the governmental systems as obtainable in England, United States of America, Switzerland,\* USSR, and India, and has been designed to meet the needs of students appearing for university and various competitive examinations. Efforts have been made to keep the text as nearly abreast of the times as the rapid changes in events in every country have permitted. Endeavour has, also, been made to make comparative study of the forms, structure and organisation of modern constitutional governments. Wherever possible case-law has been cited. In fact, no book on Constitutions can serve a useful purpose, whether it is meant for the legal profession or statesmen and parliamentarians or students of Political Science and Comparative Governments unless it is adequately supplemented by judicial decisions. A Constitution is what the judges make it. Chief Justice Hughes of the Supreme Court of the United States observed, "The Constitution is what the Supreme Court says of it."

I have tried to consult the best available sources of information in respect of the various subjects dealt within the book and I take this opportunity of acknowledging my indebtedness to the renowned authorities from whom I have borrowed so profusely and drawn the inspiration for preparing this book.

With a view to encouraging students to read as widely as possible, I have placed at the end of each Chapter a selected bibliography dealing with the subject treated in the Chapter, and have cited many additional authorities in the footnotes.

My cordial thanks are due to Shri R. L. Nirola, Secretary, Pepsu Vidhan Sabha, for permission to make use of his Secretariat Library, and Shri Thakar Das Jand, Librarian, Mahendra College, and his assistants for their unfailing courtesy in making available library books at all odd hours. My wife helped me, as usual, in pushing the book through the press.

Civil Lines,  
Patiala.

Anup Chand Kapur

June 15, 1956.

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The  
Government of the United Kingdom

## CHAPTER I

# NATURE AND CONTENT OF THE CONSTITUTION

**Nature of the British Constitution.** In almost every country in the world except the United Kingdom, 'The Constitution' means a selection of the legal rules which govern the government of that country and which have been embodied in one or several documents. Such a document or documents may have been drawn up either by a Constituent Assembly, or it may be the handiwork of a legislature, or it may have been granted by a King binding himself and his successors to govern according to the provisions of the proclamation. The Constitution is, thus, understood to mean a written, precise and systematic document containing the general principles under which government functions. It is distinct in character and is held in special sanctity. The 'Constitution' is amended and altered by a procedure different from that required in amending the statutory or ordinary law. The statutory law must be consistent with the letter and the spirit of the Constitution otherwise it is held unconstitutional or *ultra vires*.

But the British Constitution has never been devised and reduced to writing.<sup>1</sup> It remains undefined, unsystematized and uncoded. It lacks precision and coherency. The Englishmen never drew out their political system in the shape of a formal document and, consequently, there is no single place in which 'The Constitution' as a whole is clearly and definitely written down. Many books may be found which **describe** the British Constitution, but no one of them can be said to **contain** it. There are, no doubt, some enactments of Parliament which make the British Constitution, but these enactments do not bear the same date. They were made as and when they were needed and the circumstances demanded. But the most important part of the British Constitution is just what is kept out of the written law and given over to the sole guardianship of custom. Nor is there any law in the United Kingdom of which we can say that since it is a part of the Constitution, it can be altered by a procedure different from the one required for altering the ordinary law. Here, the Constitutional Law and the Ordinary Law stand at par with one another. Both emanate from the same source and undergo the same procedure in passing and amending them. Obviously, then, no British Court or any other authority can legally refuse to enforce and set aside any enactment of Parliament.

The British Constitution is, therefore, to a large extent an unwritten

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1. Except for the Instrument of Government of 1653. The Instrument of Government which made Cromwell Lord Protector and established a new legislature was, however, the British Constitution for a few years only. Restoration put an end to it and England returned to the old form of government.



Constitution. It is the product of history and the result of evolution. It has grown with the growth of the English nation, changed with its needs, and adapted itself to the needs of various times. Jennings has said, "If the Constitution consists of institutions and not of documents that describe them, the British Constitution has not been made but has grown, and there is no paper." The institutions necessary for carrying out the functions of the State were established from time to time as the need arose. "Formed to meet immediate requirements they were then adapted to exercise more extensive and sometimes different functions. From time to time political and economic circumstances have called for reforms. There has been a constant process of invention, reform and amended distribution of powers. The building has been constantly added to, patched, and partly reconstructed, so that it has been renewed from century to century; but it has never been razed to the ground and rebuilt on new foundations." In other words, the British Constitution is "the child of wisdom and chance;" it is the result of a process in which many elements, like charters, statutes, judicial decisions, precedents, usages and traditions, have entered piling themselves one upon the other from age to age and shaping the political institutions of the country according to the exigencies of time. The British Constitution is ever growing and always undergoing modifications. It is a dynamic constitution with its roots in the past and branches in the future. Lord Morrison has aptly said, "But as a whole, ours has been a peaceful development, learning as we moved on, establishing the foundation of further progress." No man in 1688 could have foretold, with any measure of accuracy, what the Constitution of present day Britain would be, and no man of our times can predict how the Constitution will evolve a few decades hence.

Briefly, the British Constitution is a body of basic rules indicating the structure and functions of political institutions and the principles governing their operation. It is just the same in nature as the constitution of any other country, the only difference being that the British Constitution has never been systematized, codified and put in an orderly form. Probably no attempt will be made in future, too, to bring all these rules and principles together to make the Constitution a consistent and coherent whole. In fact, it is an impossible task, for not only do the usages and traditions cover a wide range, but many of them are not sufficiently definite to be reduced to writing. Moreover, the Englishman, as a political animal, has never favoured a system of government based upon fixed principles involving the application of exact rules. He is practical, matter of fact, and zealous for business. Expediency is the guiding principle of his life and he seizes opportunity by the forelock. He, thus, knows no logic and the British Constitution lacks all logic. The result, as Ogg says, "is a constitutional structure which lacks symmetry, governmental system which abounds in the illogical." But it does not mean that it is a mere hotchpotch of heterogeneous elements. The

2. Jennings, W. Ivor, *The Law and the Constitution* (1948), p. 8.

3. *Ibid.*

4. As Strachey has called it in his *Queen Victoria* and quoted by F.A. Ogg in his *English Government and Politics*, p. 68.

5. Lord Morrison, *British Parliamentary Democracy*, p. 2.

rules and principles which govern the governmental machinery have been deduced from British experience and consciously adopted to and applied.

**Views of Paine and De Tocqueville.** Thomas Paine and Alexis de Tocqueville were the prominent among men who were of the opinion that the British Constitution does not exist. Thomas Paine, a great champion of written constitutions, categorically declared that where a Constitution "cannot be produced in a visible form, there is none." In a spirited reply to Burke, who eminently defended the English Constitution in his *Reflections on the French Revolution*, Paine asked, "Can Mr. Burke produce the English Constitution? If he cannot, we may fairly conclude that though it has been so much talked about, no such thing as a Constitution exists or ever did exist." De Tocqueville, the celebrated French writer on foreign Governments, a generation later said that in "England the Constitution may go on changing continually or rather it does not exist." Whatever be their reasons for making these assertions, Paine and De Tocqueville were both wrong. There can be no State without a Constitution. It is true that there is no single document intended to comprise the fundamental rules of constitutional practices to which a student of the British Constitution may turn for reference, as one does in the United States or in India. But there is no Constitution which is either wholly written or entirely unwritten. Written and unwritten elements are present in every Constitution. All written constitutions grow and expand with the passage of time either as a result of customs or judicial interpretations. Written constitutions, remarked Bryce, become "developed by interpretation, trimmed with decisions, and enlarged by customs so that after a time the letter of their texts no longer conveys their full effect." Nor can the makers of a written constitution foresee the future and shape the constitution to fulfil the needs of the people to come. Man is dynamic and so are his political institutions. The conventional element therefore, in any system of government is inevitable. Finally, a written constitution does not contain all the rules relating to all the institutions of government. A selection is made of both. For instance, the Constitution of the United States of America contains only seven Articles, and occupies about ten pages. The Constitution of India, on the other hand, is the lengthiest Constitution in the world containing 395 Articles and nine schedules covering 273 pages. The difference between the two Constitutions is suggestive, for it shows that within limits a written constitution may contain as much or as little as is thought desirable by the father-framers. And yet no constitution is complete by itself. "It is a framework, a skeleton which had to be filled out with detailed rules and practices. It is concerned with the principal institutions and their main functions, and with the rights and duties of citizens which are, for the time being, regarded as important. It may contain more or less, according to the circumstances of the moment and the

6. "En Angleterre la constitution peut changer sans cesse: Ou plutôt elle n'existe point." It will be observed that De Tocqueville's emphasis is more on the flexible character of the English Constitution. He could not reconcile himself to the fact that the constitutional law and the statutory law should emanate from the same source and both be amended by ordinary legislative process. He, accordingly, concluded that the English Constitution does not exist.

special problems being faced by the State while it is being drafted." All written constitutions provide for amendments in order to cater to the future needs of the people. Customs and judicial decisions, too, supplement the constitutional provisions. The difference between a written and unwritten constitution is, therefore, one of degree rather than of kind. Wherever there are rules determining the creating and operation of governmental institutions, there exists a constitution. Britain has such institutions and such rules, "and certainly long before the times of Paine and De Tocqueville England had such a body of rules, with Englishmen equally conscious of its existence and proud of its history."

### COMPONENT PARTS OF THE CONSTITUTION

The sources from which the British Constitution is drawn are many and diverse and we divide them into seven main categories or groups.<sup>7</sup> There are, in the first place, certain great Charters, Petitions, Statutes and other landmarks such as Magna Carta (1215), the Petition of Rights (1628), the Act of Settlement (1701), as modified by the Abdication Act (of 1936), the Act of Union with Scotland (1707), the Great Reform Act (1832), the Parliament Act of 1911, as amended in 1949, the Government of Ireland Act of 1920, the Public Order Act of 1936, the Ministers of the Crown Act of 1937, Representation of the People Act, 1949, the Life Peerage Act, 1958, the Peerage Act, 1963, the Statute of Westminster 1931, the Indian Independence Act, 1947, etc. Most of these are Acts passed by Parliament. But a document like Magna Carta is considered to be a part of the Constitution as it makes a great landmark in national history, and various Acts of Parliament "may, without undue violence to the facts, be regarded as in direct line of descent from Magna Carta."<sup>8</sup> Elder William Pitt called Magna Carta, the Petition of Rights and the Bill of Rights as the Bible of the British Constitution. One thing, however, very significant about these Charters and Statutes is that they were the product of political stress and crisis and they contain the terms of settlement of that crisis. They are a part of the Constitution because of what they deal with. It is the context of the constitutional struggle within which they originated that they bear the impress of the constitutional law.

Secondly, there are a good number of ordinary Statutes, which Parliament has passed from time to time, dealing with suffrage, the methods

7. Ogg, F.A., and Zink, H., *Modern Foreign Governments* (1953), p. 26.

8. Sir Maurice Amos divided the rules of the Constitution into three kinds: (i) Rules of Law; these included Rules of the Common Law, Rules of Statute Law, and the law, or so-called "privileges" of Parliament; (ii) the conventions of the constitution; and (iii) principles which relate to the liberty of the subjects. Amos, Sir Maurice, *The English Constitution*, p. 24.

9. Gooch, R.K., *The Government of England*, p. 64. "Magna Carta," writes Dr. Gooch, "is technically an enactment of the King, with the advice of his great council; Parliament grew out of the great council; and, even at present, an Act of Parliament is technically enacted by the King with the advice and consent of Parliament." Similarly, Gooch tries to prove that the Petition of Rights does not differ in principle from an Act of Parliament, "the Bill of Rights is, in the most literal sense, itself an Act of Parliament." *Ibid.*, pp. 64-65.



of election, the powers and duties of public officials, etc. These Statutes, unlike the constitutional landmark enumerated in group one, are not the outcome of a constitutional struggle. They were passed as and when the exigencies of time demanded them under the ordinary process of things. For example, none of the laws extending the right to vote, which were passed between 1867 and 1948, aroused popular excitement as the Reform Act of 1832. Nonetheless, all these Statutes are vitally important for the development of political democracy and any attempt to repeal them would now be regarded against the "constitutional sense" of the nation. In fact, the system of Government obtainable in Britain, would become unworkable if ever an attempt is made to repeal any one of such Statutes, though Parliament is a sovereign body and it has "the right to make or unmake any law whatever."

The third source of constitutional rules is to be found in the decisions of judges on cases heard by them in the law courts. When judges decide cases, they interpret, define and develop the provisions of the great Charters and Statutes. While doing so, their judgments create precedents which succeeding judges respect. Since many of these judgments related directly to constitutional matters, and the legal principles and judicial precedents of these judgments are an important element in the British Constitution, they resemble and correspond to the decisions of the Supreme Court of the United States which have helped to clarify and expand the provisions of the American Constitution. The decision in the case of the Sheriff of Middlesex in 1840 established the principle that Parliament had the right to punish its own members for a breach of privilege, no other legal authority being necessary. The judgment in *Bradlaugh v. Gossett* in 1884 established the supremacy of Parliament over the courts in all matters concerning the internal affairs of Parliament.

In the fourth place, are the principles of the Common Law and several matters of major constitutional importance covered by them. It is from the Common Law, for example, that the King derives his prerogative," and that Parliament derives its supremacy. The civil liberties of the people, which in America are embodied in the Bill of Rights, are ensured in Britain by the rules of the Common Law. Freedom of speech, of press and of assembly, the sanctity of a citizen's home, and the right of jury trial are Common Law rights which to-day have their effective meaning in the long line of decisions judges have made. The laws of Parliament may redefine or modify the manner of exercising these rights, but such laws are in their turn subject to judicial interpretation made in the light of the many precedents of the past.

The principles of the Common Law are not established by any law passed by Parliament or ordained by the King. They grew up entirely on the basis of usage. Common Law, according to Blackstone, consists of customs "not set down in any written statute or ordinance, but depend-

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10. Dicey, A.V., *Introduction to the Study of the Law of Constitution*, p. 10.

11. The term prerogative was in origin used to denote the sum of the rights ascribed to the King as a feudal overlord. But the expression is used today to refer to the Crown's discretionary authority, that is, to what the King or his servants can do without the authority of an Act of Parliament.

ing on immemorial usages for their support." The judges recognised "the customs of the realm", applied them in individual cases, and set precedents for decision in later cases. As these decisions were "broadened down from precedent to precedent there grew up a body of principles of general application which stand as a bulwark of British freedom and an essential part of the British Constitution". The Common Law like Statutory law, is, thus, "continually in the process of development by judicial decisions."

Another source of constitutional rules is to be found in usages or conventions. The conventions of the constitution, as they are called, are the centre and soul of the constitutional law in Britain. The fundamental convention, from which practically all others flow, is the convention of the Cabinet Government. Although the validity of the conventions of the constitution cannot be the subject of proceedings in courts of law, yet they cover some of the most important parts of the British political system and are most scrupulously observed. "Conventions are", Liner observes, "rules of political behaviour not established in statutes, judicial decisions, or parliamentary customs but created outside these, supplementing them, in order to achieve objects they have not yet embodied. These objects, in the British Constitution, can be summed up thus: to make the executive and the legislature **responsible** to the will of the people. To add concreteness we could use the terms **Crown, Government, or Cabinet** in place of **Executive and Parliament**, meaning the House of Commons (especially) and the House of Lords, in place of **Legislature**."<sup>12</sup>

Next, are the commentaries by eminent writers whose works have come to be regarded as authoritative expression on the British Constitutional Law. These commentators have systematised the diverse conventional rules, established a definite relation of one to another, and, then, linked them into some degrees of unity by reference to central principles. In certain cases such writers have provided compendious and detailed accounts of the operation of particular categories of rules and their works have acquired the status of constitutional documents. Probably, the most authoritative of such works is Erskine May's **Treatise on the Law, Privileges, Proceedings and Usages of Parliament**. It is the classic guide to the procedure and privileges of Parliament and is constantly referred to by the Speakers of the House of Commons on the formulation of their rulings on question of privilege and procedure. Also (although to a much lesser extent) A.V. Dicey's **Law of the Constitution** has acquired over the years an authority that makes it more than merely a commentary on constitutional practice.

Finally, the exercise of the Royal Prerogative forms another aspect of constitutional practice. The power to declare war, make treaties,

12. Carter, M.G., and others, *The Government of Great Britain*, p. 41.

13. Common Law may be regarded as that part of the law of the land which is traditional and judge-made. "The explanation of the adjective 'common' is that in medieval times the law administered by the King's superior courts was the 'common custom of the realm', as against the particular customs with which local jurisdictions were concerned." Harrison, W., *The Government of Britain*, Appendix B, pp. 161-62.

14. *Governments of Greater European Powers*, p. 46.

pardon criminals, and dissolve Parliament are important functions performed by Royal prerogative. They are executed through **Orders in Council** or through proclamations and writs under the great seal. Today, these functions are performed by Ministers on behalf of the Monarch, and, as such, the authority for the decision comes from the Crown rather than from Parliament.

The nature of the British Constitution may be summed up in the words of Anson. It is, he wrote, "a somewhat rambling structure, and like a house which many successive owners have altered just so far as suited their immediate wants or the fashion of the time, it bears the marks of many hands, and is convenient rather than symmetrical. Forms and phrases survive which have long since lost their meaning, and the adaptation of practice to convenience by a process of unconscious change has brought about in many cases a divergence of law and custom, of theory and practice." The British for the most part think that the nature of their Constitution "is most sensible and that a codified constitution like the American is more trouble than it is worth...."

### CONVENTIONS OF THE CONSTITUTION

The Conventions of the Constitution, the name given by Dicey to the indefinite number of customs, traditions and precedents, form an integral part of the British Constitution. So deep-rooted have these conventions been found in the habits of the Englishmen, and so firmly the mechanism of government is erected on their foundation that without them the Constitution becomes maimed if not absolutely unworkable. And yet they are not the law of the Constitution; they are nowhere written down in any formal or official document.

**Laws and Conventions.** A distinction is very often made between laws of the Constitution and conventions of the Constitution. But conventions are not really very different from laws and it is frequently difficult to place a set of rules in one class or the other. Jennings has rightly said that "The Conventions are like most fundamental rules of any Constitution in that they rest essentially upon general acquiescence. A written constitution is not law because somebody has made it, but it has been accepted." Conventions are based on usage and acquiescence and their binding force, like laws, is derived from the willingness of the people to be so bound. If obedience to law is deemed a fundamental duty, obedience to conventions is among the political obligations, because they help the wheels

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15. *Law and Custom of the Constitution*, Vol. I, p. 1.

16. Bogun, D.W., and Verney, D.V., *Political Patterns in Today's World*, p. 87.

17. John Stuart Mill referred to them as "the unwritten maxims of the constitution", while Anson referred to them as "the customs of the constitution." None of the phrases, according to Jennings, exactly expresses what is meant. Dicey's phrase has, however, now been sanctioned by common use. *The Law and the Constitution*, *op. cit.*, p. 80.

18. "Though in 1837 the term 'conventions of the constitution' had not attained regular currency, the thing meant thereby was in effective operation and had been so in essence since the revolution." Keith, A.B., *The Constitution of England from Queen Victoria to George VI*, Vol. I, p. 12.

of political machine going in accordance with the will of the people. Both, law and conventions, are inevitably similar as they serve the common purpose of regulating the structure and functions of Government aiming at the good of the people and are the result of common consent. "What is law and what is convention," Jennings maintains, "are primarily technical questions. The answers are known only to those whose business it is to know them. For the mass of the people it does not matter whether a rule is recognised by the judicial authorities or not. The technicians of Government are primarily concerned."

For the technicians the difference between laws and conventions spreads to three aspects. In the first place, laws emanate from a legally constituted body and carry with them greater sanctity. Conventions are extra-legal and they grow out of practice. Their existence is determined by usage. In the second place, law is usually expressed in more precise terms and it has the added dignity of extracting unquestioning obedience from everybody. Conventions are never formulated. They grow out of practice, they are modified by practice, and at any given time it may be difficult to say whether or not a practice has become a convention. Finally, law is enforced by the courts and it is the duty of judges to consider whether Acts are legally valid and to take such steps that the law is obeyed. Conventions are not enforced by courts and judges cannot force their obedience as they have no legal sanction.

But even from the technical point of view no definite boundary line can be drawn between legislation, on the one hand, and conventions, on the other hand. If a given provision is a part of the British Constitution, it is either law or convention and the fundamental conventions have well nigh been recognised by many Acts of Parliament. The Preamble to the British North America Act, 1867, an enactment of British Parliament, reads: "The Provinces of... have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom... with a constitution similar in principle to that of the United Kingdom." The Constitution of the United Kingdom is a body of rules determining the structure and functions of political institutions and the principles governing their operation. These rules and principles of political governance are primarily unwritten and lie scattered in the various Charters, Statutes, judicial decisions and conventions and mark a steady transference of power from the King as a person to a complicated impersonal organisation called the Crown. The King has become the Crown and that is the core of the constitutional system in the United Kingdom and around it revolves the entire machinery of government. Recognition to constitutional conventions was, again, accorded by Article 2 of the Agreement for a Treaty between Great Britain and Ireland in 1921, when the law, practice, and constitutional usage governing the relationship of the Crown, or of its representatives, or of the Imperial Parliament to the Dominion of Canada, were made applicable to the Irish Free State. In Section 4 of the Status of the Union Act, 1934, of the Union Parliament, specific reference is made to the constitutional conventions regulating the use by the Governor-General of his legal power of summoning and dissolving Parliament, and of appointing ministers.<sup>19</sup> Some of the conventions regulating

19. Refer to H.V. Evatt, *The King and his Dominion Governor*, Appendix, pp. 229-306.



relationship between the Dominions and the United Kingdom have been inserted in the Preamble to the Statute of Westminster, particularly those relating to alterations in the law touching the Succession to the Throne, or the Royal Style and Titles, and the legislative authority of the British Parliament.<sup>1</sup> The importance of the first of these conventions was demonstrated in the abdication of Edward VIII. The change in the Royal Style and Titles after the Indian Independence Act, 1947, was brought about by the full assent of the Dominion Parliaments.

The Cabinet system of government presupposes the pre-eminence and leadership of one single person and he is the Prime Minister. Abolish the institution of the Prime Minister or diminish any part of his powers, the entire political structure would be destroyed. And yet neither the institution of Cabinet nor the office of the Prime Minister were known to law before 1937. The Ministers of the Crown Act, 1937, provided for the payment of a salary of £10,000 a year "to the person who is the Prime Minister and the First Lord of the Treasury."

The same Act provided for the salaries of the Ministers who are "members of the cabinet". It also recognised "Party", "Opposition" and "the Leader of the Opposition". It may, however, be remembered that the provisions of the Ministers of the Crown Act do not validate or legalise these conventions. What it does is to recognise them that they exist. But once their existence is recognised by legislation, conventions do not really remain very different from laws. Jennings asserts that the "conventional system of the British Constitution is in fact much like the system of the common law."<sup>23</sup>

**Kinds of Conventions.** Conventions are essentially of three kinds. First, those which ensure a proper harmony between Parliament and the Executive in the light of Parliamentary Sovereignty. The Glorious Revolution of 1688 settled once for all that Parliament had supreme power and it could control every aspect of national life. The powers of the King were limited and the constitutional development was the emergence of the Cabinet. Convention, therefore, alone provides for the essential rules of the Cabinet Government. It demands that the Ministers of the

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20. "Inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it will be in accord with the *established constitutional position* (*Italiens mine*) of all members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well as of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

21. "It is in accord with the *established constitutional position* (*Italiens mine*) that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as that of the law of that Dominion otherwise than at the request and with the consent of that Dominion."

22. In fact, the office of the Prime Minister came to be recognized by legislation in 1917 when the Chequers Estate Act enabled the official "popularly known as the Prime Minister" to occupy the Chequers Estate as a furnished country residence.

23. *Cabinet Government*, op. cit., p. 5.

King must be the Members of Parliament, they should belong to the majority party in the House of Commons and function under the party leader designated as the Prime Minister. It further demands that the Cabinet is responsible to Parliament for its actions and it remains in office so long as it retains the confidence of the House of Commons. If the majority is reduced to minority and the Commons withdraw their support, the Cabinet either resigns or appeals to the electorate for mandate. The Ministry must resign if the verdict of the electorate is against it, allowing the Party in Opposition to form the government. If there are more opposing parties than one, and the result of the general election does not give clear majority to one single party, it may meet Parliament and allow a vote of the House of Commons to decide its fate as the Conservative Ministry did in 1924. "But it cannot ask another dissolution, nor should the Crown concede it if it were asked." Conventions insist on the collective responsibility of Cabinet to Parliament for all its public acts, and that its duty is to initiate legislation. Convention, again, determines that the Ministry should combat domestic crisis with all the authority at its disposal, but it must summon Parliament immediately to consult with it. Similarly, the Ministry shall have full regard to the will of the Commons in the conduct of foreign affairs, and "shall not declare war, or neutrality or make peace, or enter into important treaties without securing as soon as possible endorsement by the Commons, which so far as possible should be taken into counsel before the Crown is committed to any definite course of action."<sup>24</sup>

Secondly, there are conventions which relate to legislative procedure and the relations between the two Houses of Parliament. That Parliament meets annually and that it consists of two Houses rest on custom. The essential principle of the initiative of the House of Commons in matters of finance, under the authority of the Cabinet, and the subordination of the Lords rested solely on convention until the Parliament Act of 1911. The Act of 1911 as amended in 1949 put definite limitations on the legislative powers of the House of Lords which had hitherto been regulated by convention only. The principle that no peer other than a Law Lord sits when the House of Lords is acting as a Court of Appeal is also customary. Then, there are many conventions regulating parliamentary procedure. It is a matter of convention that every Bill must have three readings before finally voted upon. It is, again, a convention which determines that a speech from the Government benches is to be followed by a speech from the Opposition. Indeed, the whole idea of His or Her Majesty's Opposition is a product of convention. Convention, too, demands that the Speaker of the House of Commons should become a no-party man and he must resign from the membership of the party to which he belonged on his election as Speaker. It is another convention that the retiring Speaker must be returned unopposed and he should be elected Speaker as many times as he pleases.

Finally, there are conventions which aim at securing harmony between government and legislative action on the one hand and the verdict

24. Keith, A.B., *The British Cabinet System* (Second Edition by N.H. Gibbs), p. 2.

25. *Ibid.*, p. 3.

of the electorate on the other. One convention of this character is that government should not initiate legislation of a controversial nature unless they have a mandate from the electorate. The "mandate convention", as it has now come to be known is vindication of the principle of popular sovereignty. It makes necessary that any item of policy which involves radical changes must have been a part of the programme on which government fought the previous election or, "if it was not, that the Opposition should show by its action or inaction that this is not a matter of keen controversy." The Conservative minority in the House of Lords in the years immediately following Labour's victory in 1945, approved bills embracing such measures as nationalization on the ground that Labour had received a mandate from the electorate. This convention does not apply only to legislation, but also to foreign policy. Another example of this nature is that when an appeal to the electors goes against the Ministry they are bound to retire from office and have no right to dissolve Parliament a second time. "Behind these conventions", according to Greaves, "there is something of a political sanction."

Another kind of conventions are those which determine the relations between the Dominions and the United Kingdom. As said before, the Statute of Westminster 1931, embodies in a legal form the conventions which at one time regulated inter-Imperial relations thereby giving a constitutional sanction to the legislative independence of the Dominions. But the methods of inter-Commonwealth co-operation are still essentially conventional. For example in matters relating to the Dominions the King acts on the advice of the Ministers of the Dominion concerned and not on that of his Ministers constituting the Government in Britain. Then, the British Parliament does not pass any law for a Dominion unless it has been expressly authorised by the Dominion concerned to do so. The rules for making of treaties by any part of the Dominions are still to be found in the Reports of the Imperial Conferences of 1923, 1926 and 1930. Similarly, the position of the Dominion Governor-General was determined by agreements at the Conferences of 1926 and 1930. The co-operative link between the Commonwealth countries and, thus, their func-

26. In 1945 Labour Party's manifesto read, "... we give clear notice that we will not tolerate obstruction of the people's will by the House of Lords."

27. Viscount Cranborne, the leader of the Conservative Party in the House of Lords, said, "Whatever our personal views, we should frankly recognise that these proposals were put before the country at the recent General Election and that the people of this country, with full knowledge of these proposals, returned the Labour Party to power. The Government may, therefore, I think, fairly claim that they have a mandate to introduce these proposals. I think it would be constitutionally wrong, when the country has so recently expressed its view, for this House to oppose proposals which have been definitely put before the electorate." The idea of the electoral mandate is by no means new, although the concept of the mandate had been much more vague with the Liberals and the Conservatives. But the Labour has always believed since 1918, that a party should go to the electorate with a set of concrete proposals which, if successful, it is thereby mandated to put into practice. Refer to A.H. Birch's *Representative and Responsible Government, An Essay on the British Constitution*, pp. 116-122.

28. Greaves, H.R.G., *The British Constitution*, p. 18.

tioning as a single organism are matters of common understanding and mutual agreements.

**Sanction behind Conventions.** It is generally asked why conventions are so scrupulously obeyed in Britain? This has been partly explained by Dicey.<sup>29</sup> His conclusion was that violation of conventions ultimately means breach of law. He takes the example of convening a session of Parliament every year and argues if no session of Parliament is summoned annually, it is only a breach of convention and not a violation of law. But if no session of Parliament is called annually, it is not possible to raise revenues and pass the Army and Air Force (Annual) Act. In that case it becomes illegal to maintain army and air force on money raised from unauthorised taxes. Any one doing so can be brought before a court for breach of law and punished accordingly. It, therefore, becomes essential rather imperative that Parliament should be summoned at least once a year. If it is not, it means indirect collision with the laws of the land. Similarly, the Ministry may come to grief, if it does not resign after it has lost the confidence of the House of Commons.<sup>30</sup>

But this does not cover the whole case. Lowell has correctly pointed out that Britain is not obliged for ever to hold annual sessions of Parliament. Being a sovereign body, Parliament can pass a permanent Army and Air Force Act and grant the existing annual taxes for a number of years. Moreover, there are some conventions the violation of which does not necessarily lead to breach of law. For example, no breach of law would follow if the Speaker does not resign from the membership of his party after his election to that office, or if the government does not recognise His Majesty's Opposition, or if all the conventions relating to the conduct of business in the House of Commons are not observed. Similarly, there is no breach of law if the Prime Minister is taken from the House of Lords. At the same time, precedents may be broken if the altered political conditions of the country demand that. The Labour Government violated convention of ministerial collective responsibility when members of the Cabinet in 1931 agreed to differ. It was justified by Baldwin and he maintained that conventions were altered by circumstances. One of the merits of the conventions is the flexibility they impart in the governance of the country. Disraeli, in 1868, disregarded the well-established usage by resigning without meeting Parliament on defeat at the general election. In 1929, Baldwin reverted to the old convention and considered it wholly constitutional for him to meet Parliament and receive its verdict. The conventions, as Jennings points out, "do not exist for their own sake they exist because there are good reasons for them."<sup>31</sup>

29. *Law of the Constitution, op. cit.*, Ch. XV.

30. But a Ministry can continue to remain in office for a sufficiently long time even if it has lost the confidence of the House of Commons. When Parliament has passed the annual budget, and it is usually done by the beginning of July, the House of Commons does not exercise any control over the Ministry. For, no session of Parliament may be summoned until April next and the Ministry may continue to remain in office without breaking the law, though it no longer enjoys the confidence of the House of Commons. There are other means, too, by which the Ministry can retain office. (cf. H.J. Laski, *Democracy in Crisis*, Ch. II.

31. *Cabinet Government, op. cit.*, p. 7.



The conclusions of Dicey, therefore, do not command unqualified support.

Lowell says that conventions are supported by something more than the realization that their violation may mean the violation of some law. Unlike the laws of the constitution, conventions go to constitute a moral code for the guidance of public men in the field of practical politics. "In the main," he says, "the conventions are observed because they are a code of honour. They are, as it were, the rules of the game, and the single class in the community which has hitherto had the conduct of English public life almost entirely in its own hands is the very class that is peculiarly sensitive to obligation of this kind. Moreover, the very fact that one class rules, by the sufferance of the whole nation, as trustees for the public, makes that class exceedingly careful not to violate the understandings on which the trust is held."<sup>32</sup> The additional sanction for conventions comes from public opinion. The power of government rests in the last resort on the consent of the electorate and the powers of different departments of government must be exercised in accordance with that principle. Any deviation therefrom will go to make the action of government unconstitutional, though not illegal. Legally, there is nothing wrong if conventions are violated. But a legal truth in Britain may become a political untruth. Even a popular and dynamic personality like Edward VIII could not go against the wishes and advice of his Ministers in marrying the woman of his choice. The conventions are really obeyed because of the political difficulties which follow if they are violated. To raise the question of their violation is, therefore, in large measure, fruitless, for conventions are not violated. If one is at all violated, as it was done by the House of Lords in 1909, by rejecting the famous Lloyd George budget, there is an immediate demand to have this convention enacted into law. The electorate gave to the Liberal Party their unequivocal consent in defining the financial and legislative powers of the House of Lords and the result was the Parliament Act of 1911, which made it impossible for the Lords to delay Money Bills for more than one month. The same Act limited its legislative powers too.

"Government," according to Jennings, "is a co-operative function, and rules of law alone cannot provide for common action."<sup>33</sup> It implies integration of the activities of many individuals. Each individual must follow certain rules if he is to play his part well, and rules are generally obeyed because of the habit to obey them, no matter whether they are laws or conventions." Conventions are, therefore, rules of political behaviour, first established to meet with specific problems and subsequently they were followed as they seemed just and reasonable to follow. They

32. *Government of England*, Vol. I, pp. 12-13.

33. *The Law and the Constitution*, p. 98.

34. "A usage in constitutional matters, it will be found on investigation, is normally based on some definite convenience or utility in relation to the constitutional system of the day, and with the passing of the years it is followed under the influence of the normal psychological principle of imitation and willingness to follow precedent." *The British Cabinet System*, op. cit., p. 5.

thus established intelligent practices and continue their authority as such. Dr. Finer's view is that the conventions contrive that the prerogatives of the Crown shall be converted into the privileges of the people. Our modern code of constitutional morality," he observed, "secures through a roundabout way what is called abroad the 'sovereignty of the people'." It is in this context that Jennings wrote that "conventions are obeyed because of the political difficulties which follow if they are not." Marshall and Moodie give a more matter of fact explanation. They say, "conventions describe the way in which certain legal powers must be exercised if the powers are to be tolerated by those affected."<sup>35</sup> The conventions have democratised the Executive by making Parliament the centre of gravity enabling thereby the democratic system operate in a unitary government. Parliamentary practices emerging out of this process of democratization enable the Government and the Opposition to sit together, discuss, and work together for the development of national welfare. Conventions have also revolutionised the Judiciary by making the Law Lords to constitute the highest Court of Civil Appeal in Britain. They have also enabled inter-Commonwealth relations and the collaboration of the member nations to the common advantage.

Conventions are not static like law. They, indeed, "provide the flesh which clothes the dry bones of law" and consequently conventions have enabled a rigid legal framework of government to keep an organic pace with the changing political ideas and needs of the people. "New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs" and conventions are motive power of the British Constitution. They lubricate the machinery of the Government and keep the machine going more smoothly. In their absence the structure of the Government is sure to collapse and the nature of the British Constitution might well be very different from what it is now. The British system is the best example of democracy and especially of Parliamentary democracy.

Something more is served by the conventions. "No written Constitution," aptly remarks Dr. Finer, "any more than the ordinary law, can express the fulness of life's meanings and demands, because the human imagination, even at its most talented, falls far short of reality." The real Constitution is a living body of general prescriptions carried into effect by living persons. Conventions are flexible and growing and they can be easily adjusted to the future requirements without creating a political stir which an amendment of the Constitution creates. They harmonise relations where a purely legal solution of practical problems is impossible. "In converting a monarchical into a democratic constitution and in passing from the seventeenth to the twentieth century, the British eschewed writing the new articles: they preferred to rely on the growth and inheritance of customs—that is, conventions."<sup>37</sup>

35. *Law of the Constitution*, p. 431.

36. Marshall, Geoffrey, and Moodie, Graeme C., *Some Problems of the Constitution*, pp. 16-18.

37. Finer, Herman, *Governments of Greater European Powers*, pp. 49-50.

## SALIENT FEATURES OF THE CONSTITUTION

From the nature of the British Constitution, we get the following important features:

1. **It is partially written.** The British Constitution is to a large extent of an unwritten nature. It is not a pre-arranged pattern according to which government must be carried on. Nor is it the result of conscious creation. Its sources are several and the course of its development has been sometimes guided by accident and sometimes by high design. Being a child of wisdom and of chance, its growth has been piecemeal and gradual expressing itself in different Orders and Statutes, precedents, usages and traditions whatever the exigencies of time demanded. There is, accordingly, no single document which can be said to contain the general principles of political governance. In fact, no attempt has ever been made to embody these principles in a documentary form. They remain scattered. Some of these rules and principles have been reduced to writing and are embodied in the Acts of Parliament, but a greater part still remains unwritten and is "simply carried in men's minds as precedent, decisions, habits, and practices." The written elements taken by themselves do not comprise the Constitution, though they have considerably affected it.

2. **A specimen of development and continuity.** The British Constitution not having been made at a particular time in history has grown like an organism and developed from age to age. It fulfils Sir James Mackintosh's dictum that constitutions grow instead of being made. It is, thus, the product of evolution and the result of slow and steady development and successive accretions spreading over a thousand years. And all through this period, Britain has never witnessed political upheavals of a revolutionary character. In fact, all political revolutions, if they may be characterised as revolutions, have been of a conservative nature. Britain has all through moved along an essentially continuous constitutional pathway readjusting her institutions slowly and cautiously to the changing conditions and needs of the country and its people. The political changes, as Ogg says, "have as a rule been so gradual, deference to traditions so habitual, and the disposition to cling to accustomed names and forms even when the spirit has changed, so deep seated, that the constitutional history of Britain displays a continuity hardly paralleled in any other land." Lord Morrison is of the opinion that such a peaceful evolution of the British Constitution is "more permanent, more satisfactory and less painful, than if it were the result of violent and bloody revolution." And he thinks that his "country has been lucky in that respect."

3. **Difference between theory and practice.** The gradualness of the constitutional evolution and the English habits of retaining traditional

38. *English Government and Politics*, op. cit., p. 68. Even the war and revolution of the seventeenth century have not been found a catastrophic change from the past. On the other hand, "closer examination reveals that what was really happening was only the winning of full and lasting triumph for principles and usages that had long been growing up." *Ibid.*

39. *British Parliamentary Democracy*, pp. 1-2.

forms, despite radical changes in the position of power, have produced a marked difference in theory and practice. The Government in the United Kingdom in ultimate theory is an absolute Monarchy, in form, a limited constitutional Monarchy, and in actual character, a democratic republic. In theory, or, to be accurate, legally, the Government of the United Kingdom is vested in the Monarch. The officers of the State, civil and military are appointed and dismissed in Her Majesty's name. The Ministers are Her Majesty's Ministers and they remain in office during the Royal pleasure. The Monarch is the source of law and fountain of justice. Her Majesty summons, dissolves and prorogues Parliament. No parliamentary election can be held without the Royal writ. Laws made by Parliament are not valid and cannot be enforced without the Royal assent and if the Monarch so wishes may veto any law passed by Parliament.

The Monarch is also the Commander-in-Chief of all the British forces during peace and war. War is declared in Her Majesty's name, peace and treaties are negotiated and concluded in the name and on behalf of the Monarch. Government documents are published by Her Majesty's Stationery Office. All people in the United Kingdom are the loyal subjects of the Monarch and their National Anthem is "God save the Queen." In short, there is no act of Government which is not attributed to the Monarch's name and person. Her Majesty's powers, in terms of law, are uncontrolled, unrestricted and absolute.

But all this is in theory. In practice, the Monarch does nothing by doing everything. The Revolution of 1688 finally settled that in the last resort the King must give way to Parliament. Since then, the whole development of the British Constitution has been marked by a steady transfer of powers and prerogatives from the Monarch as a person to the Crown as an institution. The King has now long ceased to be a directing factor in government and he virtually performs no official act on his own initiative. If the King were to exercise any of the powers which he exercised in the past, and this he can legally do even now, he will be signing the warrant of his own abdication. The real power rests with the King's duly constituted Ministers and His Majesty remains only a symbol of authority, or to put it in the language of the British Constitution, 'The King can do no wrong.'

The Ministers of the Monarch are members of Parliament and they remain in office so long as Parliament wishes it. But the real power of Parliament rests with the House of Commons, a representative House of the people. The responsibility of the Ministers is to the House of Commons. The Prime Minister and other principal Ministers belong to it. All this means the supremacy of the House of Commons and ultimately that of the people, for the people decide the complexion of the House at a general election. It is, therefore, the verdict of the people which determines the government. No government can remain oblivious of public opinion, if it is to continue in office, man administration and to maintain support for the future too. Such a government is a government by consent. "Government with us," says Jennings, "is government by opinion,



and that is the only kind of 'self-government' that is possible". Practice, thus, outruns theory in Britain and she presents one of the most democratic systems of government in the world. The Webbs' used for the system of government as obtainable in the United Kingdom the phrase a "crowned republic". While defending British Monarchy, Lord Morrison succinctly observed, "But it takes good countries to run monarchies and it takes good monarchs to be the heads of States. And may I add that it takes a good Republic to appreciate a good monarch."

4. **Sovereignty of Parliament.** The British Constitution establishes the supremacy of Parliament. It means that Parliament is supreme. It can make and unmake any kind of law and no court in the realm can question its validity. The authority of Parliament is, thus, transcendental and absolute, and it embraces both the enactments of ordinary laws and the most profound changes in the government itself. There is no judicial review and no authority can declare that the laws made by Parliament are *ultra vires*. Even the veto power has become obsolete and the King must signify his assent to all measures passed by Parliament. Whether Parliament is really sovereign or not, it is a separate question. So far as law, pure and simple, is concerned, it is.

5. **A flexible Constitution.** As already pointed out, there is no codified and basic constitutional law having superior sanctity to statutory law. The power to make and amend the constitutional law is vested in Parliament and no special procedure is required than that attends the enactment of an ordinary bill. Furthermore, the popular ratification of constitutional amendments, required in countries like Switzerland and Australia in the nature of *referendum*, is entirely unknown in Britain. The Constitution of United Kingdom is, accordingly, flexible and responsive. It carries with it the advantage of centring public opinion according to the needs of the time. There is in it a facility of reform, an adaptability superior to written and more rigid constitutions.

The supremacy of Parliament and the ordinary easy method of changing constitutional law has been the subject of some legal controversy. Supremacy of Parliament, it has been asserted, is a legal fiction, for it is exercised in the spirit of responsibility and responsibility in actual practice means the maintenance of majority in Parliament. So long as a party can maintain its majority in Parliament, it can get anything done. But this is really not so. How easy it is to make constitutional changes depends on the general nature of the political system prevailing in a country and the attitude of the people towards constitutional amendments. Democratic principles and responsible institutions are the heritage of Englishmen and Parliament, as such, has never changed the law lightly and casually. There are profound psychological checks and voluntary res-

40. *Cabinet Government*, *op. cit.*, p. 19. The Joint Select Committee on Indian Constitutional Reform (1934) observed that there "arise two familiar British conceptions, that good government is not an acceptable substitute for self government and that the only form of self-government worthy of the name is government through ministers responsible to an elected legislature." Vol. I, part I, p. 5.

41. Sidney and Beatrice Webb.

42. Morrison, Lord, *British Parliamentary Democracy*, p. 5.

straints on the exercise of its legal authority, whatever be the extent of majority the Party in power may command. "Parliament, after all," cogently remarks Ogg, "is composed of men who, with few exceptions, are respected members of a well-ordered society, endowed with sense, and alive to their responsibility for safeguarding the country's political heritage. They live and work under the restraint of powerful traditions and will no more run riot with the Constitution if it were weighed down with guarantees designed to put it beyond their control."<sup>43</sup> The "mandate convention" is indicative of the political temperament of the people. It enjoins that no far-reaching changes in the governmental system should be made until the voters have had a chance to express their opinion upon the proposals at a general election. Asquith's Liberal Government went to the country with the scheme of second Chamber reform. In 1923, Stanley Baldwin appealed to the electorate on the issue of tariff. In 1931, general elections were held to elicit support of the people for the National Government under Ramsay MacDonald. The Labour Party in 1945, fought general elections on the issues of nationalisation and granting self-government to India and other subject countries. Similarly, in the elections of 1964, the Labour Party put before the electorate its programme of re-nationalization. Although the Party secured a precarious majority, yet Harold Wilson told the people immediately after forming the government: "Having been charged with the duties of Government we intend to carry out those duties. Over the whole field of Government there will be many changes which we have been given a mandate by you to carry out. We intend to fulfil that mandate."<sup>44</sup> Legally, therefore, the Constitution of Britain is undeniably the most flexible in the world, but actually "it is considerably less fluid than might be inferred from what the writers say." The flexibility of the Constitution does not depend wholly, or even largely, upon the simplicity of its amending process.

6. **A Unitary Constitution.** The British Constitution is unitary and not like that of the United States of America and India federal. There is, of course, devolution, but all authority flows from the central government centred at London. The local areas, as they exist in Britain, derive their powers from the Acts of Parliament which may be enlarged or restricted at its will. Parliament is, therefore, constitutionally supreme, and the local government machine is merely an agent of the Central Government. The essence of a federation, on the other hand, is union and not unity and the powers and jurisdiction exercised by the units, which compose a federation, are original, clearly demarcated, and are derived from the constitution. Neither the central government nor governments of the federating units can encroach upon each other's sphere. If any change is desired to be brought about, it must be done by amending the Constitution and the process of amendment is prescribed therein. This establishes the supremacy of the constitution. It means that the distribu-

43. *English Government and Politics*, op. cit., p. 72. Dr. Munro in this connection maintains, "Legislators come from the people; they think and feel as the people do; they are saturated with the same hopes and fears; they are creatures of the same habits and when habits solidify into traditions or usages they are stronger than laws, stronger than the provisions of a written constitution." *The Governments of Europe*, op. cit., p. 23.

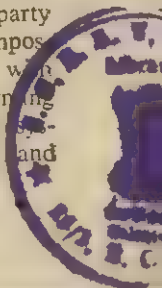
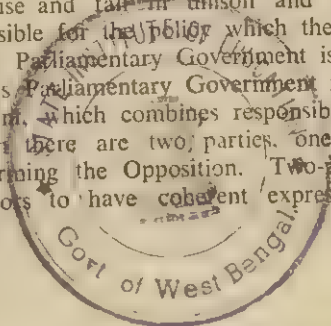
44. *The Statesman*, New Delhi, October 19, 1964.

tion of powers is maintained by a constitution-amending authority which is superior to both central and local governments. In Britain Parliament is supreme and the local areas are subordinate units with such powers as it chooses to bestow. It could, if it wished, abolish the whole complex structure of local government by simple enactment. The existence of a unitary form of government is one of the reasons why Britain is able to manage without a written Constitution. A written and rigid Constitution are the pre-requisites of a federal polity.

7. **A Parliamentary Government.** The British Constitution has a Parliamentary form of Government as distinct from the Presidential type of Government. The King, who is a legal sovereign, has been deprived of all his powers and authority. The real functionaries are the Ministers who belong to the majority party in Parliament and they remain in office so long as they can retain its confidence. The Ministers are both the executive heads and members of Parliament and, as such, co-ordinate the Legislative and Executive departments of Government. The Cabinet in Britain, as Bagehot defines it, is a "hyphen that joins, the buckle that binds the executive and legislative departments together." There can therefore, be no disagreement between the Executive and the Legislature. They work in agreement and the dangers involved in deadlock between the law-making, tax granting authority and the Executive are absent. If ever the House of Commons votes against the Executive and defeats its policy or if ever it should pass a legislation which has not the favour of the Cabinet, one of the two things would happen. The Cabinet must either resign and enable the Opposition to form Government, or it should advise the King to dissolve Parliament and order new elections and, thereby give an opportunity to the electorate to approve or disapprove the action of the Cabinet. There can therefore, be no continued conflict of policy between the Executive and the Legislature as it may happen in the United States, where there is complete divorce between the Executive and the Legislative departments. The right to govern in Britain, observes Greaves, "flows through the legislature to the Cabinet; is not separately conferred on a popularly elected Chief Executive and in a popularly elected Parliament; the right is not capable therefore of conflicting interpretation by two bodies having an equal moral claim to speak for the public. The risks of conflict or of inanition which result from such a separation of power are attested by a wide experience, whether it be the Weimar Constitution of Germany, the federal Constitution of America, or the 1848 Constitution of France."

8. **Two-Party System.** Parliamentary Government means party government as it provides the machinery to secure a stable government under a unified command of the politically homogeneous and disciplined leaders. The members of the Government rise and fall in unison and they are individually and collectively responsible for the policy which the Cabinet initiates and they carry out. Since Parliamentary Government is a party government, without political parties Parliamentary Government is impossible. Such a system of government, which combines responsibility with representation, functions best when there are two parties, one forming the Government and the other forming the Opposition. Two-party system enables the views of the electors to have coherent expression and

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Britain provides the classical example of a two-party system. It originated in the seventeenth century and for two hundred years thereafter only two parties functioned. Now with the collapse of the Liberal Party the two-party system again exists. Britain hates a coalition government because it contradicts the fundamental principle that Cabinet represents a party united in principle.

9. **The Rule of Law and Civil Liberties.** One of the fundamental principles of the British Constitution is the Rule of Law. It is based on the Common Law of the land and is the product of centuries of struggle of the people for the recognition of their inherent rights and privileges. In Britain, unlike the United States of America, and the Republic of India, the Constitution does not confer specific rights on citizens. Nor is there any Parliamentary Act which lays down the Fundamental Rights of the people. Yet there is maximum liberty in Britain and, according to Dicey, it is due to the existence of the Rule of Law.

The Rule of Law, as said before, has never been enacted as a Statute. It is implicit in the various Acts of Parliament, judicial decisions and in the Common Law. According to Lord Hewart, the Rule of Law means the "supremacy or dominance of law, as distinguished from mere arbitrariness, or from some alternative mode, which is not law, of determining or disposing of the rights of individuals."<sup>45</sup> It is sufficient for the present to say, that when powers of Government are exercised according to settled and binding rules and not arbitrarily, then, the subjects of that government are living under the Rule of Law. Such conditions of life can be possible only when there is equality of all before the law, its supremacy, uniformity, and universality. The citizens, the courts, the administrative officials, are all subject to it. "In other words, under the rule of law, obligations may not be imposed by the State, nor property interfered with, nor personal liberty curtailed except in accordance with accepted principles of law and through the action of legally competent authorities." These principles are recognised by the courts and hence judiciary is the unfailing guardian of the liberties of the people.

Sovereignty of Parliament and the Rule of Law are closely connected. By its sovereign power, Parliament can curtail or suspend the liberties of the people and, thus, set aside the Rule of Law itself. Parliament has very often done it, but it always did it at times of national emergency. Drastic restrictions were imposed upon commonly recognised rights of the people during World War I. In 1934 and 1936, Incitement to Disaffection Act and Public Order Act were passed which imposed stringent restrictions on the rights to speech, assembly and press. Throughout World War II, drastic restraints were imposed under Emergency Powers (Defence) Act, 1939. But the traditions of the country and political temperament of the people do not tolerate such infringement of their liberties when conditions of national emergency or danger are not prevailing. There is, therefore, a sense in which Parliament itself is subject to the Rule of Law. It cannot and, in fact it does not, make laws which unnecessarily encroach upon the liberties of the people. Laws in Britain are passed to promote liberty and not to restrict liberty. "Free-

<sup>45</sup> *The New Despotism*, p. 19.



dom of speech is as truly a part of the British way of life as is the responsibility of ministers. Neither rests upon written law neither would be observed more consistently if it did so."

10. **Hereditary Character in the Constitution.** Another specially distinctive feature of the British Constitution is the expression which it contains of the hereditary principle, which has been for so long discarded by the great majority of other countries. Monarchy rests on the hereditary principle and the House of Lords is primarily composed of hereditary peers. It is true that neither the King nor the House of Lords play any effective role in the political set up of the country, yet their continuance appears hardly reconcilable with the democratic ideals which Englishmen cherish so fondly. And still Englishmen had never been in a mood to abolish these historic institutions. "I would claim," Lord Attlee observes, "that, despite the maintenance of monarchical and oligarchical elements, the British system is the best example of democracy and especially of parliamentary democracy."

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## CHAPTER II

# DEVELOPMENT OF THE CONSTITUTION

**Constitutional Growth.** In the preceding Chapter we noted one leading characteristic of the British Constitution, that it is the result of continuous development. Freeman has emphasised this feature with unquestionable accuracy. He says, "The continual national life of the people, notwithstanding foreign conquests and internal revolutions, has remained unbroken for fourteen hundred years. At no moment has the tie between the present and the past been wholly rent asunder, at no moment have Englishmen sat down to put together a wholly new Constitution in obedience to some dazzling theory. Each step in our growth has been the natural consequence of some earlier step; each change in our law and constitution has been, not the beginning in anything wholly new, but the development and improvement of something that was already old. Our progress has in some ages been faster, in others slower; at some moments we have seemed to stand still, or even to go back but the great mark of political development has never wholly stopped; it has never been permanently checked since the days when the coming in of the Teutonic conquerors first began to change Britain into England."<sup>1</sup> The starting point of the British institutions and the principles which govern their working lie scattered into the past and the present mechanism of government can only be understood if we briefly analyse the process of this growth; how the British Constitution came into being and how it assumed its present form.

It is customary to divide this growth into six distinct periods, but we divide them into three for purpose of convenience and practical utility. The first period extends from the time of the Angles and Saxons through the Norman and Angevin dynasties to 1485. This period may be called the period in which were laid the foundations of the constitution. The second period extends from 1485 to 1689 and covers the establishment of the Tudor dynasty through the early and later Stuart periods and embraces the Puritan Revolution and Commonwealth. This period is called the period of reconstruction of the Constitution. The third period extends from 1689 to the present and it is of more direct interest to the students of British Government today. In this period came the rounding out, or fructification of the constitution.

## LAYING THE FOUNDATIONS OF THE CONSTITUTION

**Anglo-Saxon Institutions.** The institution of kingship developed in England among the early Angles and Saxons who came first to ravage and then to settle in the country. They drove the original people, who had become weak and defenceless after the Romans had departed from

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1. Freeman, E.A., *Growth of the English Constitution*, p. 19.

the Island, westward and occupied the greater part of England. The victorious Anglo-Saxon tribes established seven districts or "kingdoms", historically known "heptarchy". Then, followed a period of internal warfare the more powerful absorbed the weaker and the "heptarchy" was reduced to three Kingdoms of Northumbria, Mercia and Wessex. Northumbria and Mercia fell to the Danes, but Wessex stemmed the tide and ultimately established its supremacy in the ninth century and, thus, the English nation was formed. From the time of Alfred (871) till the Norman conquest (1066) the House of Wessex supplied England with most of her Kings.

The institution of Kingship during this period was strong. The King did not occupy the throne by strict hereditary right. He was elected by the **witangemot** or "Council of wisemen", and although preference was shown for members of a given family, they did not hesitate to pass over an eldest son if they considered him incompetent or otherwise undesirable. The King was, no doubt, a leader, but his strength and his position naturally varied according to his personal qualities.

The **witangemot** or **witans** exercised large powers and to some extent acted as a "check" even on a strong King. The Council consisted of the chief officers of the royal household, the bishops, the aeldormen of the Shire and other wisemen of the country whom the King was pleased to summon. It had no fixed number and hence it varied in size from time to time. The King presided at its meetings and directed its business which included enacting of laws, levying of taxes for public service, making alliances and treaties of peace, raising of land and sea forces whenever occasion demanded, appointing and deposing the bishops, aeldormen of Shires and other great officers of Church and State, authorising of ecclesiastical decrees, etc. It also acted from time to time as a Supreme Court of Justice both in civil and criminal cases.

The functions of the **witan**, from modern point of view, were primarily administrative. Although its composition depended upon the choice of the King and it met whenever the King chose to summon it, yet it was a potential check on the arbitrary power of the King, particularly when it possessed the authority to elect and depose him. This is one of the reasons why Kingship never became absolute in the Anglo-Saxon period. "It has been a marked and important feature in our constitutional history," wrote Anson, "that the King has never, in theory, acted in matters of state without the counsel and consent of a body of advisers." To put it in modern terminology, it appears as if the King acted "in Council," and in a rudimentary sense it was the beginning of a constitutional monarchy. Similarly, the **witan** was a Parliament in embryo, because the King sought the advice of his "wise men" when he had occasion to modify existing law or to cause existing law to be reduced to writing. "As a prototype of the Great, or Common, Council of later times, and even, more remotely, of the present cabinet," observes Ogg,

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2. The seven "Kingdoms" were: East Angalia, Mercia, Northumbria, Kent, Sussex, Essex and Wessex.

3. Anson, W.R., *Law and Custom of the Constitution* (23rd ed.), Vol. II, Pt. i., p. 7.

"the **witargemot** is interesting and important." At the same time, this assembly cannot be deemed to have possessed the character of either a modern cabinet or a parliament.

Another important contribution of the Anglo-Saxon times is the institution of local government. The mass of the population in those days lived in villages and their principal occupation was agriculture. Each village, with the land belonging to it, formed a **tunscip** or township. Each township led a corporate life, social, political and economic. The government machinery consisted of a **mote** or town meeting, and certain elected officers, chief among whom was a reeve. Some important hamlets situated at the junction of the trade routes or near to fortified posts grew into **burghs** or **horeoughs** which enjoyed still more local autonomy. A group of townships formed a hundred. Each hundred had its own mote. The hundreds were formed into shires. A shire may be accepted the progenitor of modern county. It had its own assembly and in the earlier states the shire mote consisted of all free men who cared to attend. With the lapse of time, however, it came to be made up of the larger landowners, principal officials of the Church, reeves and other representatives of the townships. The shire-mote met twice a year and chiefly transacted judicial business, especially those cases which were too important to be decided in the hundred-mote.

There are three significant features, according to Munro, about this Saxon system of local government. In the first place, it was a uniform system throughout the whole kingdom which helped to create a bond of national unity. Secondly, it was in the township and shire assemblies that the English people learnt their first lessons in the art of self-government. Finally, "and, perhaps most significant of all, is the fact that the government of the shire was based, in theory at least, upon the principle of representation. It was there that the idea of choosing representatives first gained a firm foothold. Men were chosen by their fellow freemen to sit in the court of the shire long before there were any elections to Parliament. So when representation in parliament came, the people were ready for it. It is no wonder that the people of the English tongue have become skilled in the art of government. There has been no time during the past thousand years when they have not been electing somebody to represent them somewhere—in townships, shire, or borough, in parish, county, or Parliament." Blackstone, while referring to the democratic element in the British Constitution, said, "The liberties of England may be ascribed above all things to her free local institutions. Since the days of their Saxon ancestors, her sons have learned at their own gates the duties and responsibilities of citizens."

**Norman-Angevin Contributions.** A new chapter in the development of British political institutions began in 1066 when William of Normandy conquered England after defeating the English King Harold. There were two tasks before the conqueror. First, his anxiety to establish a vigorous centralised rule to which he was accustomed in his Continental possessions, and second, his anxiety to win the goodwill of the people.

4. *English Government and Politics*, op. cit., p. 6.

5. *The Governments of Europe*, op. cit., pp. 32-33.



His first step, therefore, was to permit the people to retain their ancient laws, institutions and customs, except in so far as the change seemed necessary to stabilise his own position and authority. With a view to achieve the second object, William curbed the powers of the Saxon earls, confiscated their estates, and distributed them among his own supporters to be held by them under feudal tenure as his vassals. According to the terms of the new feudal tenure the tenant's foremost duty and obligation was obedience to the King. Hitherto feudalism involved relationships of an economic nature. William's mechanism gave it a highly organised and decidedly political character quite definitely to the interest of the crown."

Another step which William took towards unification of his authority was in the direction of the Church. He made himself the head of the Church and assumed the right to appoint bishops, and exercised his veto on the acts of ecclesiastical councils, thereby, asserting the supremacy of the State. Then, both William and his successors increased the authority of the Crown by sending King's judges from one county to the other, hearing cases, deciding them on uniform principles common to all and facilitating the growth of "a common law" on which hinge the liberties of the people. Finally, William and his successors brought local administration under their control by increasing the powers of the shire reeves or sheriffs. The sheriffs came to be appointed by the King and were made responsible to him alone. In this way, they became the vigilant enforcers "of the royal will, charged with maintaining law and order and with collecting the revenues due to the King, which twice a year were carried to the designated place and turned over to the custodian of the treasury."

William, thus, made himself every inch a King by concentrating greater powers in his own hands than the Saxon Kings had known. This process of royal centralization was a blessing in disguise, because "the growth of the royal power under the Normans and their successors paved the way for the ultimate triumph of democracy. Representative government did not achieve its first victories in England because the barons and lords were strong, but because they were weak. Restraints upon the King's authority in England could not be imposed by individual dukes and counts as in France, for there were none powerful enough. The curbing of the King, when the time came, had to be a joint enterprise, participated in by all. In other words, the noblemen and lesser land owners of England were compelled to pool their strength against the monarchy, and they seized upon parliament as the agency through which this right be effected."

**Magnum Concilium.** In spite of the great powers which William concentrated in his own hands, he summoned a **Magnum Concilium** or Great Council thrice a year at regular intervals. The **Magnum Concilium** was the successor of the old Saxon **witangemot**. It was composed of the leading men of the realm: archbishops, bishops and abbots, earls thegns and knights. None of them was elected. They were individually summoned by the King. The powers exercised by the Council were more

6. Ogg, F.A., *English Government and Politics*, op. cit., p. 10.

7. Munro, W.B., *The Governments of Europe*, op. cit., pp. 34-35.

or less identical to those of the *witan*, but in actual practice it was not so for two reasons. The increasing powers of the King, in the first place, eclipsed the authority of the Council, and, secondly, all its members were the vassals of the King whose foremost obligation was allegiance, loyalty and obedience to him. At the same time, it cannot be denied that the Council was the High Court of the King and his chief Advisory Council. "Presided over and guided by the King, the Council helped to decide upon policies of State, supervised the work of administration, sat as the highest court of justice, and made or modified laws on the rather rare occasions when such action was required. An august body it obviously was with functions which spread promiscuously over the entire field of government."

**Curia Regis.** Out of the **Magnum Concilium** emerged the **Curia Regis** or the Small Council. Its function was to help the Sovereign carry on the government during the interval when the **Magnum Concilium** was not in session. It consisted of the chamberlain, the chancellor, the constable, the steward, and other officers of the royal household who accompanied the King wherever he went so that they could at all times help in transacting the business of the State. The powers of the **Curia Regis**, as such, were similar to those of the Council. But weightier matters of policy, justice, and finance were generally left for the consideration of the Council whereas administrative and routine matters were decided by the **Curia**. It, however, depended entirely on the discretion of the King to refer matters indiscriminately to either body, or, indeed, to neither of them if he so preferred.

How far the King was bound to follow the advice given to him by his counsellors, it depended upon the personality of the King himself. As most of the Norman-Angevin rulers were vigorous men who exercised absolute powers, both **Council** and **Curia** were less of a check upon his sovereign powers as compared with the *witan* of the Saxon times. Nevertheless the King did gather a group of individuals round him to seek their advice and get their confirmation on such important actions as the declaring of war and peace and of the passing of laws. "This habit, under the later Kings who were not so strong, hardened into a usage and the usage became a constitutional principle. Out of the plenary sessions of the Great Council the British Parliament arose; out of the **Curia** grew the Privy Council, the exchequer, and the High Courts of justice. So the frame of government in twentieth century England owes much to this ancient council with its big and little sessions."

**The work of Henry II (1154-1189).** Henry II, William's greatgrandson, who founded the Angevin or Plantagenet dynasty, marked the great advance in English Government. Anarchy during the reign of Stephen (1135-54) had almost wrecked the entire system of government so admirably established and strengthened by the Conqueror. With the coming of Henry II all what had been lost was recovered. He waged a relentless war both against the rebellious nobility and the independent clergy. He was successful in his efforts and brought administration on a stronger footing. Henry II brought the King's law into a stronger footing by

8. Ogg, F.A., *English Government and Politics*, op. cit., p. 11.

reviving the scheme of travelling or itinerant justices. At the same time, trial by jury replaced the earlier methods of trial by ordeal, battle, or compurgation. He, also, inaugurated a distinction between the administrative and the judicial functions of the *Curia Regis*. By separating these two functions the membership of the *Curia* was divided into two separate parts, one section acted as a Royal Council, later known as the Privy Council, and the other section confined itself to judicial functions only and became the parent of the exchequer and the High Courts of justice.

- **Magna Carta.** Then, came the *Magna Carta*, the Greater Charter of 1215. The orderly and firm governmental authority established by Henry weakened in the hands of his sons, Richard I and John. By his high-handed acts John provoked rebellion of the barons and clergy and on many occasions he was forced to accept humiliating surrenders. Taking advantage of his weak position, the barons ultimately compelled the King to accept their terms embodied in the *Magna Carta* or the Great Charter on June 15, 1215, at Runnymede, between London and Windsor. The Great Charter has been characterised to be the most famous, if not the most "effective of those restraints upon political authority which is the essence of constitutionalism". The Charter was wrested by the barons from the King with the object to secure as large advantages for themselves as they could get. It was in no sense a people's Charter, but subsequent tradition transformed it into a Charter of English liberties. The famous Article 39 that no freeman might be arrested, imprisoned, dispossessed, outlawed or exiled, or harassed in any other way save by lawful judgment of his peers or the law of the land provided a cause for democratic interpretation and application than its sponsors imagined. The document reiterated the principle that the authority of the King was not unlimited and arbitrary and that abuse of power might be resisted. It also stipulated that certain kinds of taxes could not be imposed by the King without the assent of the Great Council.

The *Magna Carta* together with the *Petition of Rights* and the *Bill of Rights* constitute, according to Chatham, "the Bible of the English Constitution," and the veracity of this statement can be fathomed from the fact that the Charter was confirmed six times by Henry III, three times by Edward I, fourteen times by Edward III, six times by Richard II, six times by Henry IV, and once each by Henry V and Henry VI. "What the charter did," said Adams, "was to lay down two fundamental principles which lie at the present day, as clearly as in 1215, at the foundation of the English Constitution and of all Constitutions derived from it. First, that there exist in the State certain laws so necessarily at the basis of the political organisation of the time that the King, or as we should say today the government, must obey them; the second that, if the government refuses to obey these laws, the nation has the right to force it to do so, even to the point of overthrowing the government and putting another in its place.... In every age of British history in which the question has arisen, in every crisis in the development of English liberty, this double principle is that upon which our ancestors stood and upon which, as a foundation, they built up little by little the fabric of free government under which we live."<sup>9</sup>

9. Adams, G.B., *Constitutional History of England* (Revised by Robert L. Schuyler, 1951), pp. 138-139.

**The Rise of Parliament.** Schools of thought differ as to origin of Parliament. The most popular view traces it from the **Magnum Concilium** of the Normans. It was a meeting of the great nobles and ecclesiastics of the Kingdom and somewhat resembling to the House of Lords of modern times. From time to time, and generally for winning popular approval for levying taxes, Kings would summon representatives of the common people. In 1213, King John hard pressed for money addressed writs to the Sheriffs directing that "four discreet knights" be sent from each county to attend a meeting of the Great Council at Oxford. In 1254, Henry III, urgently needing money for wars in Gascony, summoned two knights from each county to participate in the meeting of the Great Council, and by that time the Great Council was coming to be known as Parliament. In 1265, Simon de Montfort, the victorious leader of the barons at Lewis, convened a Parliament which was attended not only by the barons, clergy, and two knights from each shire, but also by two burgesses from each of those twenty-one boroughs which were known to be friendly to his party. Simon de Montfort is said to be the father of the House of Commons because of the revolutionary representative complexion which he gave to his Parliament. But it is too much to agree to this point of view. Simon's Parliament was a partisan assembly packed up with his own supporters with the ostensible object of raising revenues to meet his needs. "Nevertheless, the meeting for which he was responsible brought the towns in a form of co-operation with barons, clergy, and country gentry and not previously attempted, and came nearer to bring a genuine national assembly than anything theretofore known." Another significant result of such a kind of representation was that unconsciously on the part of Kings, and on the unconscious minds of the people, a doctrine that there should be no taxation without representation was finding its impress. John simply found it easier to tax with representation than without it so that there may be least resistance. "But he builded better than he knew."

Next thirty years witnessed a backward swing. Henry III, who succeeded on ousting Montfort, discontinued the practice of summoning representatives of towns. Then came Edward I. In 1295, he again resorted to the old practice of Montfort. Edward, too, like his predecessors found himself in the grips of war and naturally he needed money. He, therefore, summoned all elements in the country—barons, clergy, knights of the shire, and burgesses—and in fact all who could help him to tide over his financial embarrassments. His Model Parliament, as it is usually designated, consisted of more than 400 persons representing all shades of society. They met in one single body. But the King summoned the nobles, the clergy, and the commons or townsmen separately to hear his plea for grant of money and to give their consent. Since then the three groups of the "three estates" met and voted separately on many occasions and it seemed as if Parliament had definitely divided itself into three distinct Houses. Gradually, however, practical interests led to a different arrangement. The higher clergy, who were themselves great nobles, and the greater barons coalesced in a single body because of their affinity of interests. Similarly, the knights and the commons began sitting together. "The upshot was a gradual re-alignment of the membership in two great groups, of which one became the House of Lords, the other the House



of Commons—the one composed of men who attended in response to individual summons, the other of persons, who, elected in counties and boroughs, attended in a representative capacity.”

By the end of fourteenth century the system of two Chambers, one for the Lords and one for the Commons, had become an accomplished fact. It was not designed as a result of some political theory. It came to be established by force of social and economic circumstances. “It was an important step, one of the most significant in the entire history of government, for it started the bicameral system on its way around the world. No one planned or guided this separation and coalescence, it was merely the natural working out of the social forces of the age. Regarded as of little or no consequence in the earlier centuries, this division of the English Parliament into two Chambers gave it a frame that has been transmitted to every other great legislative body on earth.”

But far more important was the development of the power of Parliament. From the thirteenth century onwards this power began to make itself felt in its control over the national purse. The King was in constant need of money. By calling his barons, and the representatives of the shires and towns he could get an estimate of what the country could give him. Edward I summoned his Model Parliament with the avowed object of getting money to fight French and Scottish wars. “What affects all,” he said in the writs of summons, “by all should be approved.” This was later seized upon by the people to press the regular summoning of Parliament and obtaining its approval of money grants. It also evolved the principle of no taxation without representation. This principle assumed a conspicuous form when in 1407, Henry IV agreed that all grants of taxes should be first made by the commons and then assented to by the Lords. Thus, the financial initiative came to be vested in the representatives of the people.

Likewise with legislation. Hitherto laws were made by the King with the assent of the Lords Spiritual and Temporal. The Commons simply presented petitions for the redress of grievances. Sometimes the laws so enacted turned to be something very different from the requests contained in the petitions. In 1414, Henry V granted that “from henceforth nothing be enacted to the petitions of the Commons that be contrary to their asking, whereby they should be bound without their assent.” This rule was often violated. Late in the reign of Henry VI a change of procedure was brought about when measures began to be introduced in either House in the form of drafted bills. Statutes, thus, came to be made “by the King’s most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same.” This form is still followed unless the measure is passed under the provision of the Parliament Act of 1911, when mention of the Lords is omitted. The obvious result of all this development is, as Ogg observes, “Once merely

10. Adams, G.B., and Stephens, H.M., *Select Documents of English Constitutional History* (1947), p. 82.

11. *Ibid.*, p. 82.

12. Refer to Act declaring Valid Act of Lancastrian Kings. *ibid.*, p. 202.

...of the House of Commons, at the end of the fifteenth century had become legally at all events a co-ordinated law-making assemblage."<sup>12</sup>

### THE PERIOD OF RECONSTRUCTION

**Tudor Absolutism.** By the end of the fifteenth century Parliament had lost much of its strength and the King's power had definitely increased. The constitutional foundations of the modern law-making assembly had been badly laid. The years to come were in the nature of a further growth and adjustment of these institutions "according to the necessities of power and mechanisms of control."

Beginning our account from 1485 when the War of Roses came to an end, the first House under Henry VII began to sway the destiny of England, much was done to readjust the balance of power in favour of the King. The times were propitious and the opportunities great. The country needed a firm and orderly government and the monarchs of the Tudor dynasty, with a grasp of the psychology of the nation, and Henry VII, Henry VIII and Elizabeth were able to lead the nation along their own decisive paths, leaving the people with the impression and satisfaction that the monarch was graciously granting their wishes."

The period beginning from 1485 to 1603 is referred to as that of Tudor Absolutism. There is even truth in it. Parliament during this period had come to be the servant of the King rather than an independent force. Sessions were held irregularly and the sessions used to be short, lasting for only a few days or at most a few weeks. These laws which Parliament could not be induced to enact were made by royal proclamation, and the sources of revenue over which Parliament as yet had no control were so numerous that government could be carried on for years without a subsidy. The real centre of gravity was the Privy Council, a group of advisers chosen by the King but drawn from the middle classes. The Tudors never relied upon the great nobles. By these means, keeping their fingers on the pulse of the people, and by thorough efficiency in administration the Tudor Sovereigns concentrated power in themselves and thereby heightened the effect of Kingship.

Nevertheless the power of Parliament, though obscured, was far from being unimportant. The overweening pride and assumed omnipotence of the Tudor monarchy received rough shocks from a Parliament that withstood Walsely's demands and from one that presumed to remonstrate with Elizabeth on the question of monopolies. Parliament's prestige was

12. Ogg, F.A., *History of Government and Politics*, op. cit., p. 26.

14. A Privy Council which powerfully dogged was kept for years whereas one that stood in no way was dissolved. In the reign of Henry VIII, for example, nine Parliaments were elected, one sitting for seven years, two for three years, the other six were quickly dissolved.

15. Even during the forty years of Elizabeth, when Parliament counted for more than earlier, the House was in session, in the aggregate, something less than three years on an average for the reign was slightly over three weeks a year. One of the ten Parliaments of this reign lasted eleven years, but met only three times.

so increased as a result of the struggle between Henry VIII and the Roman Catholic Church. Thus the House of Commons, which sat from 1512 to 1529, acquired a reputation for its independence and courage in the face of royal wrath. It was the House of Commons which first broke with the Church of Rome and made King Henry VIII of the Church of England. Queen Elizabeth I. encouraged Parliament more frequently than her predecessors and accepted its aid in many important occasions. The members of the House of Commons now had become conscious of their duties as representatives and took pride in their growing political influence.

**The King and Parliament under the Stuarts.** After the death of Elizabeth (1603) the throne passed on to James Stuart of Scotland. He became James I of England and established the Stuart dynasty. James I soon came into conflict with Parliament. He believed in the Divine Right of Kings to rule their subjects and held his authority as absolute and unlimited. He even claimed that resistance to the King's authority was unlawful under every circumstance. "Monarchy," the King asserted in a speech before Parliament, "is the supremest thing upon earth. As to dispute what God may do is blasphemy; so is to question subjects to dispute what a King may do in the height of his power." In defence of his Divine Right, James himself wrote a book entitled **The True Law of Free Monarchies**. This concept of Monarchy was antagonistic to the constitutional sense of the Englishmen with which they had become familiar since the time of the Saxons and which had by that time become their proud heritage.

But there was no open rupture. It was the fate of his son Charles I, who, like his father, believed in the Divine Right of Kings. He was tactless and soon fell into the hands of rash and unwise counsellors. He dissolved his first two Parliaments in rapid succession. Unable to get money grants from Parliament he resorted to the method of getting forced loans. When Parliament was, again, summoned in 1628, it presented the famous Petition of Rights to the King asserting therein the ancient liberties of the people and denouncing the royal abuse of power. The King granted the Petition finding no other way to get out of the crisis.<sup>16</sup> But he did not keep his word and very soon imposed various old levies without the sanction of Parliament. Charles, also, secretly tried to flare up the army against Parliament. Knowing all the designs of the King, Parliament presented to the King **The Grand Remonstrance** with the Petition accompanying it, on December 1, 1641. It contained a dignified assertion of its rights and privileges and appealed to the King to respect the same. The climax had, however, reached and the conflict between the King and Parliament developed into the Civil War. The King was defeated and put to death.

**The Commonwealth.** For eleven years England was without a King.

16. For the text of the Petition and the King's reply thereto refer to Adams, G.B., and Stephens, H.M., *Select Documents of English Constitutional History*, op. cit., pp. 339-42.

17. *Ibid.*, pp. 376-79.

In 1649, Parliament formally proclaimed a "Commonwealth" or Republic. Monarchy and the House of Lords were abolished. A written constitution, the Instrument of Government, was put into operation in 1653 with Cromwell as Lord Protector. But the Protector, too, had trouble with his Parliament and he dissolved it. Republicanism failed to strike root. "Shrewder men, including Cromwell, had recognised from the first that the English people were monarchist at heart, and it is not too much to say that from the start the restoration of Kingship was inevitable. Even before the death of Cromwell, in 1658, the trend was decidedly in that direction, and after the hand of the great Protector was removed from the helm, the change was only a question of time and means."

**The Restoration and Abdication of James II.** On May 25, 1660, Charles II, the third Stuart, was restored to the throne. It appeared that Charles had accepted the Supremacy of Parliament and the old conflict had come to an end. But like his father, Charles II also tried, later, to rule despotically. Parliament did not take any drastic step "as it was painfully reminded of the Commonwealth period." An important feature of Charles's reign was the passing of the Habeas Corpus Act in 1679."

**James II and the Glorious Revolution.** James II succeeded his brother Charles II in 1685. Even before his accession to the throne many petitioners had demanded that he be debarred from the throne because of his avowed adherence to Catholicism. Within a short time after his accession, he quarrelled with Parliament over his right to exercise Dispensing Power. In 1687, he issued a Declaration of indulgence<sup>1</sup> which interfered with the powers of the established Church. All this was sufficient to precipitate the "Glorious Revolution" of 1688. A group of leading men representing the various political elements in Parliament invited William of Orange, son-in-law of the King, and his wife Mary to accept the throne. James fled from the country on December 2, 1688 and in this way the Stuart Monarchy came to an end.

**Supremacy of Parliament.** The "Convention Parliament"<sup>2</sup> was held on January 22, 1689, and six days later it passed two resolutions giving reasons which led to the abdication of James and establishing William and Mary on the throne as joint sovereigns. These proceedings were validated by the "Confirmation of the Convention Parliament" Act of February 20.

18. Ogg, F.A. *English Government and Politics*, op. cit., p. 36.

19. The Act secured the personal liberty of every citizen and required production of the person committed and charged with any crime in a court of law, within three days on receipt of a complaint in writing, to stand a regular trial. Adams, C.B., and Stephens, H.M., *Select Documents of English Constitutional History*, pp. 440-48.

20. In the Hales' case Chief Justice Herbert, eleven Judges concurring, upheld the Dispensation Power of the King and, thus, enabling him to dispense with or to suspend the operation of certain laws. Judge Street, the only dissenting Judge, was of the opinion that the King could not dispense the provisions of the statutes passed by Parliament. *Ibid.*, pp. 450-51.

21. *Ibid.*, pp. 451-54.

22. The Convention Parliament was not in form a Parliament, because it was not summoned in the regular way by a King. This was inevitable by the flight of James II, and by the fact that William had not yet been crowned King.



1689. Then, came the famous **Bill of Rights** embodying the Constitutional rules and principles which should guide the transactions of the King in his dealings with Parliament. This Bill stated clearly and definitely the limitations on the powers of the King, and in one specific clause decreed that no future ruler of England could be a Roman Catholic or could marry a Roman Catholic. William and Mary set on the throne by virtue of Parliamentary sanction, a sanction that was recognised for all times in the King's consent to the Bill of Rights. What the Bill of Rights did was to sum up the results of the Revolution, and the Glorious Revolution drew to a close the great constitutional struggle of the seventeenth century. "King in future held the throne by the grace of Parliament. Kings could be made and unmade by Parliament. Parliament was, therefore, supreme."<sup>23</sup>

The Act of Settlement (1701)<sup>24</sup> still further limited the powers of the King thereby establishing the authority of Parliament beyond all doubt. The Act deliberately changed the hereditary principle, and to ensure against a Roman Catholic sovereign it was decreed that after the death of Anne (1702-1714) without heirs the Crown was to pass over to a small German family, the House of Hanover, the nearest Protestant branch of the Stuart line. George I, the first of the Hanoverians, thus, ascended the throne as a result of the Act of Settlement. In other words, he was a nominee of Parliament and, as such, a servant to the will of Parliament. The House of Hanover occupied the throne in hereditary succession from 1701 until Queen Victoria's death in 1901. Edward VII, succeeding his mother, began the House of Saxe-Coburg-Gotha, the name of which was changed to Windsor during the Great War of 1914.

### THE PERIOD OF FRUCTIFICATION

The Bill of Rights, accordingly, marks the culminating point in the evolution of the fundamentals. The centre of gravity had shifted from the Crown to Parliament. But it was many years before the change became clearly understood. It took time for seeds which had been sown in earlier periods to germinate in this and to grow into fully matured institutions of popular government. Following are the main lines of growth and development in this direction which complete our account in making the British Constitution what it stands for today.

**Diminished Powers of the Monarch.** Parliamentary supremacy actually amounted to a little for a quarter of a century or thereabout after 1688. For nearly two decades the sovereigns continued to exercise the right to veto acts of Parliament.<sup>25</sup> William and Mary continued to appoint as

23. For the text of the Act refer to *Select Documents of English Constitutional History*, op. cit., pp. 454-56.

24. For the text of the Bill of Rights refer to *idid*, pp. 462-69.

25. Rosenberg, K., *How Britain is Governed*, p. 20.

26. For the text of the Act refer to *Select Documents of English Constitutional History*, op. cit., pp. 475-79.

27. Victoria married Albert of Saxe-Coburg-Gotha.

28. The veto power was last employed in 1707 by Queen Anne in defeating a bill for settling the militia in Scotland. Since then no monarch has exercised veto and this power of the king has now become obsolete.

their ministers persons of their own choice regardless of the wishes of Parliament. They likewise continued to control the policies of their ministers and very often declined to follow their ministers' advice. The only means at the disposal of Parliament to oust an obnoxious minister or to force change in the ministerial policy was through the process of impeachment or attainder. The ministers were not required to be members of Parliament and they continued to be appointed, and to retire from office individually and collectively.

But this situation was completely changed with the coming in of the Hanoverians. George I (1714-27) and George II (1727-60) were not familiar with the language and the political institutions of England. They neither understood their prerogatives nor tried to assert those which they understood. They were, accordingly, willing parties to let the powers, which their predecessors had jealously guarded, slip out of their hands. By the middle of the eighteenth century, therefore, the Sovereigns had ceased to exercise their personal control over the Government. It went to those who were ever eager to have it: Ministers and Parliament. George III (1760-1820) endeavoured to live up to Bolingbroke's "patriot King" and tried to resist parliamentary power. But it was in vain; the clock could not be turned back, and with the loss of American Colonies and the insanity of the King the power of the monarch as an institution of government had departed for ever. The successors of George III had become accustomed to the new role of the monarch that he reigned and did not govern. Victoria (1837-1901) had her own notions, and, of course, very strong about the rights of the monarch even under a cabinet system of government. But she exercised those rights consistent with the new position of the Sovereign in England and in accordance with the principles of limited monarchy. "A satisfactory way of running the government with a minimum of personal participation by the monarch had been worked out, and no King or Queen could have induced or compelled the nation to give it up. Any effort in that direction would have meant a new dynasty—perhaps the end of monarchy itself."<sup>29</sup>

**The Responsible Ministry.** The quarter of a century immediately following the Revolution of 1688 was a period of trial and error. The supremacy of Parliament, as pointed out in the preceding paragraphs, was hedged with practical limitations and it seemed as if the country was destined for another conflict. There was no intermediate agency which could act as a buffer between the King and Parliament. But by the middle of the eighteenth century circumstances brought into existence such an agency, its utility discovered, and it rapidly developed into a practical, effective and popular organ of government. It was the Cabinet. Responsibility for the actual exercise of executive functions gradually came to be vested in a group of ministers who belonged to one single political party, were members of Parliament, and directly responsible to it for all their official acts. The condition on which they could remain in office was the confidence of Parliament rather than the pleasure of the King, and they were expected to vacate office whenever Parliament ceased to have confidence in them. There was no law about it. Experience and utility were the unescapable truths and they had to be re-

29. Zink, H., *Modern Foreign Governments*, op. cit., pp. 17-18.

conciled to theory and practice. The theory was absolute monarchy. The fact of constitutional development all through these centuries was a limited monarchy. Experience and utility had to be reconciled to facts in order to make it a matter of reality, and assumption of responsibility by the ministry for the executive acts of the sovereign was the essence of limited monarchy.

This transformation of the King's ministers of the late seventeenth century into Parliament's ministers of the eighteenth century was facilitated by the rise of political parties, the Whigs and the Tories. In the beginning the King selected his ministers without reference to parties or to political conditions in Parliament. He included for a time both Whigs and Tories in the same ministry. But it was a combination of strange bedfellows as both parties held sharply contrasting views with regard to the kind of government the English people should have and what that government should do. It soon became clear that ministers could only carry on administration harmoniously and effectively, if they belonged to one single party possessing identical political views. At the same time, it became apparent that the ministers could not function successfully unless they possessed the confidence of Parliament, and had the support and confidence of a majority in the House of Commons. The House of Commons controlled the purse and had by that time become a dominating chamber. It was, therefore, natural to look to the House of Commons for active support in order to ensure stability of the ministry and efficient prosecution of the policies of government.

**The Prime Minister.** But collective responsibility of the ministry to Parliament could not be ensured in the absence of a leader. Parliament needed leadership and the ministry supplied it. But the ministry itself needed a leader and leadership there was slow in making its formal appearance. For a long time no minister was willing to accept primacy. Even Walpole, who had, *ipso facto*, assumed that role by dominating ministry and Parliament for more than twenty years, resented being called **First** or **Prime Minister**. Nevertheless Walpole actually held the position which later leaders came to hold and though unknown to law till 1937, the office of the Prime Minister "became a recognised and highly honourable term in the English political vocabulary." In course of time, Kings ceased to select all the ministers. They would simply summon the outstanding leader of the majority party in the House of Commons and commission him with the task of selecting his own colleagues.

**The Cabinet and the Cabinet System.** A rudimentary Cabinet had existed under some of the Stuart Kings. The Privy Council had grown so large by the seventeenth century that Charles II felt that the secret and expeditious affairs of the State could not be entrusted to such an unwieldy body. He, therefore, gathered a group of men, usually known as Cabal," with whom he would confer. This group, very naturally, was regarded with suspicion by both the Privy Council and Parliament. The Cabal has, however, very little in common with the Cabinet as we know it today, though it is generally referred to in connection with its origin.

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30. The word 'Cabal' was formed by the initial letters from the names, of its first members—Clifford, Ashley, Buckingham, Arlington and Lauderdale.

William III, as said before, in the beginning of his reign formed a Ministry of Whigs and Tories both. The method was soon discarded because of certain practical difficulties and he began selecting his ministers from one single party. The Whig Junto of 1696 is regarded as the real **beginning of the Cabinet system.**

William III and Anne themselves presided at the meetings of the Cabinet. George I gave up this practice and designated Walpole to do so as he understood no English. This resulted into the management of the Cabinet passing into the hands of the most powerful man in the Cabinet. He would preside at Cabinet meetings, would control the Cabinet, would report from the Cabinet to the King and from the King to the Cabinet. Being a member of Parliament this minister had also become a link between the Cabinet and Parliament. This is how the position of Prime Minister was evolved. The evolution of the office of Prime Minister is closely connected with the rise of the Cabinet as we understand it today. In Walpole, indeed, we find all characteristics of the present-day Cabinet system. "It was Walpole who first administered the Government in accordance with the rise of the Cabinet as we understand it today. It was Walpole, who first conducted the business of the country in the House of Commons. It was Walpole who in the conduct of business first insisted on the support of his measure of all servants of the Crown who had seats in Parliament. It was under Walpole that the House of Commons became the dominant power in the State and rose in ability and influence as well as in actual power above the House of Lords. And it was Walpole who set the example of quitting his office while he still retained the undiminished affection of his king for the avowed reason that he had ceased to possess the confidence of the House of Commons."

At the same time, there had developed the principle of ministerial responsibility. The principle of ministerial responsibility, that is, a minister is responsible to Parliament for all his public Acts and can, therefore, be brought to book by Parliament, had become one of the accepted principles governing the working of Parliament and the Cabinet. In brief, the whole machinery of the Cabinet system is based upon well defined conventions. By the end of eighteenth century all such conventions had become clear cut and their significance generally understood as we understand them today.

**Shifting of Power within Parliament.** Important changes also occurred, during this period, in the relative importance of the two Houses of Parliament. Before the Glorious Revolution, the House of Lords exercised unquestioned supremacy and it was a dominating chamber for all intents and purposes. It was only by degrees that the House of Commons was able to win legal equality with the House of Lords chiefly by means of its control over the purse. But during the seventeenth and especially in the eighteenth century, the House of Commons increased in prestige and authority while the House of Lords sank into a secondary position. Several factors are responsible for it. The seventeenth century had settled for ever the right of the Commons to control taxes and appropriations. The Septennial Act of 1716 increased the life of the Commons from three to seven years and hence caused to make a "seat in the



elective branch more attractive to able men and ensuring greater experience and a better morale on the part of members." The eighteenth century, also, witnessed the dominating figure of Walpole, who had been all through his political career a member of the House of Commons. We have seen how Walpole actually became the first Prime Minister of England and established all those principles on which hinges the Cabinet system of government today. Walpole, thus, made the House of Commons the recognised centre of legislative and political leadership.

The nineteenth century brought the democratization of the House of Commons by the enactment of a series of Reform Bills (beginning in 1832) which widely extended the right to vote and redistributed parliamentary seats among localities on a fairly equitable basis. All these measures made the House of Commons far more truly representative of the people than the hereditary House of Lords. The reforms in suffrage culminated in the epochal Representation of the People Act of 1918 supplemented by the Act of 1928. Both these Acts brought the House of Commons "to a point where it can easily be numbered among the most democratic parliamentary bodies in the world."

The House of Lords stood still all through this period. It had, in fact, begun to play a secondary role on its own initiative, though it possessed legal parity of powers with the House of Commons. But in the middle of the nineteenth century the peers, once again, became vigorous and adopted an independent attitude. This attitude was deplored by Gladstone, when Gladstone's second Home Rule Bill was rejected by the Lords. In his last speech in Parliament in 1894, the Prime Minister referred to the struggle that had begun between the two Houses and predicted that it would have to go forward to an issue. This issue came in the first decade of the present century when the House of Lords rejected the annual revenue bill. The result was the Parliament Act of 1911 which stripped the Upper Chamber of its right to veto even general legislation passed by the Commons. The Labour Party had always deemed the House of Lords a political anachronism and advocated its complete abolition. It has not been abolished, but in 1949, the Labour Party imposed by law further restrictions on its power of obstructing the passage of ordinary legislation. The Life Peerage Act, 1958, and the Peerage Act, 1963, have made a drastic change in the composition of the Lords; the peers can now disclaim their peerages. Further changes depriving the Lords of their privileged position are awaiting legislation. For more than two centuries, thus, the prestige and the power of the House of Commons have been steadily increasing and today it stands the supreme organ of the British Government.

**Other Constitutional Developments.** Many other constitutional developments have taken place since 1688. Scotland entered into a parliamentary union with England in 1707. Almost a century later came the Act of Union with Ireland. During the same period the overseas dominions of Great Britain expanded and developed until the British Empire acquired unrivalled proportions in world affairs. Local Government was reorganised and democratized. Similarly, the judicial system was overhauled through the Judicature Acts between 1873 and 1876. The Civil Service was transformed in spirit and method after 1870. And finally,

there had been an ever-increasing multiplicity in the functions of the State necessitating creation of new administrative agencies. All these developments have not entailed a catastrophic change in the Constitution. Even the great constitutional changes which changed the character of the British Empire did not produce any radical reconstruction of the government at home. Burma was the first to achieve full independence. India, too, became a Sovereign and Independent Republic. Pakistan, too, had proclaimed herself a Republic. Many more Colonies have since become sovereign States and acquired the status of independent members of the Commonwealth. With the diminution of her territories and a consequent change in the character of the British Empire the basis of governance still remains the same. A very important feature of the British Constitution is its adaptability to the demands of time.

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## CHAPTER III

# THE KING AND THE CROWN

**The King and the 'Crown'.** In early days all the powers of the government were centred in the man who wore the crown, the state cap of royalty. In the course of history those powers have been almost entirely transferred from the King as a person to a complicated impersonal organization called the "Crown". It does not mean the exit of the monarch from the body politic of the country. The King is still there as head of the State and he wears, as before, the diadem or the crown. Now, as then, the King is the Chief Executive and the supreme legislative power rests with the King-in-Parliament. His Majesty is, as ever, the 'fountain of justice', and the 'fountain of honour'. He is the commander of the military forces of the realm by land, sea and air. Even postmen deliver His Majesty's mails. The King, in short, is still the source of all authority, the 'Great Leviathan' embodying in his own person the sovereignty, the dignity and the unity of the State.

Such are the legal powers of the King. But a legal truth is very often a political untruth in Britain. Down to 1688, the King was an efficient factor in the Constitution. He ruled as well as reigned. Thenceforward it became otherwise. The King still reigns, but he has gradually ceased to rule. And the fact of the Constitution today is that the King personally has nothing to do with any affairs of Government. The actual exercise of powers and rights connected with the office of the King belong to the Crown.

The Crown is not a living, tangible person. It is an artificial contrivance; an abstract concept. Sir Sidney Low calls it "a convenient working hypothesis." Sir Maurice Amos says, "The crown is a bundle of sovereign powers, prerogatives and rights—a legal idea." Historically, the rights and powers of the Crown are the rights and powers of the King. Legally, this is still in general the case. But Parliament has now enchained the King and the Constitution requires these powers and rights to be exercised, in substance, not by the King personally. They are exercised in the King's name, as the personal bearer of the powers and rights comprised in the Crown, by ministers who derive their authority from Parliament and are solely responsible to Parliament. This somewhat intangible synthesis of authority is what we call the Crown. The Crown is, thus, "a subtle association" of King, Ministers and Parliament and all three combined make an abstract concept of supreme authority. The King is its physical embodiment whereas Ministry, a creature of Parliament, is its "most concrete visible" embodiment.

1. The word 'King' is here used as a term common to either sex. But the Head of the State is now a Queen.

2. Sidney Low, *Government of England*, p. 255.

3. Maurice Amos, *The English Constitution*, *op. cit.*, p. 88.

There are two main stages which stand conspicuous in the transfer of powers from the King as a person to the Crown as an institution. The first is what we may call the "institutionalizing" of the King. As said earlier, kingship in Anglo-Saxon days was elective. Succession to the throne was not determined by hereditary principle. Every monarch reigned personally and independently of his predecessors and, consequently, when a King died there was an "interregnum" or break in government till another was established by a new King. After William, Duke of Normandy came to the English throne in 1066, but essentially in the twelfth and thirteenth centuries title to the throne became hereditary and the next in line succeeded to the rights and privileges connected with royalty.<sup>4</sup> The result was the emergence of the institution of the kingship or the monarchy; a continuous political system which remained uninterrupted by the coming and going of individual monarchs.

A vital distinction was, in this way, made in the person and the office of the King. The distinction is now reflected in the maxim of the British Constitution: "The King is dead; long live the King." This announcement made at the time of the Royal demise, means in the words of Blackstone, "Henry, Edward or George may die, but the King survives them all", that is, the King as a natural person may die, but long live the office (the Crown) which one monarch passes on to another. The Crown, as an institution, never dies; it is permanent. There is no interregnum between the death of one Sovereign and the accession of another. Immediately on the death of his or her predecessor the new Sovereign is proclaimed at an Accession Council.

The distinction between the King as an individual and the King as an institution paved the way for the transfer of political functions from a *personality* to an *institution* and as the chance would have it, it began with King John. The pace was slow and the process was not fully complete till the middle of the nineteenth century. But the constitutional struggles of the seventeenth century transferred final authority from the King to Parliament and thereafter led by logical evolution to government by Ministers responsible to Parliament. The whole of this process has been beautifully explained in a fairy tale and it runs, "once upon a time there was a king who was very important and who did very big and very important things. He owned a nice shiny crown, which he would wear on specially grand occasion, but most of the time he kept it on a red velvet cushion. Then somebody made a Magic. The Crown was carefully stored in the Tower; the King moved over to the cushion and was transformed into a special kind of Crown with a capital letter; ....The name given to the Magic is the Constitutional Development." And the course of the constitutional development, during the past eight centuries, had been that most of the functions which were at one time performed by the King are now exercised on the advice of Ministers, though still in the King's name. George Ponsonby, speaking in the House of Commons (June 11, 1812), said that it is an essential principle of the Constitution "that the Sovereign shall be irresponsible, that the servants

4. King John was the first English King who styled himself *Rex Angliar* (King of England) and not *Rex Anglorum* (King of the English) and it so happened that he was the first English King to be succeeded by his eldest son when that son was still a boy.



of the Crown shall be alone responsible" When a King speaks on political questions, he always speaks as the mouthpiece of his Ministry. The Duke of Windsor, the former King Edward VIII, began the radio address on the day after his abdication with these words: "At long last I am able to say a few words of my own. I have never wanted to withhold anything, but until now it has not constitutionally been possible for me to speak."

To sum up, the King is a natural person and he wears the Crown, the state-cap of royalty. But when we use a capital letter in writing the word Crown, it stands for the Kingship as an institution. The distinction between the King and the Crown, thus, becomes obvious. Broadly speaking, it is two-fold. First, the King is a person, the Crown is an institution. The King as a person dies or may abdicate or may even be dethroned whereas the Crown as an institution is permanent; it is neither subject to death nor abdication nor dethronement. This has been succinctly explained by Kerr. He says, "Nobody toasts the Crown or prays God to save it." Secondly the King does not exercise the powers which belong to the Crown on his own initiative and authority. They are exercised by the King at the behest of those who exercise the will of the people, i.e., Ministers responsible to Parliament. The King, Ministers and Parliament make a synthesis of supreme authority and it is called the Crown. The Crown is the keystone of the country's constitutional structure.

**Title and Succession to the Crown.** The events of 1688-89 finally established the supremacy of Parliament and determined that the Sovereign's right to rule rested upon the consent of the governed as expressed through Parliament. The basic Act in the matter of title to the Crown is the Act of Settlement passed by Parliament in 1701. It provided that the Crown shall be hereditary in the line of the Princess Sophia of Hanover, so long as it remained Protestant.<sup>5</sup> The succession is now vested in the House of Windsor, a name adopted during World War I to relieve the House of Hanover of any suggestion of German connections. The principle of heredity is determined by the rule of primogeniture at Common Law. The basic rules are that an elder line is preferred to a younger and that, in the same line, a male is preferred to a female. If there are no sons, the daughters in order of their seniority succeed to the Throne. In any event the heirs must be Protestants. If all Protestant heirs are extinct or if there be no heir within the prescribed degrees

5. The Duke of Windsor, *A King's Story* (1951), p. 411.

6. Kerr, W.G., *European Governments and their Backgrounds*.

7. Sophia, the grand-daughter of James I, was the widow of the ruler of one of the smaller German States, the Electorate of Hanover.

8. The Act was passed in the reign of William III after the death of his wife, Queen Mary. It anticipated that neither William nor his cousin and sister-in-law, who became Queen Anne, might have children. The Act, accordingly, provided that in the event of such default of issue, "the Crown and regal government...., with the royal state and dignity....and all honours, styles, titles, royalties, prerogatives, powers, jurisdiction and authorities to the same belonging and appertaining, shall be, remain and continue to the....most excellent princess Sophia and the heirs of her body, being Protestants...." On the death of Queen Anne in 1714, Sophia's son, the King of Hanover, became King of Great Britain with the name of George I.

of relationship to succeed. Parliament is competent to bestow the Crown on another family and thereby start a new dynasty. But succession cannot now be altered, under a provision of the Statute of Westminster, 1931, except by common consent of the member nations of the Commonwealth which owe allegiance to the Crown.\*

The Royal Marriages Act of 1872 provides that until the age of twenty-five, the consent of the King is necessary to a marriage that might affect the succession to the Throne. After twenty-five no consent is required except a year's notice to the Privy Council. But Parliament may disapprove such a marriage. The issue arose with respect to the possibility of a marriage between Princess Margaret, sister of Queen Elizabeth, and a commoner, Peter Townsend, who had divorced his wife. The Princess finally gave up the idea of marriage. When the heir to the throne is a minor (under 18 years of age) or whenever the reigning sovereign becomes physically or mentally incapacitated a regency is set up in conformity with the terms of the Regency Acts passed by Parliament. The latest of these Acts, the Regency Act, 1953, laid down that the first potential regent should be the Duke of Edinburgh and thereafter the Princess Margaret and then those in succession to the Throne who are of age. In the event of the Sovereign's partial incapacity or absence abroad, provision is made for the appointment of Counsellors of State (generally speaking, the wife or husband of the Sovereign, and the four adult persons next in succession to the Crown) to whom the Sovereign may delegate by Letters Patent certain royal functions. But Counsellors of State may not, for instance, dissolve Parliament except on the express instructions of the Sovereign, nor create peers.

The title of Her present Majesty Queen Elizabeth II depends on the Abdication Act, 1936. King Edward VIII abdicated in 1936 on the issue of His Majesty's marriage with Mrs. Simpson.<sup>9</sup> The Duke of York, then, next in succession to the throne, succeeded thereto as George VI.<sup>12</sup> George VI had no son and his elder daughter, Princess Elizabeth, became Queen in 1952, upon the death of her father.

**Royal privileges and immunities.** The Sovereign enjoys numerous

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9. The Preamble to the Statute of Westminster, 1931, provides that "it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of Parliament of the United Kingdom."

10. The Regency Act, 1953, provided that Queen Elizabeth, the Queen Mother, should be added to the persons to whom royal functions may be delegated as Counsellors of State.

11. Mrs. Simpson, a lady of United States origin, became a British subject by a second marriage after she had obtained a divorce from her American husband, Edward VIII, who was a bachelor till then, desired to marry Mrs. Simpson and the lady lodged a petition for divorce from her second husband. The Cabinet took exception to this marriage and eventually on December 10, 1936, the King executed an instrument of abdication renouncing the throne for himself and his descendants.

12. The Abdication Act was duly assented to by Parliaments of the Commonwealth countries, thus, fulfilling the requirements of the Statute of Westminster, 1931.

personal privileges and immunities. He may acquire hold and dispose of property of all kind precisely in the same manner as any private citizen. But the King is above law. He cannot be called to account for his private conduct in any court of law or by any legal process, not even as Dicey humorously observed, if he were to shoot his own Prime Minister. He is exempt from arrest. He cannot be made a defendant in a lawsuit, his goods cannot be seized by officers of law in default of any kind of payment, and no judicial processes can be served against him so long as a palace remains a royal residence.

The King receives a large annual grant from the State treasury. This grant is made available by Parliament in the form of an appropriation for the Civil List. The Civil List is granted by an Act of Parliament to the Sovereign for the duration of his or her reign and for a period of six months afterwards. The yearly Civil List allowed to the present Queen is £475,400. It is divided thus: privy purse £60,000, household salaries £185,000, household expenses £121,800, alms, etc., £13,200, and future contingencies £95,000. £40,000 are the annual grant of the Duke of Edinburgh. One informed source estimated that the Monarchy costs the nation about £2,000,000 per year.

### POWERS OF THE CROWN

**Powers of the Crown.** The powers of the Crown are those which belong to the office of the King or to the Kingship as an impersonal institution. These powers, let it be repeated once again, are never exercised by the Monarch himself. They are exercised in the King's name by Ministers who derive their authority from Parliament and are responsible to Parliament for the use they make of these powers. As the Crown powers are not the King's personal powers, they may be described as nominal powers of the King as distinct from his actual powers. The nation is governed by Ministers who, acting in his name, exercise the nominal powers of the King. So extensive is the authority of the Crown that it embraces all fields and functions of government and yet it is still growing. The province of the State, during recent years, has increased considerably and keeping pace with these political developments, the activities and functions of Government, too, have enormously expanded. This means fresh duties of direction and control by the Government and consequently augmentation of powers of the Crown. Lowell, writing in the first decade of the present century, observed, "All told the executive authority of the Crown is in the eye of law, very wide, far wider than that of the Chief Magistrate in many countries, and well-nigh as extensive as that now possessed by the monarch in any government, not an absolute despotism; and although the Crown has no inherent legislative power except in conjunction with Parliament, it has been given by statute, very large powers of subordinate legislation."<sup>13</sup> The powers of the Executive,

13. Queen Victoria handed down more than £2,000,000 and the personal fortune of the Royal Family is not diminished by death duties. In addition there are valuable Royal collections of jewellery, stamps and pictures. Estimates as to the total value of the Royal Family's personal wealth vary from £10,000,000 to £60,000,000. Anthony Simpson, *The Anatomy of Britain Today*, p. 22. Also refer to Martin, K., *The Crown and the Establishment*, p. 134.

14. Lowell, A.L., *The Government of England*, op. cit., Vol. I, p. 26.

under any system of Government, cannot be rigidly divided into water-tight compartments. Under the Parliamentary system of Government, as obtainable in Britain, Ministers of the Crown are the real functionaries. There is no divorce between the Executive and the Legislature. The Crown, has, therefore, as much to do with legislation as with the executive and administrative matters. It has, also, to do something with justice. The Crown, thus, forms a part of the Executive, Legislative and Judicial mechanism. It is indeed, the keystone of the country's constitutional structure. It may apparently seem paradoxical, although it is logical to the nature of the British Constitution "that the powers of the Crown have expanded as democracy has grown."

**Sources of Powers.** The powers possessed by the Crown are derived from two sources: prerogatives and statutes. Statutory powers of the Crown refer to those duties which have been assigned to the Executive authorities by Acts of Parliament. They include not only the greater part of powers under which the different departments of the Government function, but also the powers by which Whitehall exercises control over the local government authorities and other bodies distinct from the Crown. The powers of the Crown under this head are various, wide, and, as said before, growing. Acts of Parliament have, really, become a prolific source of Crown power, particularly with the development of the practice of delegating legislative powers to the Executive.

The powers and privileges which the Crown derives from the Common Law constitute the prerogative. Dicey defines it as "the residue of discretionary or arbitrary authority which at any time, is legally left in the hands of the Crown."<sup>15</sup> The prerogative was in origin the sum of the rights ascribed to the King as a feudal overlord and it continued to be the basis of authority till parliamentary control of public affairs became an established fact. The seventeenth century was one continuous struggle between the use of prerogative powers by the person of the King and the determined attempt of Parliament to control such powers either by Statute or by Ministers responsible to Parliament. Parliament emerged victorious out of this struggle and the King, to the most part, was deprived of the prerogative powers which inhered in his person. Some were abrogated by Statutes,<sup>16</sup> some have been lost by disuse, and the residue which remain have been inherited by the Crown. It is impossible to draw a list of the prerogatives of the Crown. The existence and limits of some raise difficulties of constitutional law. But the undoubted prerogatives include the summoning of Parliament, declaration of war or neutrality, ratification of treaties, appointment to offices, to dismiss the servants of the Crown, and to regulate the conditions of their service, and the power to pardon offenders.

The expression prerogative is, then, used to refer to Crown's discretionary authority, that is, what the King or his servants can do without the authority of an Act of Parliament. It provides a convenient mecha-

15. Ogg and Zink, *Modern Foreign Governments*, op. cit., p. 51.

16. Dicey, A.V., *Law of the Constitution*, p. 424.

17. Refer to the clauses of the Bill of Rights forbidding, suspending or dispensing with laws; the Act of Settlement, and various other Acts of Parliament of the like nature.



nism of various important activities of Government. Although the prerogative has no statutory authority, yet it is acknowledged by courts. Most of the prerogative powers derive authority from Common Law and the rules of Common Law form part of the Law of the Constitution in Britain. It may, also, be added that some prerogative powers have been conferred upon the Crown by statute and it is within the competence of the courts to determine whether an Act of Parliament is within the prerogative or to what extent royal power of prerogative has been abridged or abolished by Statute.<sup>18</sup> In brief, the Crown possesses the prerogative powers that still inhere in the Monarch, and those powers conferred by Parliamentary legislation, in total constitute a vast reservoir of authority.

### EXECUTIVE POWERS OF THE CROWN

**The Crown as Executive.** The Executive powers of the Crown are so numerous that only some of the most important can be mentioned here. They have increased in the past, are increasing in our own time and must continue to increase so long as the functions of the modern governments continue to expand. The Crown is the supreme Executive head and it must, as such, see that all national laws are duly observed and enforced. It directs the work of the administrative branches and national services; collects and expends, according to law, national revenues; appoints all higher executive and administrative officers, judges, bishops and the officers of the army, navy, and air force; regulates the conditions of services; and suspends and removes these officers, except judges, and other employees of government from service. The Crown holds the supreme command over the armed establishments. The Crown supervises, and in some instances directs, the work of local government especially that of boroughs and counties. The officers of local government and other bodies, like the British Broadcasting Corporation, are not the officers of the Crown. No doubt, these bodies are created by the Acts of Parliament, but they do not represent the Crown. The Crown simply exercises supervisory functions over them. Its right to control and direction is limited to certain specified matters only.

The modern tendency is to assign powers to Ministers, or to civil servants, "without any necessity of royal intervention."<sup>19</sup> The exercise of the prerogative of mercy, for example, is now primarily a matter for the Home Secretary, and the Royal share is mainly formal. In the same way, the practice of delegated legislation vests powers in the Ministers, rather than in the King-in-Council as originally the practice was, to make rules, regulations, and orders.

**Conduct of Foreign relations.** The Crown conducts the foreign relations of Great Britain with other countries; sends and receives ambassadors

18. For example, in 1876, the Appellate Jurisdiction Act gave the Crown the power to create four judicial life peerages, the number has since been increased.

19. Refer, for example, to the case of *Wilts United Dairies* (1921).

20. Judges can be removed only on joint address by the two Houses of Parliament. See *Infra*.

21. Keith, A.B. *The Constitution of England from Queen Victoria to George VI*, Vol. I, pp. 49-50.

or other diplomatic agents, and all foreign negotiations are carried on in the name of the Crown. The declaration of war and making of peace are the prerogative of the Crown. The Crown is also the treaty-making authority, and all international agreements are made in its name. Treaties concluded by the Crown are not subject to ratification by Parliament unless it is specifically conditioned upon parliamentary approval, or anything else is involved in it, like the cession of territory, payment of money, changes in the laws of the land, that require the assent of Parliament in order to make it valid. But "any treaty of high moral import", as the Locarno Treaty of 1925, is essentially laid before the two Houses of Parliament.

When the Treaty of Versailles was submitted to Parliament in 1919 for its approval, a section of the people, who were strongly wedded to the principle of democratic control over foreign relations, had hoped that in future no treaty would be made without parliamentary assent. Labour leaders, too, had long pleaded for it. But the Labour Governments of Ramsay MacDonald and C.R. Attlee never attempted it. Perhaps, they did not find such a policy feasible and treaties continued to be negotiated and ratified by action of the Crown alone.

It is true that no government can venture to declare a war unless there is assurance that Parliament will supply the funds to carry it to a successful end. But Parliament itself has no authority to declare a war. This power belongs exclusively to the Crown. Both in 1914 and 1939, the Ministers made the decisions and in the name of the Crown they led the country to war. And both the times the declaration of war took the form of a Royal Proclamation authorized by Order-in-Council. The question of Parliament's expressing disapproval of the Government's policy, or its refusal to grant supplies does not at all arise. So long as the Ministry can command a stable majority in Parliament, its support is *ipso facto*.

### LEGISLATIVE POWERS OF THE CROWN

The powers of the Crown are mainly, though not exclusively, Executive. In the United States of America, the Executive, Legislative and Judicial functions are clearly defined among three separate departments, although the authors of the Constitution could not maintain the purity of the doctrine of the Separation of Powers when they came to details. In the United Kingdom little or no distinction is given to this doctrine of Separation of Powers. The law-making function is vested in the King-in-Parliament. Every Statute declares itself to have been enacted "by the King's Most Excellent Majesty, by and with the advice and consent of Lords Spiritual and Temporal and Commons in Parliament assembled and by the authority of the same," and here, as everywhere else, the King has yielded his power to the Crown. The Crown is, therefore, an integral part of the national Legislature and its assent is essential to the enactment of laws.

The Ministers of the Crown, who constitute the country's real Executive, are members of Parliament as well. They control and guide the work of Parliament and determine how conveniently it can be transacted. The Crown, accordingly, summons, prorogues, and dissolves Parliament. When a new Parliament meets it is usually greeted by the Monarch in a

Speech from the Throne, which is usually delivered by the King or Queen in person from the Throne in the House of Lords with the Commons present. The Speech from the Throne outlines the legislative programme of the Crown and expresses the views and opinions of Government on various matters of national and international importance. But the Speech from the Throne is not the King's or Queen's speech. It is the Government's speech. It is put in the hand of the Monarch to be read. "The Monarch can, however, talk to the Prime Minister about it and sometimes minor amendments are suggested because it may be felt that the revised language suits the Monarch better than the official language which is set out. But alterations about policy are not made. That is for the Government responsible to Parliament, and everybody knows it."<sup>22</sup>

**Veto power.** As has just been said, the Royal assent is essential to the validity of laws passed by Parliament. It means that the King may refuse assent to, or veto, any law passed by Parliament. But the veto power has never been exercised since 1703. It has become obsolete. Disraeli in 1852, however, considered that the King's right to refuse assent to legislation still existed and was not an "empty form." But no Monarch exercised this power. The passing of the Parliament Act, 1911, revived the issue and suggestions were made in 1913 that the King could refuse his assent to the Irish Home Rule Bill. Bonar Law asserted that the King's veto was "dead" only so long as the House of Lords was not liable to be overridden by the House of Commons, and as the Home Rule Bill was being put through Parliament under the Parliament Act of 1911, the King could exercise his "right of refusing assent to matters not sufficiently considered by the people which the Lords had been supposed to exercise."<sup>23</sup>

George V, as Jennings points out, was "himself inclined to accept the same idea," and insisted upon an appeal to the country.<sup>24</sup> Lord Fisher, who was advising the King, did not agree with this viewpoint and insisted that it would be dangerous for the Monarch to refuse to accept the advice of Ministers. Sir William Harcourt, too, was of the same opinion and in a personal interview with the King insisted that if there were to be general election, an appeal to the electorate would not be made on the issue of Home Rule. The sole question would be—"Is the country governed by the King or by the people? and that would mean an attack on the person of the King."<sup>25</sup>

Supposing some headstrong King refuses assent to a Bill passed by Parliament ignoring the advice of his Ministers, then, what would happen? There is no reason to believe that such a contingency would ever happen in Britain, but if it ever does, the Ministry would forthwith resign. In that case, there would be two alternatives before the King. One, to summon the Leader of the Opposition and commission him to form the Ministry. The House of Commons would refuse to support such a Ministry, because it would be tantamount to approving the action of the King and

22. Lord Morrison, *British Parliamentary Democracy*, pp. 60-61.

23. Keith, A.B., *The Government of England from Queen Victoria to George VI*, Vol. I, p. 358.

24. Jennings, W.I., *Cabinet Government*, op. cit., p. 369.

25. *Esher Papers III*, p. 132. As quoted in Jennings' *Cabinet Government*, op. cit., p. 370.

the Government ousted formed the majority in the House. So there would be no other option for the King, but to dissolve Parliament and order new elections. "That would be a dangerous step," as Munro says, "for any King to take, because an adverse decision at the polls would inevitably suggest his abdication."<sup>26</sup> This is the verdict of British history. So long as the Ministry has a majority in Parliament, and so long as Parliament remains representative of the people, it carries with it the verdict of the people. There is, under the circumstances, no need for the exercise of the veto. This is exactly what Asquith submitted to George V in a Memorandum on the controversy of 1913. The Prime Minister asserted, "We have now a well established tradition of 200 years, that, in the last resort, the occupant of the Throne accepts and acts upon the advice of his ministers...." This point is abundantly clarified by the Duke of Windsor, the former King Edward VIII. He says, "Whenever the Prime Minister 'advises' the King he is using a respectful form of words to express the will and decision of the Government. The King is virtually bound to accept such 'advice'. Furthermore, he cannot seek 'advice' elsewhere. However, if, in the exercise of his undoubted powers, he chooses not to accept the 'advice' thus formally tendered, then his Ministers resign, and he must try to form a new Government from the Opposition."<sup>27</sup> Asquith also pointed out to the King in 1913 that "the veto could be exercised only by the dismissal of the Ministry, for no Government would accept a refusal to assent to a Bill without resigning."<sup>28</sup>

The King has now ceased to give assent to Bills personally. The assent is given by a Royal Commission appointed by the Crown under the Royal Sign Manual. The Lord Chancellor or Senior Commissioner simply says that His Majesty not having seen fit to be personally present upon this occasion, has appointed a Royal Commission and that they shall indicate the Royal Assent has been given to the Bills as good and proper Acts of Parliament. The assent to Bills is, therefore, only a picturesque formality.

**Orders-in-Council.** The Crown, acting alone, have the power to issue measures authorising certain executive actions. The Orders-in-Council, as they are known, are issued by the King and Privy Council. There are two varieties of Orders-in-Council. First, those which are merely administrative rules and govern the various branches of government in their routine business. Others are promulgated only by virtue of authority expressly granted by Parliament and are frequently called statutory orders. Such orders have actually the force of law, because they are based upon the authority of Parliament. This kind of "subordinate legislation" is now of steadily increasing importance and the subject is dealt with more fully at its appropriate place.

### JUDICIAL POWERS OF THE CROWN

The King is still described as the 'fountain of justice' and this historic

26. Munro, W.B., *The Governments of Europe*, op. cit., p. 63.

27. Spender, J.A., *Life of Lord Oxford and Asquith*, Vol. II, pp. 29-31.

28. *A King's Story*, op. cit., p. 343.

29. Spender, J.A., *Life of Lord Oxford and Asquith*, Vol. II, pp. 29-31. Asquith's Memorandum.



expression reflects that the King's conscience spoke the last word in the administration of justice. This is not the case now. The principle of the independence of Judiciary, as it prevails in Britain, has freed for all practical purposes, the judges and courts from control at the hands of the Executive. And yet the courts are not "entirely outside the Crown's wide-sweeping orb." Judges, including the Justices of Peace in the counties and boroughs, are appointed by the Crown. The Lord Chancellor, a member of the Cabinet, exercises general judicial supervision. All issues which come before the Judicial Committee of the Privy Council are decided by the Crown. Finally, the Crown exercises the prerogative of mercy and may grant pardon to persons convicted of criminal offences. This is done by the Home Secretary.

### "THE KING CAN DO NO WRONG"

Such in brief, are the powers of the Crown. The Crown, no doubt, is closely associated with the person of the King, but the King in person is for the most part the principal formal element of the State and its Executive. The actual or potential element is the Crown. The position of the King has been cogently summed up by Lowell. He says, "According to the early theory of the Constitution the ministers were the counselors of the King. It was for them to advise and for him to decide. Now the parts are almost reversed. The King is consulted, but the ministers decide." In many cases the Monarch may personally know little what they decide or even if he knows, he may have little liking for them, although the Crown powers are exercised in his name. His Majesty's servants have become His Majesty's masters.

There are two important principles on which the constitutional structure rests in Britain. First, the Monarch may not perform any public act involving the exercise of discretionary powers, except on advice of the Ministers. Second, for every Act performed in the name of the Monarch the Ministers are responsible to Parliament, and hence the meaning of the pregnant phrase, "The King can do no wrong." That is to say, the King can do nothing right or wrong, of a discretionary nature and having legal effect. Whatever may be the personal views of the Monarch, he must, as a constitutional Monarch, give way to his Ministers, feeling that they have behind them a majority of the people's representatives and they can be called upon to account for their acts, singly or collectively, by Parliament." This is now a well established tradition of nearly three hundred years. Conventions are an integral part of the Constitution and every King of Britain at the time of coronation swears to maintain the Constitution and uphold constitutional Monarchy.

Nor can any Minister plead the orders of the King in defence of a

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30. Back in the days of Charles II one of the courtiers wrote on the door of the Royal bedchamber:

"Here lies a Great and Mighty King,  
Whose Promise none relies on;  
He never said a Foolish Thing,  
Nor ever did a wise one."

"Very true," retorted the King, "because while my words are my own, my acts are my ministers'."

wrongful act or for an error of omission and commission. Thomas Osborne, Earl of Danby,<sup>1</sup> was impeached in 1679 of "high treason, and diverse high crimes and misdemeanours." Danby's plea was that whatever he had done was by order of the King, and that the King could do no wrong. He even produced, at the time of his impeachment, the Royal pardon. Parliament held Danby's plea illegal and void.<sup>2</sup> It was, thus, definitely laid down that the Ministers cannot plead the command of the King to justify an illegal and unconstitutional Act, and thereby shield themselves behind the legal immunities of the occupant of the Throne.

### THE JUSTIFICATION OF MONARCHY

The almost wholly formal position of the King in the British system of government and the fact that conventions prevent him from exercising the powers that he legally possess, raises the question why the English Kingship should not be abolished? To some people Monarchy does not appear to be worth it costs the nation. To a few more it appears a political anachronism. But the real fact is that the great mass of the British people are not willing to see Kingship disappear. The seventies of the last century witnessed a strong republican movement.<sup>3</sup> It even, caused sensation, when persons like Sir Charles Dilke joined its ranks,<sup>4</sup> and Chamberlain could predict that the "Republic must come and at the rate at which we are now moving it will come in our generation."<sup>5</sup> Yet a few years later the movement had collapsed, "and Queen Victoria was able to impose a public recantation upon Dilke before accepting him as a Cabinet minister."

Since then, Monarchy in Britain has been more popularly acclaimed and it is now generally accepted by all political views without discussion."<sup>6</sup> "Monarchy, to put it bluntly," writes Laski, "has been sold to democracy as the symbol of itself, and so nearly universal has been the

31. Danby succeeded Clifford as Lord High Treasurer and consequently he had become virtually the first minister of the Crown.

32. Resolution concerning the Royal Pardon in Bar of Danby's Impeachment, *Select Documents of English Constitutional History*, op. cit., p. 439.

33. A Republican demonstration was held in Trafalgar Square in September 1879 and early in 1871, a Republican Club was formed in London with Charles Bradlaugh as its first President. While speaking at its inauguration Bradlaugh said that "the heir-apparent to the throne has neither the intelligence, nor the virtue, nor the sobriety, nor the high sense of honour, which might entitle him to take a front rank in this Great Nation."

34. At a crowded meeting at Newcastle, Dilke attacked on the excessive cost of the Crown. He asserted, "If you can show me a fair chance that a republic here will be free from the political corruption that hangs about the monarchy, I say, for my part, and I believe that the middle classes in general will say—let it come."

35. Among other sympathisers of the movement the notable were Bright, Odger the Trade Unionist, Mundella, M.P. for Sheffield, and John Morley.

36. There are even now some people who would prefer in principle that Britain were a republic. A few members of Parliament desired its substitution after the abdication of Edward VIII. "Had Edward VIII not abdicated in 1936", writes R.M. Punnett, "there might have been an evolution of Monarchy into a form more akin to the Scandinavian model but George VI and Elizabeth II have sought to preserve much of the Monarchy's remoteness and mystique." *British Government and Politics*, p. 254.

chorus of eulogy which has accompanied the process of the sale that the rare voices of dissent have hardly been heard. It is not without significance that the official newspapers of the Trade Union Congress devote more space, of news and pictures, to the royal family than does any of its rivals.<sup>37</sup> Although the cost of the Crown in Britain and elsewhere reveals a glaring disparity,<sup>38</sup> yet a little suggestion is made that the people fail to get "their money's worth." Ceremony, pomp, and ritual connected with royalty involve, no doubt, a certain amount of lavishness and many people contrast this display with the poverty and distress of a great mass of the people. But to raise such a question, says Crooch, is not necessarily to resolve it against Kingship.<sup>39</sup> "Democratic government", according to Jennings, "is not merely a matter of cold reason and prosaic policies. There must be some display of colour, and there is nothing more vivid than royal purple and imperial scarlet."<sup>40</sup> The Kingship, therefore, in the words of Winston Churchill, "is the most deeply founded and dearly cherished by the whole association of our peoples." Lord Attlee, who had been active in the Socialist movement for more than half a century, claimed that during that period he had taken part in bringing about a number of changes in British society by helping to abolish some old things, such as the Poor Laws, but "there is one feature of it which I have never felt any urge to abolish and that is the monarchy. I have never been a republican even in theory, and certainly not in practice."<sup>41</sup>

This patriotic admiration of the mass of the Sovereign's subjects for Monarchy is due to somewhat complex considerations of history, of human motives and sentiments, and of utility. Even Lord Altrincham, the Conservative peer who criticised the Queen and the Court in an article published in *The National and English Review*, the magazine he edits, said on television on August 6, 1957, that he regretted any impression that he "was hostile to the Queen or trying to attack her in a personal way or be beastly about it." Lord Altrincham's criticism of Queen Elizabeth aroused nation-wide controversy. He had described the Queen's speaking as a "pain in the neck" and her utterances as those of a "priggish school-girl," and called for a "truly classless Commonwealth Court" to replace her present entourage of "people of the tweedy sort." *The Reynold News*, a Left-wing Sunday newspaper, supported the criticism of the young Peer because he "has said aloud what many people are thinking: Buckingham Palace is not in tune with the Britain of 1957."<sup>42</sup> But the general mass of the people were angry with Lord Altrincham and many suggested that he should be shot. Lord Altrincham was actually slapped as he left the television studio. The man, who struck him, said, "That's

37. Laski H.J., *Parliamentary Government in England*, p. 392.

38. Refer to Greaves, H.R.G., *The British Constitution*, pp. 83-84. See also Punnett, R.M., *British Government and Politics*, pp. 256-57.

39. *The Government of England*, op. cit., p. 10.

40. Jennings, W.I., *The British Constitution*, p. 116.

41. Broadcast Speech at the death of George VI in early 1952.

42. *Observer*, Attlee on Monarchy.

43. As reported in *The Tribune*, Ambala Cantt., August 6, 1957.

for insulting the Queen."<sup>44</sup> Lord Morrison said, "you get funny people breaking out now and again like Lord Altrincham, but nobody would know him if he was not a Lord; he is a Lord only because he is the son of his father. But he says funny things. They get him headlines in newspapers and even get him on television, which pleases him no end. But don't worry about these jokers."<sup>45</sup> The general body of the British people support the British Monarchy and Morrison cited an instance which he could never forget. "I shall never forget", said Morrison, "seeing, at the time of the Coronation of King George VI, a banner going right across the street of an East End slum in London which said, 'Lousy but loyal.' And I think that was one of the greatest compliments that has ever been paid to the British Royal Family."<sup>46</sup> As long as the Monarch "behaves constitutionally," concludes Morrison, the Labour Peer, "as I have every expectation, I think it will remain a popular institution in my country."<sup>47</sup>

### FUNCTIONS OF THE MONARCHY

According to Jennings the functions of the Monarchy may be said to be four." First, appearing in an impersonal fashion as the Crown, the Monarch's name is the cement that binds the Constitution. Secondly, the Monarch similarly binds the units of Commonwealth. Thirdly, there are political functions of the highest importance which the Monarch performs personally. Fourthly, the Monarch is a social figure exercising important functions outside the political sphere. We begin the elaboration of these functions first taking the personal functions of the Monarch, though it upsets the order in which Jennings enumerates them.

**Personal authority of the King.** In the actual conduct of the work of the Government the Monarch still personally performs certain specific acts and the most important of these is that the Kings must make certain that he has a Government in the United Kingdom. The Government is headed by the Prime Minister and the Prime Minister selects his own team to make a Government. The King, thus, chooses a Prime Minister and the latter then prepares a list of Ministers and submits it to the King for his approval. But, when choosing the Prime Minister, the King must remember that a Ministry must have the support of a majority of the House of Commons otherwise it will be unable to govern.

Now-a-days, the choice of such a person who is to be the Prime Minister and can lead the majority in the House of Commons is obvious. The leader of the majority party in the House of Commons is summoned and commissioned to form Government. "The essential point", writes Herbert Morrison, "is that the new Prime Minister should be able to command a majority in the House of Commons, and not merely be able to form a government, for the government cannot live without a parliamentary majority." If the Government is defeated on a hostile vote in

44. As reported in the *Hindustan Times*, New Delhi, August 9, 1957.

45. Lord Morrison, *British Parliamentary Democracy*, p. 5.

46. *Ibid.*

47. *Ibid.*

48. Jennings, Ivor, *The Queen's Government*, p. 30.



the House of Commons, the Sovereign summons the Leader of the Opposition and commissions him to form a new Government. Even if the Prime Minister dies in office the choice of his successor can be reasonably obvious, though careful consideration would be given to the likelihood of the person appointed being acceptable to a majority in the House of Commons. Since Churchill's War Government has emerged the office of the Deputy Prime Minister, though it has not been constitutionally recognised.<sup>49</sup> When the Prime Minister dies in office the Deputy Prime Minister might be specially considered by the Sovereign. "though there would be no obligation to do so, especially as I gather," says Herbert Morrison, "that the Sovereign does recognise such an office."

But if no party commands a real majority, or when a Prime Minister retires and when the majority party has not yet designated its leader, the choice of the Prime Minister is not easy. The Sovereign makes, in such a case, a personal decision as to whom to send for, although he or she is always careful to follow that course which is least likely to arouse criticism. "The Sovereign's choice in these conditions," says Morrison, "has much constitutional significance. The choice may be a very delicate one and involve embarrassing complications. The Sovereign would, of course, take all relevant considerations into account, and be at great pains not only to be constitutionally correct, but make every effort to see that the correctness is likely to be generally recognised."<sup>50</sup> It is the Sovereign's undoubted right to seek or not to seek the advice of the outgoing Prime Minister and is also free to receive counsel and advice from such Privy Councillors whom the Monarch may wish to consult. When the Conservative Prime Minister, Bonar Law, resigned because of ill-health on May 20, 1923, King George V passed over the claims to succession of Sir Austen Chamberlain and Lord Curzon and sent for Stanley Baldwin to form a government.<sup>51</sup> In 1924, no party had a clear majority in the House of Commons. George V sent for Ramsay MacDonald, and not Mr. Asquith, to form the Government, although the Labour Party had behind it only about one-third of the members of the House. A minority Labour Government under MacDonald, dependent on Liberal votes, took office again in 1929. The events of 1931 or "the crisis of 1931", as Herbert Morrison describes, were more complicated and the act of George V in commissioning Ramsay MacDonald to head the National Government has been characterised by Professor Laski "as much the personal choice of George V as Lord Bute was the personal choice of George III."<sup>52</sup> "King George V was, I feel sure," writes Herbert Morrison, "actuated by sincere motives. And

49. A major reconstruction by Harold Macmillan was announced on 17th 16th and 18th July 1962. The new post of first Secretary of State was specially created for Mr. R.A. Butler, who would, according to the announcement, "act as Deputy Prime Minister." But Butler did not step into the office of the Prime Minister when Macmillan resigned.

50. Herbert Morrison, *Government and Parliament*, p. 77.

51. Lord Curzon's peerage was advanced as a disqualification in his case. But, according to L.S. Amery, a minister of the time, "the final decision was to the best of my belief, made mainly on the issue of...personal acceptability....If a constitutional precedent was created, it was largely as the ex-post facto cover for a decision taken on other grounds." L.S. Amery, *Thoughts on the Constitution*, p. 22.

52. Laski, H., *Parliamentary Government in England*, op. cit., p. 408.

certainly the financial and economic situation of the country was serious. Nevertheless, I think his judgment was at fault." The King would "have been wise", he adds, "to have ascertained what was likely to happen by inquiry of one or more Labour Privy Councillors likely to know. He might have asked the Prime Minister to ascertain the view of the Labour Cabinet, but no action was taken to ascertain the general Labour view."<sup>53</sup> Morrison even questions the need of the National Government and is of the opinion "that a Conservative-Liberal coalition could have done all that the so-called National Government did."<sup>54</sup>

Whenever the Labour Party secured a majority it insisted on the right of the Labour members of Parliament to choose their own leader and the Sovereign's choice of the Prime Minister was, accordingly, obvious. But the Conservative Party did not follow this practice and the Sovereign had, thus, a choice when the Conservative Party had a majority but no leader. Baldwin became leader in 1923, and Chamberlain in 1937, because they were Prime Ministers. This practice of the Conservative Party evoked a severe criticism from the Labour Party when Sir Anthony Eden resigned on January 9, 1957 and the Queen appointed Harold Macmillan as the new Prime Minister. Until the moment Macmillan went to the palace the nation was left guessing whether he or R.A. Butler, the Lord Privy Seal, would become Sir Anthony Eden's successor. The Queen sought the advice of Sir Winston Churchill and the Marquess of Salisbury and it was believed that the advice of Churchill was a powerful factor in deciding the issue. The *Times* in an editorial said that ultimate responsibility for the choice of Harold Macmillan was the Queen's alone and that time and events would show how wisely she had judged. Labour Party chiefs at a specially called meeting of their 'shadow cabinet' parliamentary committee, expressed the fear that the Crown had been brought into party politics in a most undesirable way. James Griffiths, Labour Deputy Leader, in the absence of the leader, Hugh Gaitskell, said in a radio interview on January 11, 1957: "We do not question that the Crown acted with due constitutional propriety," but, he added, "we do believe it is important that parties themselves should decide on their leaders and that the Crown should not be put in the embarrassing position of having to make a choice between rival claimants for the Premiership from the same party." Griffiths further asserted that if this position was to recur often there would be a full case for examining the procedure, because "this is bringing the Crown into internecine party warfare which is very bad for the Constitution."

The historical method of choosing a leader by the Conservative Party underwent a considerable strain when Sir Alec Douglas-Home was asked to take over from Harold Macmillan in 1963 and eventually led to the retirement from politics of R.A. Butler. In 1965, the party changed its method of selecting a leader. Today, a ballot is held of all Conservative MPs, and to be elected a leader on the first ballot a candidate has to receive an overall majority of votes, and also he has to receive 15 per cent

53. Herbert Morrison, *Government and Parliament*, p. 79.

54. *Ibid.*

55. *Ibid.*, p. 78.

more votes than his nearest rival. If he does not achieve this a second ballot is held two to four days later, for which the contestants have to be renominated, and for which new candidates can be nominated. To be successful in the second ballot a candidate merely has to secure an overall majority of votes. If this is not still achieved, a third ballot is held. The third ballot is restricted to the three leading candidates of the second ballot and the voters indicate their first and second preferences on the ballot paper. After the votes have been counted, the third candidate is eliminated, and the votes secured by him are redistributed, according to the second preferences, between the two remaining candidates. The successful candidate is then presented to a party meeting consisting of Conservative MPs, Peers, prospective candidates, and members of the National Union Executive Committee.<sup>56</sup> This process has been used only once in July 1965, when Sir Alec Douglas-Home resigned as party leader. The new democratic method is sure to end the hoary tradition of evolving a sort of consensus after private soundings of Conservative members of Parliament, prospective MPs, Peers and the party executive. In the past, when the Conservatives would be in power the retiring Prime Minister had always a big say about his successor. All this led to intrigue and wire-pulling in the party. The new method is in line with the Labour Party, and it also alleviates the controversial issue of Monarch's intervention in active politics. For the selection of a Labour Party leader, a ballot of the Parliamentary Labour Party is held in which, in order to be elected, a candidate has to receive an absolute majority of the votes. If no candidate receives an absolute majority, the candidate at the bottom drops out of the contest and a second ballot is held a week later, this process being repeated until a candidate secures a majority.<sup>57</sup>

Jennings thus concludes: "These examples show that the Queen is no mere figurehead. She does not steer the ship, but she has to make certain that there is a man at the wheel. Nor is it always easy to know when the problem will arise. Neville Chamberlain in 1937 had a large majority, but by 1940 George VI was looking forward for a Conservative Prime Minister who could secure Labour as well as Conservative support—and found him in Mr. Churchill."<sup>58</sup> It is however true, Jennings admits, that the cases are exceptional. Normally the machine runs efficiently because the Government has a majority and if it loses at an election, the Opposition steps in to form the Government. The existence today, of the Labour and Conservative Parties' procedures for electing their lead-

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56. When Sir Alec Douglas-Home resigned in July 1965, as party leader, Edward Heath, Reginald Maudling, and Enoch Powell were nominated to contest to succeed him. In the first ballot Heath got 150 votes, Maudling 133 votes and Powell 15 votes. Heath, thus, did not have the required 15% more votes than Maudling. Before the second ballot was held, however, Maudling and Powell withdrew from the contest and Heath was left the only choice to be duly approved by the party meeting.

57. In February 1963, in the election to choose a successor to Hugh Gaitskill, in the first ballot Harold Wilson received 115 votes, George Brown 88 votes, and James Callaghan 41 votes. As Wilson could not secure an absolute majority, Callaghan dropped out, and in the second ballot a week later, Wilson was elected with 104 votes to George Brown's 103.

58. Jennings, Ivor, *The Queen's Government*, p. 43. Also refer to N.H. Brasher's *Studies in British Government*, p. 12.

ers does not in itself effect the constitutional prerogative of the Monarch, in that the Monarch remains free to choose whoever may be regarded as suitable. Nevertheless, in practice it seems inconceivable that the Monarch would now choose as Prime Minister anyone who had not first been elected party leader, provided that in a crisis time was allowed for the election to take place. It is possible, however, that the Monarch could still play an effective role in selecting a Prime Minister if it was not clear which party could form a government.

It is sometimes asserted that the dismissal of Ministers and the dissolution of Parliament may be undertaken by the King without the consent of Government. No Government has been dismissed by the Sovereign since 1783,<sup>59</sup> although it is still maintained by many constitutional experts that the King has the right to dismiss Ministers, if he has reason to believe that their policy, though approved by the House of Commons, has not the approval of the people. But, as Jennings correctly points out, such an argument "is an argument for dissolution and not a dismissal of ministers."<sup>60</sup> Ministerial dismissal by the Head of the State is not the essence of the Parliamentary system of Government and no King would dare venture it, whatever be the legal opinion, unless he is determined to gamble in the most dangerous manner.

The duration of Parliament in ordinary circumstances is for five years, but conditions may arise in which a dissolution of Parliament may be desired before the expiry of its full term of life. There might, for example, be an important difference of opinion within the Cabinet which would make it impossible for the Government to carry on, or a Government may desire to take the verdict of the electorate on an important matter of policy on which it had no mandate, or there might be revolt within the ranks of the Government Party which caused the Government to be defeated in the House of Commons on some matter of importance. In circumstances such as these the Prime Minister might request the Sovereign to exercise his Royal prerogative of dissolving Parliament and direct new elections to be held.

The Sovereign's right to dissolve Parliament has been a subject of deep controversy. It has been maintained that the Sovereign is not bound to accept Ministerial advice on this matter. This, indeed, seems to have been the view of Queen Victoria and some of her contemporaries. Even Prof. Keith held similar opinion. "The prerogative of the Crown to dissolve Parliament," he wrote, "is undoubted. The manner of dissolution does not, as often said, strictly speaking, involve the aid of ministers, for the King could still present himself in the House of Lords, and

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59. Gladstone appears to have thought in 1878 that the right to dismiss still existed. Disraeli also held the same view. In 1886, Queen Victoria had made efforts to overthrow the Liberal Government because to her mind the government was not governing with integrity for the welfare of the country. Prof. Dicey, too, was of the opinion that the King could dismiss ministers in order to ascertain the will of the nation. Mr. Asquith, on the other hand, rebutted Prof. Dicey's arguments and maintained that "a practice so long established, and so well justified by experience should remain unimpaired."

60. *Cabinet Government*, *op. cit.*, p. 380.



by word of mouth, dissolve the Parliament."<sup>61</sup> But in practice dissolution takes place by a proclamation under the Great Seal, which is based on the advice of the Privy Council for whose summons the Lord President accepts responsibility. Consequently, the King cannot secure a dissolution without advice. If the Ministers refuse to give such advice, he can do no more than dismiss them and we know how hazardous it is for the Sovereign to dismiss Ministers who command the confidence of the House of Commons. A forced dissolution, therefore, is impossible, "though one induced by royal pressure is perfectly in order."<sup>62</sup> There have been two definite occasions during the last fifty years when dissolution took place at the express desire of the King. The first was over the Budget in 1910 at the desire of Edward VII and, the second, over the power of the Lords in the same year, at the desire of George V. "In each case, however," maintains Laski, "the ministers, however, reluctantly, acquiesced in the King's desire, and the dissolution was, accordingly, amply surrounded by the cloak of ministerial responsibility; though the King took the initiative in pressing a dissolution upon the government in each case, also, the government accepted the advice." But there are many instances as well, for example, in 1866, 1873, 1885, 1895, and 1905, when the Cabinet did not wish to dissolve in spite of the royal sanction.<sup>63</sup>

The right of the King to dissolve Parliament without advice became a matter of practical discussion in 1913 over the Home Rule Bill. The Home Rule Bill had been passed by the House of Commons in two successive sessions but rejected by the House of Lords in each of these sessions. The Unionists claimed that the government had received no mandate from the electorate at General Elections for such a measure in 1910, and, thus demanded a dissolution before the Bill was submitted to the House of Commons the third time and passed under the Parliament Act, 1911. The Unionists realised that Asquith was unlikely to advise dissolution and they discussed the power of the King to dissolve without advice. George Cave argued that the King had an undoubted right to dissolve Parliament and that he should exercise the right on this occasion to satisfy himself that the House "does indeed represent the democracy of today." Sir William Anson admitted that the advice of the Ministers was constitutionally necessary, and that if the government was not willing to give such an advice, the King would have to ascertain, presumably from the Opposition, whether the alternative Ministry could take office and to accept the responsibility for a dissolution. Dicey agreed with Anson, but Professor Morgan insisted that such independent action on the part of the King "would almost inevitably be equivalent to dismissal of his ministers," and that if once a dissolution was effected by the King's choice, "no dissolution would be free from ambiguity, and speculation as to the degree of responsibility of the Sovereign would be a feature of every election." Commenting on this issue Jennings comes to the conclusion that "there cannot be the least doubt that Professor Morgan was wholly in the right. Either

61. "There was no doubt of the power and prerogative of the Sovereign to refuse a Dissolution—It was one of the very few acts which the Queen of England could do without responsible advice." *Letters of Queen Victoria*, edited by Benson and Esher, Vol. III, pp. 314-365.

62. *The British Cabinet System*, op. cit., p. 297.

63. *Ibid.*

the King 'persuades' his ministers to 'advise' a dissolution or ministers resign." In other words, the King cannot exercise his prerogative of dissolution without advice.

During the last hundred years there is no instance of a refusal of a dissolution when advised. Nevertheless, opinion has always prevailed, and there exists a persistent tradition that it could be refused, if the necessary circumstances arose. Summing up the discussion of the right of the King to refuse dissolution, Keith says, "It appears that there is some divergence of view among the authorities on the question whether the King can refuse a dissolution to a Prime Minister who asks for it, the better opinion is that the power still exists, but that it could be properly exercised only in exceptional circumstances."<sup>64</sup> What those exceptional circumstances can be, Stannard gives one specific instance. The contingency for refusal was there, he says, if Mr. Chamberlain had advised a dissolution in May, 1940 when the Germans were crossing the Albert Canal. At such critical moments, he says, "the limits of the convention that keeps the Crown out of politics are reached, and the reigning Sovereign must himself decide, in the last resort, where his duty lies." Similarly, the right to a dissolution", as Keith says, "is not a right to a series of dissolutions." The King would not give the ministry, which had obtained dissolution and lost an election, another dissolution. The circumstances are which should enforce the retirement of the Ministry, although it is also true that a defeated Ministry would not ask for a second dissolution.

The King summons and prorogues Parliament. On the opening of Parliament, the Kings reads the Speech from the Throne. But the Speech which the Sovereign reads is not his own work," and may be read for the King by the Lord Chancellor. The King assents to the election of the Speaker of the House of Commons and here too, he may act by proxy. Orders-in-Council cannot be passed except for the presence of the King. Similarly, the appointment of the Lord Chancellor and the Secretaries of State are the personal acts of the King, consisting in actual handing of the seals of office to the designated ministers. The Monarch receives ambassadors in person, though this too is a sheer formality.<sup>65</sup> The King may convoke a conference of party leaders, as did George V in 1914, with a view to avoid a constitutional crisis, though such a step the King can take only upon advice received from his ministers.<sup>66</sup>

64. *The British Cabinet System*, p. 302.

65. Stannard, H., *The Two Constitutions*, p. 17.

66. It has been accepted since 1841, that the Speech from the Throne is a statement of ministerial policy for which the Sovereign accepts no responsibility. In 1881 Queen Victoria objected to a paragraph in the Queen's Speech on the proposal of withdrawal of troops from Kandhar. Lord Spencer and Sir William Harecourt, who were Ministers-in-Attendance, "impressed upon Sir H. Ponsonby that Speech from the Throne was in no sense an expression of Her Majesty's individual sentiments but a declaration of policy made on the responsibility of her Ministers". As cited in *Cabinet Government*, *op. cit.*, p. 373. Also refer to Herbert Morrison's *Government and Parliament*, p. 75.

67. In 1929, George V raised objections to receiving an ambassador from the Soviet Union. The Foreign Secretary, politely but firmly, told the King that there was a Cabinet decision to that effect. The King then received the ambassador.

68. The King summoned the Home Rule Conference of July 1914 on the  
(Continued on next page)

The Sovereign is the 'fountain of honours'. "It is the essence of honours of any kind", says Prof. Keith, "that they should appear to be the personal gift of the Sovereign, and for this reason all honours are submitted to and formally approved by the Sovereign, and whenever possible the investiture with the insignia or other act in connection with its bestowal is performed by the King in person or at least the royal signature is attached to the instrument conferring it." But the principle in the great majority of cases of the conferment of honours is that the recommendation to the Sovereign goes from a Minister, and normally the Prime Minister. The grant, however, is not entirely on advice. The Sovereign is able to resist the grant of honours of which he does not approve. In 1869, Queen Victoria refused to consent to a Privy Councillorship for Mr. Bright. In 1869, she refused to sanction a peerage for Sir L. de Rothschild and in 1881 she firmly resisted Gladstone's advice to make Sir Garnet Wolseley a peer. In 1906 Edward VII objected to several peerages and Privy Councillorships, although on pressure he ultimately gave way. A few honours, i.e., the Order of Merit, the Order of Companions of Honour, the Royal Victorian Order, the Most Noble Order of the Garter, and the Most Noble and most Ancient Order of the Thistle, are in the Sovereign's personal gift.

**The King as Adviser.** Far more important is the Monarch's role as critic, adviser and friend of the Ministers. In the oft-quoted phrase of Bagehot,<sup>69</sup> the Sovereign has "three rights—the right to be consulted, the right to encourage, the right to warn." And "a King of great sense and sagacity", he further adds, "would want no others. He would find that his having no others would enable him to use these with singular effect." Or, as stated by Sir Winston Churchill, "under the British Constitutional system the Sovereign has a right to be made acquainted with everything for which his Ministers are responsible, and has an unlimited right of giving counsel to his government."<sup>70</sup> Since the time of George I. the Sovereign has not attended a Cabinet meeting, but the King is better informed than the average Cabinet Minister on all matters which are brought before the Cabinet. He sees all Cabinet papers, whether they are circulated by the Cabinet office or by the departments. He receives the Cabinet agenda in advance and can discuss memoranda with the Ministers responsible for them. If he requires information from a Department he can ask for it. He also receives a copy of the Cabinet minutes, reports of Cabinet Committees, including the Defence Committee and the Chiefs of Staff Committee and the "daily print" of dispatches circulated by the Foreign Office. He follows debates in Parliament by means of the "Official Report". If other information would be helpful, he can ask his private Secretary to obtain it. Moreover, he has a staff to keep him informed of the development of political events. In short, the Prime Minister must keep the King abreast of what happens within and without the country, always tell him of Cabinet decisions and he must be ready to explain the reasons for any

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advice of Asquith, the Prime Minister. The speech which George V delivered to the Conference was sent to and approved by the Prime Minister. *Cabinet Government*, op. cit., pp. 361-62.

69. Bagehot, W., *The British Constitution* (The World Classics ed.), p. 69.

70. Churchill, Winston S., *Their Finest Hour*, p. 379.

policy. "In some respects," says Jennings, "notably on foreign affairs and on matters dealing with the Commonwealth, he may be better informed than the Prime Minister."<sup>71</sup>

The King would, thus, acquire some knowledge and experience which no other statesman in control of governmental machine can claim. Bagehot rightly showed that the King has two advantages over the Prime Minister. One, while Prime Ministers and Ministers change, the King goes on until he dies. Cabinet business, therefore, is continuous for him and a change of Government "is merely a change of personnel". All this makes the King a mentor whom a wise Minister is not only obliged, but positively desires, to consult. "In a word, the King knows the mistakes made by a Premier's predecessors, and probably why they made them." Writing about the advantages of Monarchy, just after the death of George VI, Clement Attlee said, "Yet another advantage is that the monarchy, continuously in touch with public affairs, acquires great experience," whereas the Prime Minister might have been out of office for some years. "He (Prime Minister) has no doubt kept himself as fully informed as possible and, on coming into office, can avail himself of the experience of the civil service, but this is not the same thing as having access, year after year, to all the secret papers. . . . King George VI was a very hard worker and read with great care all the state papers that came before him. . . . A Prime Minister discussing affairs of state with him was talking to one who had a wider and more continuous knowledge than any one else." Since the Prime Minister must discuss his policies with the Monarch, speak of new developments, and listen to what he has to say; and what the Monarch says is the result of his perennial knowledge and experience, he is in an excellent position to influence the man who has the power to decide on policy. "To express a doubt", as Jennings says, "is often more helpful than to formulate a criticism; to throw in a casual remark is often more helpful than to write a memorandum. The easy personal relationship that George VI maintained with his Ministers probably had more influence than the letters which Queen Victoria wrote in profusion." Jennings, accordingly, concludes that the statement of Walter Bagehot that the Monarch had the right to be consulted, the right to encourage, and the right to warn stands modified now. "That is not quite what happened under George VI and it will probably not happen under Elizabeth II." The Monarch exercises personal influence in matters of State, though influence is not power.

The views of the King are particularly valuable, because they are not clouded by political controversy. He has no party objective at all, nor

71. Herry Hopkins wrote after luncheon with Their Majesties on 30th January 1941: "The King discussed the Navy and the Fleet at some length and showed an intimate knowledge of all the high-ranking officers of the Navy, and for that matter, of the army and the air force. It was perfectly clear from his remarks that he reads very carefully all the important dispatches and, among other things, was quite familiar with a dispatch which I had sent Sunday night through the Foreign Office." Sherwood, Robert E., *Roosevelt and Hopkins*, p. 251.

72. *Life*, February 18, 1952.

73. Jennings, I., *The Queen's Government*, p. 46.

74. *Ibid.*



is he concerned with intra-party intrigues. He is, in the words of Lord Attlee, "the general representative of all the people and stands apart from the party political battle". Then, there is the traditional reverence for the King's Office which must add weight to his opinions. Asquith wrote in his Memorandum on the Rights and Obligations of the King that He is entitled and bound to give his ministers all relevant information which comes to him, to point out objections which seem to him valid against the course which they advise, to suggest if he thinks fit an alternative policy. Such intimations are always received by ministers with the utmost respect and considered with more respect and deference than if they proceeded from any other quarter."<sup>75</sup>

Jennings gives a matter of fact summing up. He says "Thus the King may be said to be almost a member of the Cabinet and the only non-party member. He is, too, the best informed member and the only one who cannot be forced to keep silent. His status gives him power to press his views upon the minister making a proposal and (what is sometimes even more important) to press them on the Minister who is not making proposals. He can do more, he can press those views on the Prime Minister, the weight of whose authority may in the end produce the Cabinet decision. He can, if he likes to press his point, insist that his views be laid before the Cabinet and considered by them. In other words, he can be as helpful or as obstreperous as he pleases. . . . in the end, of course, he is bound by a Cabinet decision, but he may play a considerable part in the process by which it is reached."<sup>76</sup>

The King's function is advisory only. He can press his opinions as forcefully as he likes. He may resist the advice given to him by his Ministers, but he must not persist and in the last resort give way if Ministers refuse to accept his opinion. He cannot carry his point so far as to threaten the stability of his Government. There are two reasons for it. In the first place, the King cannot act unconstitutionally so long as he acts on the advice of a Minister supported by a majority in the House of Commons. Ministerial responsibility is the safeguard of the Monarchy. The saying that the 'King can do no wrong' precisely illustrates that the Monarch cannot make decisions of a political or controversial character. The price of his popularity and position is his abstention from politics. In the second place, if the King forces his opinion which the Ministers are not willing to accept, the Cabinet must resign. The King's action, then, immediately enters into political controversy. But the real power of the King depends upon "his willingness to keep respectable and to keep off politics." The Throne cannot stand for long amid the gusts of political conflict and the storm of political opinion. "The road of least criticism is the road for the King." Lord Fisher, who was advising George V on the dispute over the Home Rule Bill controversy, most correctly summed up the position of the King. He wrote in a memorandum, "Every constitutional monarch possesses a dual personality. He may hold and express opinions upon the conduct of his ministers and their measures. He may endeavour to influence their actions,

75. Attlee on Monarchy, *Observer*, *op. cit.*

76. Spender, J.A., *Life of Lord Oxford and Asquith*, Vol. II, pp. 29-31.

77. Jennings, I., *Cabinet Government*, pp. 327-28.

He may delay decisions in order to give more time for reflection. He may refuse assent to their advice up to the point where he is obliged to choose between accepting it and losing their services."<sup>78</sup>

**The King as Mediator.** The King very often acts as a mediator and uses his prestige to settle political conflict or "diminish the virulence of opposition." As he wields no political power and makes no political enemies his advice is deemed valuable and is generally accepted. In 1872, Queen Victoria wrote to Lord Russel without Gladstone's knowledge, and urged upon him not to move for papers on the Alabama question so that the Government should not be embarrassed. In 1881, the Queen asked General Ponsonby to see Sir Stafford Northcote and Lord Beaconsfield to secure agreement about the government's proposals to meet Irish obstruction. The Queen's mediation was again very useful in resolving differences between the two Houses of Parliament. In 1913 and 1914 the King made efforts to secure agreement on the Home Rule Bill. The leaders of the parties did not reach agreement, but he did bring them together. There is also some evidence available that in 1916 Lord Stamfordham, as the King's Private Secretary, endeavoured to settle the dispute between Mr. Asquith and Mr. Lloyd George which led to the resignation of Mr. Asquith. George V had much conspicuous part to play in 1921 over the Irish Home Rule tangle. "A King is," as Attlee says, "a kind of referee, although the occasions when he has to blow the whistle are now-a-days very few."<sup>79</sup>

**The King as a Symbol of Unity.** The King of Britain is at once the King of Canada and other Dominions. He is, as Winston Churchill says, "the mysterious link, indeed I may say the magic link, which united our loosely bound but strongly inter-woven Commonwealth of nations, states, and races."<sup>80</sup> In his welcome speech on the visit of George VI to Canada in 1939, Prime Minister Mackenzie King said, "Here you will be in the heart of the family that is your own. We would have your Majesties feel that in coming from the old land to the new, you left one home for another." The constitutional developments of 1911 to 1931, ending with the Statute of Westminster, have given the Dominions complete independence both in matters of legislation and in matters of policy. But the King is still, in the language of the Preamble to the Statute of Westminster, a symbol of the free association of the members of the British Commonwealth of Nations. Subordination to the Government at Westminster, no doubt, is inconsistent with Dominion Status, but common "allegiance to the King" is not. The King, therefore, provides an indispensable symbol of unity of the far-flung Commonwealth countries. It is "the last link of the Empire that is left" as Baldwin reminded Edward VIII. Break this link which is furnished by Royalty and nothing remains in common among the autonomous partners in the Commonwealth. With a view to stabilize the bonds of unity the Statute of Westminster provides that any change made in the order of succession to the throne must have the consent of the members of the Commonwealth. Queen Elizabeth is the Queen of all territories that admit allegiance to her. She is one Queen and not a

78. *Ibid.*, p. 312.

79. Attlee on Monarchy, *op cit.*

80. Broadcast speech on the death of George VI.

score of Queens. "The Queen is a person and not an institution, and so she is one Queen". The essential factor in this scheme of governance was, and still is, the Monarchy.

Then, the Sovereign is the symbol of the free association of the members of the Commonwealth including the Republic of India. The position of the Sovereign as head of the Commonwealth countries was best explained by Prime Minister Jawaharlal Nehru. In a broadcast speech on May 10, 1949 Mr. Nehru said, "it must be remembered that the Commonwealth is not super-state in any sense of the term. We have agreed to consider the King as a symbolic head of the free association. But the King has no function attached to that status in the Commonwealth. So far as the Constitution of India is concerned the King has no place and we shall owe no allegiance to him." This is the correct position, yet the King provides the link which brings about the free association of Sovereign nations which meet and think over problems of common interests and derive means of mutual amity.

**The King as the Chief of the Nation.** "British Kingship," wrote Earl of Balfour, "like most other parts of our Constitution, has a very modern side to it. Our King, in virtue of his descent and of his office, is the living representative of our national history. So far from concealing the popular character of our institutions... he brings it into prominence. He is not the leader of a party nor the representative of a class; he is the chief of the nation... He is everybody's King." He is really everybody's King and that is precisely the feeling of all British people. The accession of the King, his coronation, his jubilee, are the occasions for unparalleled demonstration of popular and patriotic devotion. Enthusiastic and loyal subjects throng the route to watch the path of his progress when the King drives in State to open a new session of Parliament. In fact, every item of royal activity is newsworthy and it is flashed through by every device that modern publicity can utilise. "Some of the tributes," says Laski, "devoted to the person of the Monarch since the war would certainly have been more suited to the description of a demi-god than to the actual occupants of the throne in the last sixty years."<sup>81</sup>

Monarchy, therefore, provides a useful focus for patriotism particularly where it has a long and glorious history. "We can damn the Government," says Jennings, "and cheer the King."<sup>82</sup> A person can be loyal to his King and yet oppose the Government. The Conservatives "served the King" in 1914, although they opposed some aspects of the Liberal Government's policy. The patriotic fervour of the people is more easily stimulated when the "King" declares war and asks for recruits for the "royal forces". The national appeal: "Your King and country need you" is sufficient to remind them that they are one nation. The King is the most concrete symbol of this oneness and unity. According to Lloyd George, "the King in 1917 enormously assisted the laying of industrial unrest by his visits to munition works and other places when suspicion

81. Introduction to Bagehot's *English Constitution*, p. xxv.

82. Laski, H., *Parliamentary Government in England*, op. cit., p. 389.

83. *The English Constitution*, op. cit., p. 111.

of war motives was being aroused."<sup>84</sup> The visits of George VI to various theatres of War and the bombed areas in England imbued the soldiers and the civilian population alike with a new spirit of patriotism. They made a heroic bid to win the war and the loyal subjects of the King ultimately won it. "God save the King" is their National Anthem, and they do and die for the Sovereign who for them personifies the state. Or to put it in the words of Amery, "Human nature not only craves for symbols but prefers them to be personal and human."<sup>85</sup> The Monarch is, thus, a more personalized and attractive symbol of national unity "than a vague concept of the state, the flag, or even a President, and the hereditary system at least solves the problem of succession."<sup>86</sup>

**The King as a Social Figure.** The King is not merely a part of the political machine. He is an important part of the social structure and, as such, wields a great social influence. The Sovereign is the leader of society by general precedence dating from the fourteenth century and sustained until the present day by Royal ordinances, ancient usage, established custom and the public will. The Royal Family sets morality, fashion<sup>87</sup> and aptitude even in art and literature. The Royal patronage is an enormous asset to any cause and ensures for it popular support. Such a national appeal no other person, however, eminent, could give "His presence at ceremonies such as the laying of the foundation stones, the launching of ships, and the opening of new works, enables people of opposing views to associate without suppressing their mutual opposition." Government is a collective concern and it requires the willing co-operation of all sections of people. The presence of the King adds personal touch to the individuals feeling a personal responsibility for the collective action. No government is averse to use the personal popularity and social influence of the Sovereign to strengthen its own popular appeal. The Jubilee and Diamond Jubilee celebrations of 1887 and 1897 "strengthened popular support for the imperialistic ideas of the Conservative Governments then in office." It is certain, too, that the Silver Jubilee of 1935 strengthened the "National Government, whose popular support had until then been rapidly diminishing." Thus, it will be clear that these "dignified", as Bagehot calls, functions of the King are far more important than his Government functions. If democracy means the government by the people as well as for the people, the presence of the King helps to make it so. "When the people cheer the Queen," writes Herbert Morrison, "and sing her praises, they are also cheering our free democracy." The proper part of the Monarch, as Laski rightly emphasised, "has been that of a dignified emollient rather than of an active umpire between conflicting interests."

84. *Cabinet Government*, op. cit., p. 364.

85. Amery, L.S., *Thoughts on the Constitution*, p. 139.

86. Punnet, R.M., *British Government and Politics*, p. 257.

87. Princess Rose, now Queen Elizabeth II, and her sister Princess Margaret, began going out for their evening walks, in the Spring of 1939, without hats, and this set a fashion for children in London causing a considerable diminished sale in children hats. A deputation of children-hat dealers waited upon the Queen and explained to Her Majesty how hard they had been hit. The Queen asked her daughters to use hats for their evening walks and it set a fashion for children to follow.

88. Morrison Herbert, *Government and Parliament*, op. cit., p. 92.



**The King and Parliamentary Government.** The Cabinet system of government has nowhere proved a workable plan without the presence of some titular Head of the State, whether he be a King, as in Britain or a President, as in France. But from the political point of view a person who is free of party ties and stands above party considerations is the most desirable adjunct of the Parliamentary system of government. An elected Head of the State is a promoted politician and howsoever sincerely he may endeavour to forget his past party associations, he cannot do it. Even if he can, others cannot. But the Sovereign, unlike an elected President, has no party associations or partisan leanings. His august position, as the occupant of the Throne, puts him in an altogether different atmosphere. He is everybody's King and he does not form party loyalties. "As a result, not only is he in a position to act more impartially, but also, what is of more importance, he is believed by others to be impartial." If Parliamentary government in Britain is to be retained in the classic form in which it has been developed, then, the best representation of such a "dignified and detached" figure is the King. "Thus far, beyond doubt, the system of limited Monarchy has been an unquestionable success in Great Britain. It has, so far, trodden its way with remarkable skill amid the changing habits of the time. Its success, no doubt, has been the outcome of the fact that it has exchanged power for influence; the blame for errors in policy has been laid at the door of ministers who have paid the penalty by loss of office."<sup>89</sup> Monarchy, as such, has been no bar to the progressive democratization of the Government otherwise it would have been thrown overboard long ere this. "The security and popularity of the British Monarchy today," writes Herbert Morrison, "are largely the result of the fact that it does not govern and that government is the task of ministers responsible to a House of Commons elected by the people. The Monarchy as it exists now facilitates the processes of parliamentary democracy and functions as an upholder of freedom and representative government."<sup>90</sup>

**Conclusion.** The popularity of the British King and the role which he plays in the British politics is now an undisputed fact. In Britain, there had been moves to end or mend the House of Lords; even to reform the House of Commons and the Cabinet. But Monarchy has withstood the test of time. People realise and appreciate its "unifying, dignifying, and stabilising influence." If it were to be abolished, the substitute would be either like the type of French Presidency or the American Presidency. The former is not a good substitute, because the President of France neither rules nor reigns; and if he rules it is the negation of Parliamentary government. The limited period of office of a President has disadvantages as compared with the continuing reign of a hereditary monarch. The type of American Presidency would entail revolutionary changes in the existing political set-up of the country. An Englishman will never agree to it. The institution of Monarchy is something with which all Britons have grown up; it is a part of their heritage and their culture. They have shaped it so that it does not interfere with their social and political development and they see no reason to substitute some other institution for this venerable institution. Lowell has aptly said, "If the King is no longer

89. Laski, H., *Parliamentary Government in England*, op. cit., p. 295.

90. Morrison, Herbert, *Government and Parliament*, op. cit., p. 92.

the motive power of the state, it is the spar on which the sail is bent, and as such it is not only a useful but an essential part of the vessel." So despite its anachronism in a democracy, the Kingship is impregnably entrenched in the British Constitutional system, and, as Ogg says, the country will, and should, continue, as now, a "crowned republic". The only opposition is that of the Communists, just a handful of them with no influence with the people and with no representation in Parliament, except one solitary peer, Lord Milford, who succeeded to the title on the death of his father, but he, too, has not so far been able to take his seat in the Lords."

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91. The new Peer needs two sponsors to be seated in the Lords

## CHAPTER IV

# PRIVY COUNCIL, MINISTRY AND CABINET

The powers of the Crown are exercised through different agencies. Some are exercised by Ministers acting singly in the Departments over which they preside, some are performed by the Privy Council and its various Committees, some by the Cabinet and some are carried with the help of the permanent Civil Servants. Let us see what these institutions precisely are and how do they actually function.

### THE PRIVY COUNCIL

**Origin and development.** From early times there had been a Council, a group of men attendant on the King, fulfilling certain duties, and acting as the King's advisers. The Privy Council is an official name given in law to the body of persons who are the advisers of the Sovereign. In its origin, the Privy Council is the descendant of the King's Council, the **Curia Regis**, which dates from Norman days, and has had, under various names, a continuous history. An attempt was made under the Lancastrian Kings to make it directly subordinate to Parliament, but it could not succeed. In the sixteenth century the King's Privy Council became the powerful instrument of Tudor despotism. In the next century its powers were considerably eclipsed by an inner circle of the King's advisers which eventually came to be known as the Cabinet.

As the Privy Council had become an unwieldy body for purposes of effective consultations, the later Stuart Kings started the practice of consulting with a few members of the Council who met the King in his closet or "Cabinet". It became a regular practice and by 1679, the old Privy Council may be said to have been virtually abolished except for formal business and as a Court of Law. This change can be observed from the farewell speech of Charles II, in the same year, to his Privy Councillors. The King said, "His Majesty thanks you for all the good advice which you have given him which might have been more frequent if the great numbers of the Council had not made it unfit for the secrecy and dispatch of business. This forced him to use a smaller number of you in a foreign Committee, and sometimes the advice of some few among them upon such occasions for many years past."

**Its present composition and functions.** The Privy Council was, therefore, the chief source of Executive power in the State. As the system of Cabinet Government developed, the Privy Council became less prominent. Many of its powers were transferred to the Cabinet as an inner Committee of the Privy Council, and much of its work was handed over to newly created government departments. The present-day Privy Council is the body on whose advice and through which the Sovereign exercises his or her

statutory and executive powers. It also has its own statutory, vested independently of the power of the King in Council.

The Privy Council includes all Cabinet ministers, past and present, the Prince of Wales and the Royal Dukes, the Archbishops and the Bishop of London, and a large number of other people of distinction in the field of politics and of the science of law who are elevated as Privy Counsellors. A list of the names of the Privy Counsellors, and since the re-edition of 1897, Dominion Premiers are regularly offered its membership. The Speaker of the House of Commons, too, is normally offered Privy Councillorship. The title of "Right Honourable" is borne by all members of the Privy Council. There are usually 300 Privy Counsellors and the membership of the Privy Council is retained for life.

The Privy Council is convened by the Clerk of the Privy Council and is presided over by the Sovereign or, when the Sovereign is abroad or ill, by Counsellors of State. Three Privy Counsellors form a quorum, but, as a rule, not fewer than four are summoned to attend. Rarely is any one invited to attend a Council meeting who is not a Cabinet member. The whole Privy Council is called together only on the death of the Sovereign or when the Sovereign announces his or her intention to marry.

The Privy Council is responsible for the submission for the Sovereign's approval of the Orders in Council, of which there are two kinds. First, are those made by virtue of the Royal prerogative and have no formal relation to Parliament. The use of this type of Orders in Council are conventionally limited mainly to legislation for Colonies, which do not have representative assemblies. The others are those which are authorised by Act of Parliament and are a form of delegated legislation. Members of the Privy Council attending meetings at which Orders in Council are made do not thereby become personally responsible for the policy upon which the orders are based, this rests with the Ministers in whose departments the draft orders were framed, whether they are present at the meeting or not. Certain Orders in Council must be published in the "London Gazette", which is an official periodical published by the authority of the Government. The Privy Council also advises the Crown on the issue of Royal Proclamations, some of the most important of which relate to the prerogative acts (such as summoning or dissolving Parliament) of the same validity as Acts of Parliament.

The Privy Council serves, as in ancient times, as a panel for the composition of the Committees. The meetings of the Committees differ from those of the Privy Council itself in that the Sovereign cannot constitutionally be present. These Committees have only advisory functions. The Committee relating to Jersey and Guernsey is of long historical lineage. Similarly, there are Committees for the Universities of Oxford and Cambridge and the Scottish Universities. Early in the reign of Queen Victoria it was found convenient to entrust the Privy Council, acting through a Committee, various functions, which later on were handed over

1. Once appointed to the Privy Council, a person ordinarily retains his membership for life.

2. General Hertzog and Mr. De Valera, however, refused Privy Councillorship.



to departments. The Council of the Court of Chivalry, which is composed considerably more than half of lay members, is a Privy Council which meets in place of the Council of the Court of Chivalry. The Judicial Committee of the Privy Council is set out in the Privy Council Order of the Council of the Lord President of the Council.

The most noteworthy of such committees is the Judicial Committee of Privy Council which in 1833 took over the functions of the Council from Lord Chancellors, ex-Lord Chancellors, and Lords of Appeal in Ordinary, although other members of the Privy Council who have held high judicial office formerly, Chief Justices and certain Chief Justices from other Commonwealth countries who have been sworn members of the Privy Council, may also be asked to sit when business of the Judicial Committee is heavy. The Judicial Committee does not deliver judgment. It advises the Sovereign who acts on its report and approves a Order in Council to give effect thereto.

The Judicial Committee of the Privy Council is the final court of appeal from the courts of the United Kingdom, dependencies and certain member States of the Commonwealth. It receives appeals by petition in respect of such appeals from the principal of the High Court of Law which recognises the right of appeal of the King's subjects to appeal for redress to the Sovereign in Council if they believe that the Courts of Law have failed to do them justice. The Judicial Committee is also the final court of appeal from the ecclesiastical courts of England, from the Channel Islands and the Isle of Man, and from Prize Courts in the United Kingdom and dependencies. It acts appeals by petition of the judicial, dental and certain kindred professions against decisions of their respective disciplinary bodies.

Lord Samuel describes the Judicial Committee of the Privy Council as "one of the most august tribunal in the world". Members of the Judicial Committee hold or have held certain high judicial offices in the United Kingdom or the Commonwealth and are Privy Counsellors. Appeals are admitted only by leave given by the court overseas according to local law or, failing that, by the Judicial Committee itself.

## THE MINISTRY

**The Ministry and the Cabinet.** The term Ministry is used in two senses. Sometimes it is used to mean Cabinet as if the two terms are synonymous. Sometimes it is used to mean both the Cabinet and other Ministers who are not members of the Cabinet. The second meaning is preferable. When a new Prime Minister is appointed, he has to fill hundred or so posts, major and minor, which together make up the Ministry. For example, the Cabinet formed by Winston Churchill in 1951, contained sixteen members. In addition to these Ministers in the Cabinet, there were twenty-two Ministers who were not in the Cabinet. Then, there were over fifty junior Ministers and this total of about ninety con-

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3. Prize courts deal with matters concerning property captured in time of war which, by the grace of the Crown, falls to the forces which assist in the capture.

stituted Churchill's Ministry. The Labour Government formed by Harold Wilson in October 1964 contained a total of 101 Ministers and Parliamentary Secretaries. The Cabinet contained 23 members like its Conservative predecessor Government under Sir Alec Douglas-Home. The Ministry is, thus, a convenient concept that embraces all categories of Ministers collectively with varying shades and degrees, who go to make up the political side of the Executive. That is Her Majesty's Government.

The Ministers vary in nomenclature and in importance. About twenty or more of the most important out of the Ministry are the members of the Cabinet.<sup>4</sup> They meet collectively, decide upon policy, and in general "head up" the government. It does not, however, mean that every Cabinet Minister must necessarily preside over an administrative department. There are a few sinecure offices which involve no substantial departmental duties. Men of great political importance whose capacity for departmental work has been lessened by the passage of time, or those who have no taste for administration, but whose counsel is always of immense value,<sup>5</sup> are assigned offices with a few or no duties attached. For example, the duties of the Lord Privy Seal were abolished in 1884, and yet he is always a member of the Cabinet. The Lord President of the Council, too, has only nominal duties. Sometimes these offices are usefully occupied by Ministers who are entrusted with major responsibilities of a general rather than of a departmental kind. This was true of Lord President from 1940-43, and Mr. Herbert Morrison who became Lord President in the Labour Government of 1945. In Macmillan's Government (1961) the Lord President of the Council was entrusted with the general duty of promoting scientific and technological development as Minister of Science. The Lord Privy Seal handled foreign office business in the House of Commons. The Earl of Home (now Sir Douglas-Home), the Foreign Secretary, was in the Lords.

Another expedient is the appointment of Ministers without Portfolio. From 1915 to 1921 ten cases occurred of Ministers in the Cabinet without Portfolio.<sup>6</sup> But this system ended in 1921 after a scathing criticism in the House of Commons. It was revived in Baldwin's Ministry of 1935 when Lord Eustace Percy and Anthony Eden received Ministries.<sup>7</sup> Arthur Greenwood held the office of Minister without Portfolio during his membership of the War Cabinet and also for a short while in 1947. W.F. Deedes was appointed Minister without Portfolio by Harold

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4. Anthony Eden, who succeeded Churchill after the latter retired from active politics, had eighteen Cabinet Ministers. Harold Macmillan continued with more or less the same number. Harold Wilson's Cabinet formed in 1964 had twenty-three members, though Wilson advocated 15 to 20 members, to make an ideal Cabinet. BBC Publications, *Whitehall and Beyond*, p. 26. In 1967 Wilson's Cabinet had 20 members.

5. John Bright proved a poor administrator at the Board of Trade in 1869, but was later valuable as Chancellor of the Duchy.

6. Keith, A.B., *The British Cabinet System*, p. 45.

7. Lord Eustace Percy found his position anomalous and resigned office, later leaving parliamentary life. Mr. Eden was given the duty of dealing with League of Nations' affairs, but on Sir Samuel Hoare's retirement in 1935, he was appointed in his place.

Macmillan in a major reconstruction of Cabinet in July 1962 and in October 1963, Home appointed two Ministers without Portfolio. But it is not usual for such a Minister to be created.

In the second place, there are certain Ministers who are designated as of "Cabinet rank." Attlee's Labour Government, formed in January 1949, had fifteen such Ministers. The Ministers of the "Cabinet rank" are the heads of the administrative departments, and although they are formally of Cabinet status and are paid the same salary as Cabinet Ministers, but they are not members of the Cabinet itself. They attend the Cabinet meetings only when specifically invited by the Prime Minister to deal with matters concerning their departments. This division of Ministers was observed by Churchill in 1951 and he had eighteen Ministers under this category. The Ministers of "Cabinet rank" vary in numbers from government to government; it is a matter for the Prime Minister's discretion.

Then, come the "Ministers of State", who are Deputy Ministers in Government departments where the work is particularly heavy and complex, or when it involves frequent travelling overseas. The Minister of State may, if circumstances demand, hold independent charge of a department, though there is no precedent so far. Compared with ten Ministers of State in Home's Government there are now sixteen in Harold Wilson's Government. The Ministers of State usually have a status intermediate between that of a full Minister and of a Parliamentary Secretary. The first Minister of State ever created was Lord Beaverbrook in May 1941, and since then the practice has come to stay. "In practice the general idea of the Minister of State," says Herbert Morrison, "is to create minister of higher status than that of a Parliamentary Secretary who could relieve heavily burdened departmental ministers of material parts of their work to an extent which might not be considered appropriate in the case of Parliamentary Secretaries." It would appear that any action taken by a Minister of State, who is subordinate to the Minister in charge of a department, would be on behalf of the Minister under delegated powers. The Minister-in-charge of the department is answerable to Parliament for all intents and purposes.

Finally, there are the Parliamentary Secretaries, or Junior Ministers. Each departmental Minister has usually a Parliamentary Secretary, but in some of the larger departments there may be two. A Parliamentary Secretary may not be confused with the Permanent Secretary who is a senior member of the Civil Service in the department. Parliamentary Secretaries are mostly the members of the House of Commons, or if not, then, of the House of Lords. They belong to the majority party and are selected by the Prime Minister in consultation with the Minister concerned. They remain in office so long as the Ministry is there or the Prime Minister wishes them to be there. But they are not **Ministers of the Crown** and constitutionally have no 'powers'. The primary function of the Parliamentary Secretaries is to relieve their senior Ministers of some of their burden by taking part in parliamentary debates, and answering

parliamentary questions, and by assisting in departmental duties. There are also five "political" officials of the Royal Household, including the Treasurer, the Comptroller, and the Vice-Chamberlain. These offices carry a political complexion and their incumbents are ranked as Ministers.

All these categories of Ministers, who make the Ministry, are members of Parliament and belong to the majority party in the House of Commons. They are individually and collectively responsible to the House of Commons and continue to remain in office so long as they can retain its confidence. The Ministry may, thus consist of "the whole number of Crown officials having seats in Parliament, sustaining direct responsibility to the House of Commons, and holding office subject to a continued support of a working majority in the latter body." But the Ministry has no collective functions. It is the function of the Cabinet. The Cabinet is a committee of the Government or Ministry, chosen by the Prime Minister, who meet together for four or five hours each week to deliberate, formulate policy, supervise and co-ordinate the work of the whole Government machine. The Ministry as a whole never meets and it never deliberates on matters of policy. The duties of a Minister, unless he is a Cabinet Minister, are individual duties relating to the administrative department or departments to which he is attached. "In sum, the Cabinet officer deliberates and advises; the Privy Councillor decrees; and the Minister executes. The three activities are easily capable of being distinguished, even though it frequently happens that Cabinet officer, Privy Councillor, and Minister are one and the same person."

**Size of the Government.** The overall size of the government (excluding Parliamentary Private Secretaries) has more than doubled this century, rising from about forty-five in the Governments of Balfour, Campbell-Bannerman, and Asquith before 1914, to more than one hundred in the Wilson Government formed in 1964. This increase has created the danger of excessive Executive domination of the Legislature. Although members of the House of Commons appointed to Ministerial office no longer have to secure re-election to the Commons, there do exist statutory limits on the number of Ministers allowed to serve in the Commons at any one time.

The Ministers of the Crown Act, 1937 provided that only eighteen out of twenty one senior Ministers could serve in the House of Commons at any one time. This meant that if all the twenty-one posts were filled, at least three had to be held by members of the Lords. In addition, the Act of 1937 provided that not more than twenty Junior Ministers could

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9. It is a well settled convention that Ministers should be either Peers or members of the House of Commons. There have been, however, occasional and temporary exceptions. Gladstone held the office of Colonial Secretary in 1845 for nine months without a seat in Parliament. Sir A. G. Boscawen, Minister of Agriculture, was a similar case in 1922-23. General Smuts was a Minister without Portfolio and a member of the War Cabinet from 1916 until the end of War without a seat in Parliament. Mr. Ramsay MacDonald and his son Malcolm MacDonald were members of the Cabinet though not in Parliament from November 1935 until early in 1936. MacDonalds were defeated at the General Elections held in November 1935. Patrick Gordon-Walker was appointed Foreign Secretary by Harold Wilson despite his failure to get elected in October, 1964. Gordon-Walker had to quit on his defeat in the by-election too.



sit in the Commons at any one time. During World War II under the provisions of the emergency legislation, these figures were exceeded, while many of the Ministerial posts created after the War were specifically excluded from the limitations imposed by the Act of 1937. In 1941, the Select Committee on Offices and Places of Profit under the Crown recommended that only sixty Ministers in all should serve in the House of Commons. In pursuance of this recommendation, the House of Commons Disqualification Act, 1957 specified that not more than seventy Ministers of all categories, could serve in the House of Commons at one time. This limit was not exceeded by Macmillan or Home. When the Labour Government came in power in 1964, it created the new Ministerial posts which correspondingly increased the size of the Ministry and accordingly, the necessity of new legislation arose. The Ministers of the Crown Act, 1964 increased from seventy to ninety-one the total number of Ministers who could serve in the Commons at any one time, and abolished the limit on the number of senior Ministers that could be drawn from the Commons. Since the figure of ninety-one fixed by the 1964 Act is the maximum number of Ministers that could be drawn from the House of Commons, was below the total number of Ministerial posts in the Wilson Government, the Act, therefore, recognised the principle that some posts should be filled by the Lords. It means that Ministers over and above the number of ninety-one would come from the Lords thereby increasing the strength of the Peers in the Ministry.

### THE CABINET

**Not known in Law.** The Cabinet is, thus, the core of the British Constitutional system. It is the supreme directing authority, "the magnet of policy," as Barker calls it, which co-ordinates and controls the whole of the executive government, and integrates and guides the work of the legislature. According to Bagehot, the Cabinet is a "hyphen that joins, the buckle that binds the executive and legislative departments together." Lowell calls it "the keystone of the political arch." Sir John Marriot describes it as "the pivot round which the whole political machinery revolves." Ramsay Muir speaks of it as "the steering-wheel of the ship of State." Sir Ivor Jennings succinctly says that the Cabinet "provides unity to the British system of government." With whatever colourful phrase it may be described and from whatever angle it is approached, the Cabinet is the motive power of all political action in Britain. And yet it is not known to law.

Like various other political institutions of the country, the Cabinet, too, is the child of chance. Until 1937, it was not even mentioned in any Act of Parliament, and in the Ministers of the Crown Act there is just an occasional reference to it.<sup>10</sup> As the Cabinet has no legal existence, its actions, as such, have not the force of law. The judicial acts of the Cabinet are formally made the actions of the Privy Council which body

10. The Herbert Committee Report, H.C. 120 of 1941.

11. *Britain and the British People* (1943), p. 54.

12. The Ministers of the Crown Act, 1937, referred to it while providing higher salaries for those ministers who were members of the Cabinet.

has existence in law. The machinery of the Cabinet system is, thus, based upon conventions, unwritten but always recognised and stated with almost as much precision as the rules of law. This, indeed, is the most remarkable outcome of the British Constitution.

**Development of the office of Prime Minister and Cabinet.** The name Cabinet, as said before, referred originally to a small body of ministers whom the later Stuart Kings commenced consulting in preference to the Privy Council of their predecessors. Then, came the Revolution of 1688, and the consequent increase in the powers of Parliament. William III on ascending the throne formed a Ministry drawn both from the Whigs and the Tories. But he soon realized that the Tories were very critical of his policy and their opposing views made it impossible for him to carry out smooth administration. He, therefore, gradually dismissed all the Tories from his Ministry and got, for the first time, a body of Ministers chosen from one political party. The Whig Junto of 1696 is regarded as the real beginning of the Cabinet system. Queen Anne carried the development a stage further by letting the inner circle **decide policy** while her predecessors **tolerated only advice**. But she still continued to dismiss her Ministers when they forfeited her favour. At the same time, both William and Anne presided in person at the meetings of the Cabinet.

The system of Cabinet Government can be said to have really emerged when the King was excluded from the meetings of the Cabinet. This happened, by chance, in 1714, when George I ceased to attend the meetings of the Council because he did not understand English. The King designated Sir Robert Walpole to preside in his place. The Cabinet thereupon ceased to meet at the Palace with the Sovereign presiding, and met instead at the House of the First Lord of the Treasury. The first Lord thus became a kind of Chairman to the Cabinet and Walpole furnished the required leadership in the absence of the King and his colleagues looked to him for direction. As Chairman of the Cabinet, he presided at its meetings, guided and directed its deliberations, reported the decisions arrived at the Cabinet meetings to the King, and reported to the Cabinet the opinion of the King. Moreover, as a member of Parliament he served as a link between the Cabinet and Parliament. This new position and duties of Walpole in effect involved the origin of the office of the Prime Minister, although he resented and repudiated the suggestion that his position was of that kind. Necessity, thus, grafted the Premiership as well as the Cabinet on the Constitution.

Another consequence of the absence of the King from meetings of the Cabinet was that Ministers, instead of tendering individual advice, began seeking for unanimity. Walpole could hardly go to the King with a dozen or fifteen different opinions. Differences amongst themselves the Ministers began to resolve inside the Cabinet, and, thus, agreed advice was conveyed to the King. Out of this emerged another development. The

13. The smaller inner group of persons to whom the King came to give his special confidence was variously known as the 'Junto' (a term first used during the reign of Charles I), the 'Cabal' (after the initial letters of the inner group of 1671—Clifford, Arlington, Buckingham, Ashley and Lauderdale), the 'Cabinet Council' or the 'Cabinet' (the cabinet being the private room or closet of the King's palace in which the group met).

Cabinet: if it were to tender opinions, it would be a non-effective body. When distinct political parties began to form, it became convenient to draw all Cabinet Ministers from a single political party to be sure of parliamentary approval.

For twenty years Walpole headed the Government, and during that period a system that was in its infancy gradually took the measure of stability. In fact, in Walpole's administration are found the essential characteristics of the present-day Cabinet government. It was Walpole who first administered the Government in accordance with his own views of our political requirements. It was Walpole who first conducted the business of the country in the House of Commons. It was Walpole who in the conduct of that business first insisted upon the support for his measures of all servants of the Crown who held seats in Parliament. It was under Walpole that the House of Commons became the dominant power in the State and rose in ability and influence as such as in actual power above the House of Lords. And it was Walpole who set the example of quitting his office while he still retained the affection of his King for the avowed reason that he had ceased to possess the confidence of the House of Commons.<sup>14</sup> It was Walpole who used No. 10, Downing Street while he was in office which subsequently became the official residence of the Prime Minister.

At the same time, there had developed the principle of Ministerial Responsibility, that is, the principle that a Minister was responsible to Parliament for all his public acts, and that he could be brought to book by Parliament if ever it considered his acts prejudicial to the interests of the country. The principle of Ministerial Responsibility evolved slowly. For the first time Stafford in the reign of Charles I was made to answer to Parliament for what was considered the bad advice he had given to the King. The King did his best to shield him but, and in spite of the best efforts of Charles himself, Stafford was made to pay the penalty imposed by Parliament.<sup>15</sup> Exactly the same happened in Durbeyck's case during the reign of Charles II.<sup>16</sup> Since then the principle of Ministerial Responsibility has been recognised as the *sine qua non* of the Parliamentary system of government.

It does not, however, mean that the Cabinet system of government had become an accomplished fact in the eighteenth century, and the King was a mere cipher in his relations to the Cabinet. Even Sir Robert Walpole felt himself very much the King's servant and dismissible by him. George III demanded the inclusion of some members in the Cabinet though they belonged to the opposing party. George IV made efforts to create among the Ministers division by getting their individual opinions on Canning's foreign policy. William IV once, or perhaps twice, contemplated the dismissal of a Cabinet which enjoyed the confidence of the House of Commons and the electorate.

14. Stafford was impeached of high treason by the House of Commons "for endeavouring to subvert the ancient and fundamental laws and government of His Majesty's realms of England and Ireland and to introduce an arbitrary and tyrannical government against law in the said kingdom." *Select Documents of English Constitutional History*, op. cit., p. 361.

15. See *ante*, Chap. III.

Thus, the complete theory and practice of the Cabinet system, as it emerged out of the eighteenth century did not take its present form before the reign of Queen Victoria. "Under Peel, Disraeli, and Gladstone the system reached a kind of climax, indeed the classic exposition of its working is still a chapter in the *Life of Walpole*, written by one of Gladstone's colleagues (Morley) with his master's assistance."

It is early to analyse the development of the Cabinet during the twentieth century. But two significant observations may be made here. The first is, that the membership of the Cabinet has increased from twelve or less to eighteen or more. Sir Robert Peel was content with thirteen members; Disraeli in 1874 tried as few as twelve. Since then the Cabinet has tended to grow steadily until recent times. With the expansion of the functions of government, it became a practice to include in the Cabinet the heads of all important departments as well as a number of Ministers without departmental duties, like the Lord President of the Council and the Lord Privy Seal, and sometimes even the Chancellor of the Duchy of Lancaster. Between the two World Wars the number was seldom less than twenty. In 1935, it was twenty-two. But there were constant complaints against the swelling size of the Cabinet. It was contended that a Cabinet of twenty one or twenty-two members was too large for an effective deliberative body. A Cabinet say of twelve persons, like Disraeli's in 1874, can amicably and conveniently settle questions by intimate discussion around a table. A Cabinet of about two scores, on the other hand, verges upon "a public meeting, it must have a formal procedure, a considerable committee organization, a substantial secretariat, and so on. A small Cabinet can usually take decisions by a consensus of opinion, a large Cabinet may find it easier to take a vote."<sup>17</sup>

Experienced politicians prefer a small cabinet. Attlee reduced the number of his Cabinet Ministers to seventeen in 1949, Winston Churchill still further reduced it to sixteen in 1951, with a separate provision of 'ministers not in the Cabinet.' In 1962, there were twenty Cabinet Ministers and the number increased to twenty-three in 1964. In January 1967, it stood at twenty. The nomenclature of the Ministers was, adhered to in the succeeding Cabinets, except that holders of the most of the newly created posts by Wilson Government have the formal title of Ministers whereas those who hold older-posts have special titles, for instance the Chancellor of the Exchequer and the President of the Board of Trade. The holders of nine offices (some ancient and others of recent creation) are known as 'Secretaries of State'. The 'Ministers not in the Cabinet' carry the same status as the Cabinet Ministers, receive all the Cabinet conclusions, except those of the utmost secrecy, and take their full share in the Cabinet Committees. But they participate in the deliberations of the Cabinet only when summoned, and matters concerning their departments are under discussion.

Closely connected with it are two other phases. First, to cope with the increased work of the Cabinet, the system of standing Cabinet Committees, which discuss and settle all contentious matters, has been intro-

16. Derry, K., *British Institutions of Today* (1948), p. 41.

17. Jennings, I., *The Queen's Government*, p. 116.



duced on the extended scale. Secondly, the Labour Government began to meet twice a week whereas before the War one meeting a week was generally sufficient. The War Cabinet of 1940-45 also met twice a week in the ordinary way, but naturally there were many more special meetings than in peace time, some of them late at night. Now it meets for a few hours once or twice a week during Parliamentary sittings and rather less frequently when Parliament is not sitting. Additional meetings may be called by the Prime Minister at any time.

The second significant development of the twentieth century is that the Cabinet has sacrificed much of its party character at periods of national emergencies in the efforts to achieve national solidarity. Britain, it had always been argued and the same conviction holds good even now, hates a coalition, because it is deemed distortion of the Parliamentary system of government. And yet in the inter-War period of about twenty one years, four years were occupied by Lloyd George's Coalition Ministry surviving from the previous War, and eight years by the National Government headed by MacDonald, Baldwin and Chamberlain which carried on into succeeding War of 1939. There were also two periods of minority government—again a distortion of the Parliamentary system—the Labour Governments of 1924 and 1929-31. Taking, thus, the whole period between 1918 and 1945, less than six years were occupied by governments of the normal type when there was one single-party government with a working majority.<sup>18</sup>

Whatever be the demerits of coalition government, this twentieth century development is characteristic of the adaptability of the British people. Jennings, while referring to the War coalition, points out that "the coalition which saved civilization between 1940 and 1945 seems to have been at least as united as the ordinary party government." The National Government in 1932 maintained its unity by the strange device of an "agreement to differ," an exception to collective responsibility.

### FEATURE OF THE CABINET GOVERNMENT

The Cabinet is, thus, a wheel within a wheel. Its outside ring consists of a party that has a majority in the House of Commons; the next ring being the Ministry, which contains the men who are most active within that party; and the smallest of all being the Cabinet, containing the real leaders or chiefs. By this means is secured that "unity of party action which depends upon placing the directing power in the hands of

18. These were Bonar Law and Baldwin Governments from October 1922 to January 1924 and the second Baldwin Government from November 1924 to June 1929. Normal single party Government was again restored in 1945 and it continues. The October 1959 elections with a very comfortable majority for the Conservatives ensured its continuance. But the Labour Party in the elections of October 1964 could secure a precarious majority of five only. Now the Labour Party again commands a comfortable majority.

19. *Cabinet Government*, p. 247.

20. Refer to Leeki's admirable thesis, *Crisis and the Constitution* (1932).

21. The "Samuel Liberals" disagreed with the tariff policy of their colleagues. For a time an "agreement to differ" was observed. Before long, however, they withdrew from the Government.

a body small enough to agree and influential enough to control." The Cabinet is, in brief, the driving and the steering force. But despite its importance, it has no legal status as an organ of Government. Its existence and working hinges upon some well established customs, traditions and precedents. There is, however, one supreme virtue in it. The conventional character of the Cabinet makes it a highly flexible institution easily adjustable to meet emergencies or any other special circumstances. In fact, the stupendous success of the Cabinet system of government in Britain, for the past two and a half centuries, may be properly attributed to the Cabinet's high degree of adaptability. The whole system of Cabinet government is based upon the fact that the government is carried on in the name of the King, by Ministers who are members of the majority party in Parliament, and are responsible to Parliament for all their public acts both individually and collectively. These important features of the Cabinet system of government, which have now become classical, need analysis.

**A Constitutional Executive head.** In the first place, Cabinet government means that the King is no longer the directing and deciding factor responsible before the nation for the measures taken. The whole of the political and executive power of the Crown is exercised in the King's name by political men who belong normally to the majority party in Parliament. These political men can be criticised, attacked and compelled to answer questions, and they are liable to be turned out of office, if their policy is not approved by Parliament. As the King takes no part in politics, he does not, accordingly, participate in the confidential discussions in which his ministers decide the advice they will give him. In other words, the King does not preside over Cabinet meetings. The abstention of the King from Cabinet meetings was originally a matter of sheer accident, but it was a step of great constitutional importance in the development of the responsible Ministry. It does not, however, mean that the King has nothing to do with the Cabinet and what it does. As Jennings has said, the Monarch "may be said to be almost a member of the Cabinet, and the only non-party member."<sup>2</sup> Though, he keeps off the politics, yet he commands a position to influence the decisions of the political leaders constituting the government of the day. But it must be repeated that influence is not power and in the end the Monarch is bound by the Cabinet decision.

**Ministers chosen from parliamentary majority.** Secondly, Ministers are members of Parliament and generally, in modern times, of the House of Commons, and they are chosen from that party which has a majority in that House. These two facts, taken together, are of fundamental importance. The membership of Parliament gives to Ministers a representative and responsible character. It also binds together the Executive and Legislative authorities and there can be, as such, no working at cross purposes between these two organs of Government. The harmonious collaboration thus brought about ensures a stable and efficient government. Such a government is always responsive to the needs of the people. Moreover, Cabinet Ministers are leaders of the majority in the House of Commons

and as leaders they must assume direction of principal activities of Parliament. This offers an effective opportunity to the Executive to present, to advocate, and to defend its views and proposals.

It is now a well-settled convention that Ministers should be either peers or members of the House of Commons, though there had been exceptional occasions when ministers held office out of Parliament. General Smuts was a Minister without Portfolio and a member of War Cabinet from 1916 until the end of the War without his being a member of Parliament. Sir A.G. Boscawen, as Minister of Agriculture, is another identical case in 1922-23. Ramsay MacDonald and Malcolm MacDonald were both members of the Cabinet though not in Parliament from November 1935 until early in 1936. Patrick Gordon-Walker was the Foreign Secretary in Wilson's Government till he was defeated in the by-election. "The House of Commons is, however, extremely critical of such exceptions.... In truth, the conduct of government business in the House of Commons is such an onerous task that the absence of an important minister places a considerable burden on the rest."<sup>23</sup> Even in the House of Lords the representation of the many departments, the piloting of their legislation, and the explanation of their policy demand the presence of a good number of Ministers and the Ministers of the Crown Act, 1964 recognises the principle that some Ministerial posts must be filled by members of the Lords. "Practical convenience as well as constitutional convention, therefore, compels the Prime Minister to confer office only upon members of Parliament or peers."<sup>24</sup> Ministers remain out of Parliament only while they are trying to find seats. If they cannot get in, and are unwilling to be created Peers, they resign from their offices.

Cabinet government means party government. This was explained by Professor Trevelyan in his Romanes Lecture. He said, "The secret of British Constitution as it was developed in the course of the eighteenth century was the steady confidence reposed by the parliamentary majority in the Cabinet of the day. If that confidence is withdrawn every few months government becomes unstable, and men cry out for a despotism, old or new. In eighteenth-century England the requisite confidence of Parliament in the Cabinet could have been obtained in no other manner than through the bond of a party loyalty held in common by the Cabinet and by the majority of the House of Commons."<sup>25</sup> Party, therefore, provides the machinery which secures a stable government under a unified command of the politically homogeneous and disciplined leaders.

It was an easy task to form a Ministry from one single political party, which commanded the majority in Parliament, so long as there were only two political parties. With the emergence of the Labour Party in the beginning of the twentieth century, the position became a little uncertain because sometimes it might happen, as it did in 1924 and 1929, that no single party could command a majority with it in the House of Commons. Ramsay MacDonald on both these times formed Government on the distinct support of the Liberal Party. In times of national emergencies and

23. *Ibid.*, p. 53.

24. *Ibid.*

25. As quoted in *The English Constitution* by Sir Maurice Amos, p. 70.

grave crises, like the Economic Depression of 1931, there are Coalition Ministries. But it is a rare feature as a Coalition Government is essentially anomalous in Britain, "because it contradicts the fundamental principle that a Cabinet represents a party united in principle"<sup>26</sup> Coalition Government is a combination of strange bed-fellows who pursue rival policies and rival ambitions. The truth of the matter is that "coalitions do not love each other" and except in times of unusually abnormal political circumstances, the Government in Britain has always been a unified whole representing one single political party. The Coalition formed in May, 1940, was a true National Government as it represented all parties. "But its sole aim was the successful prosecution of the War and it failed to survive the defeat of Germany by more than a few weeks. At that point, disagreements about post-War reconstruction proved more fundamental than the common wish to go on to defeat Japan."<sup>27</sup>

**Leadership of the Prime Minister.** The Cabinet is a team which plays the game of politics under the captaincy of the Prime Minister. "The Prime Minister", according to Morley, "is the key-stone of the arch." Although in the Cabinet all its members stand on an equal footing, speak with equal voice and act in unison, yet the Chairman of the Cabinet is the first among equals and occupies a position of exceptional and peculiar authority. He is the leader of the Parliamentary majority and all Ministers work under his accepted leadership. It is true that the Prime Minister is technically appointed by the King, but in practice the choice of the King is "pretty strictly" confined to a man who is designated as a leader of the party.

It is from the time of Walpole we have the convention that the Prime Minister selects his own Ministers. The Ministers, no doubt, are appointed by the King, but in actual practice they are the nominees of the Prime Minister. The King simply receives and endorses the list prepared and presented to him by the Premier. If the Prime Minister has the power to make his Ministers, it is also his constitutional right to unmake them. The identity of the Ministers is not known without the Prime Minister. In 1931, Ramsay MacDonald tendered the resignation of his Cabinet without the knowledge of his colleagues and, in the words of Laski, "with the announcement of the national government the ministers learnt of their own demise." A party lives on party spirit and as an instrument of government it preserves its continuous corporate identity under the leadership of the Prime Minister. All this accounts for unity and close association between Ministers on the one side, and the Cabinet and the Parliamentary majority on the other. Or, as Barker says, "The unity and the corporate character is sustained and maintained by the dominance of the Prime Minister." This is the essence of Ministerial Responsibility.

**Ministerial Responsibility.** Ministerial Responsibility is the first and foremost principle of the Cabinet system of government and collective responsibility is "Britain's principal contribution to modern political practice." According to Birch the term "responsible Government" may be applied to the British political system in three main respects.<sup>27</sup> In the

26. Jennings, I., *Cabinet Government*, op. cit., p. 246.

27. See Birch's *Representative and Responsible Government*.



first place, it may be regarded as a characteristic of the British system that governments do not act irresponsibly. That is to say, they do not abuse wide legal powers which they possess. In fact, the various features of the Constitution concentrate considerable power in the hands of the Government of the day. "In this sense, responsible government means 'trustworthy government', and is a general description of the British political culture."<sup>28</sup> Secondly, responsible government is responsive to public opinion, and it acts in accordance with the wishes of the majority of the people. The third and the most specific meaning of responsible government is that the government is answerable to Parliament for all its acts. This meaning is based on the principle that Ministers are members of Parliament and secondly, they must be drawn from the majority party and they remain in office so long as they can command the support of the majority of the members of the House of Commons. From this flow the doctrines of collective responsibility of the Government and individual Ministerial responsibility to Parliament.

By collective responsibility is meant that **all** members of the government are collectively responsible for the successes and failures of the Government, and **all** Ministers share collective responsibility for the policy of the Government. Since Cabinet formulates and determines policy, collective responsibility applies to the Cabinet. It means in principle that individual members of the Cabinet and all others who are not in the Cabinet must share moral responsibility for its decisions.

Implicit in the doctrine of collective responsibility is the unity of the Government. Cabinet is a unit—"a unit as regards the Sovereign and a unit as regards the legislature." Cabinet Government is a party Government and its members (Ministers) come into office as a unit under the leadership of a person whom the party acclaims. All Ministers stand for the political programme of the party and, accordingly, represent the uniformity of political opinion. They must, therefore, swim and sink together because the fall of the Ministry is the fall of the party and consequently is political programme.

The essence of the Cabinet is its solidarity, a 'Common front' and collective responsibility had its origin in the need for Ministers in the eighteenth century to represent a united front to the Monarch on the one hand, and to Parliament on the other. "Today, collective responsibility," writes Punnett, "enables the Government to present a common face to its party supporters inside Parliament, to the party outside Parliament, and to the electorate generally—the maintenance of a united Government front being an essential prerequisite of preservation of party discipline in the House, and to the answering of Opposition and public criticism of Government policy."<sup>29</sup>

Collective responsibility applies to all Ministers alike, from senior Cabinet Ministers to Junior Ministers and one who is not prepared to defend the Cabinet decision must resign.<sup>30</sup> General Peel and three other

28. Punnett, R.M., *British Government and Politics*, p. 178.

29. *Ibid.*, p. 178

30. Lord Salisbury expressed this rule clearly in 1778: "For all that passes in Cabinet each member of it who does not resign is absolutely and irrevocably responsible, and has no right afterwards to say that he agreed in one

(Continued on next page)

Ministers resigned because they did not agree with and support Disraeli's Reform Bill. Lord Morley and Mr. Burns resigned in 1914 as they could not approve of the decision to go to War. Sir Herbert Samuel and other Liberals, and Viscount Snowden resigned in 1932 because they could not support the Ottawa Agreement. Anthony Eden resigned in 1938 because he was unable to agree with the foreign policy adopted by Neville Chamberlain and the Cabinet. In 1950, when a Junior Minister not in the Cabinet criticised the Government's agricultural policy and resigned immediately afterwards, the *Economist* commented that he would "have been in a stronger position if he had resigned first and made his criticisms afterwards, rather than transgress an accepted rule of the Constitution."<sup>31</sup> In 1958, when the Chancellor of the Exchequer resigned because of the disagreement with other Ministers on the question of economic policy, the public could know of the disagreement only when the resignation was announced. The practice as established now is that the doctrine of collective responsibility applies even to the unpaid Parliamentary Private Secretaries. In 1965, Frank Allaun, Parliamentary Private Secretary to the Colonial Secretary, resigned his post because he could not accept government policy towards the crisis in Viet-Nam. In 1967, the Prime Minister forced a group of Parliamentary Private Secretaries to resign when they declined to support specific aspects of Government economic policy.<sup>32</sup>

But if a Minister does not resign, then, the decision of the Cabinet is as much his decision as that of his colleagues even if he protested against it in the Cabinet. This means that the Minister must vote for the decision in Parliament and, if necessary, defend it either in Parliament or in public. He cannot rebut the criticism of his opponents on the plea that he did not agree in the decision when the matter was being discussed in the Cabinet. Lord Melbourne emphasised this aspect upon his colleagues after his Cabinet had come to a conclusion on the Corn Laws. He said, "Bye the bye, there is one thing we have not agreed upon, which is, what we are to say. Is it to make our corn dearer or cheaper, or to make the price steady? I do not care **which**; but we had better all be in the same story." That is to say, all Ministers should vote for the government and tell the same story wherever it was to be told. Gladstone would even insist that a Minister absenting at the time of division in Parliament should be censured.

The duty of a Minister is not merely to support the Government but to refrain from making any speech which is contrary to the Cabinet

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to a compromise, while in another he was persuaded by the colleagues....

....It is only on this principle that absolute responsibility is undertaken by every member of the cabinet who, after a decision is arrived at remains a member of it, that the joint responsibility of Ministers to Parliament, can be upheld, and one of the most essential principles of parliamentary responsibility established."

31. *The Economist*, April 22, 1950.

32. In 1838, Lord Fitz Roy, the Vice-Chamberlain, was dismissed from his post for voting against the Government. In 1856, Queen Victoria asked Lord Palmerstone "to make it clear to the subordinate members of the Government that they cannot be allowed to vote against the government proposal about the National Gallery tomorrow, as she hears that several fancy themselves at liberty to do so."

policy or make a declaration of policy in a speech upon which there is no Cabinet decision. In 1922 Edwin Montagu, the Secretary of State for India, was virtually dismissed as he had permitted the Government of India to publish a telegram involving it in a policy without Cabinet sanction. In 1935, the Foreign Secretary, Sir Samuel Hoare, was at least "allowed" by the Baldwin Government to become involved in secret proposals with the French Premier, Laval, on the Italian front which question had met with nation-wide disapproval."

The Cabinet is, thus, by its nature a unity and collective responsibility is the method by which this unity is created. There is no other condition upon which that it is in work, which is the sine qua non of the Cabinet system, can become possible. Mr. Morrison, therefore, whether members of the Cabinet or not state collectively to Parliament, including that for Cabinet or Cabinet Committee decisions in the future, of which they have taken no part whatever. "This may sound rather harsh," writes Morrison, and indeed from time to time it is. But the government must stand together as a whole and Ministers must not contradict each other, otherwise cracks will appear in the government fabric. That is liable to be embarrassing or possibly fatal, and indeed mortally to good government. All this is part of the contract of service. It has to be endured as a condition of acceptance of office." Moreover, collective responsibility begets mutual confidence and it makes possible that give-and-take in the shaping of policy without which any effective mutual confidence is rarely attained. There is still another reason. If it were regarded as possible for a Cabinet Minister to free himself from the decision of his colleagues, after the course decided upon had proved unsuccessful or unpopular, both the trust and the secrecy which are so essential to the working of the Cabinet would be destroyed. This would further mean that the most private transactions in the Cabinet would of necessity be divulged to the public. Such a position is really frightful because it might lead to the emergence of another body to replace the Cabinet, as the Cabinet once upon a time replaced the Privy Council, as organ for the discussion of policy.

Collective responsibility means, then, that an attack on a Minister is attack on Government. It also means that members of the Cabinet express a common opinion. To repeat the phrase used by Lord Melbourne, "they must all be in the same story." The theory of the Cabinet is that

33. The duty of the minister in respect of speeches was stated by Lord Palmerston in a letter to Mr. Gladstone in 1864: "A member of the government when he takes office necessarily divests himself of that perfect freedom of action which belongs to a private and independent member of Parliament, and the reason is this, that what a member of the Government does and says upon public matters must to a certain degree commit his colleagues, and the body to which he belongs if they by their silence appear to acquiesce; and if any of them follow his example and express publicly opposite opinions, which in particular cases they might feel obliged to do, differences of opinion between members of the same government are necessarily brought out into prominence and the strength of the government is thereby impaired."

34. "Subsequent action by the Cabinet showed that it really shared the Foreign Secretary's views, and in a few months he was back as First Lord of the Admiralty. For the time being, however, he was encouraged to make himself a scapegoat."

it must not disagree. Of course, it sometimes does, but not in public. To put it in the poignant words of Lord Morrison, "It must not seem to disagree."<sup>35</sup> Ministers must aim at preserving not only the spirit "but the appearance of Cabinet solidarity."<sup>36</sup> Collective responsibility is associated with the cognate principle of Cabinet secrecy. Disclosures of Cabinet discussions plague the Government and bring into open a Cabinet split. "A Cabinet split," as Jennings says, "may become a party split and a party split may lose the next election."<sup>37</sup>

The idea of collective responsibility, as said earlier, first developed in the eighteenth century as a protection for Ministers against the King, and then it grew as a device for maintaining the strength and unity of the party. In 1782 there occurred the first example of the collective resignation of a Ministry, when Lord North resigned in anticipation of a certain parliamentary defeat. All his Ministers, with one exception of the Lord Chancellor, resigned with him. Following this, Pitt did a great deal to develop conventions relating to collective responsibility and by 1832, it was well-recognised. But the concept of "responsible government," that the Government should resign if it lost the confidence of Parliament, appears not to have been introduced "into British political debates until as late as 1829, and then in relation to Canada rather than Britain."<sup>38</sup> After the Reform Act, 1832, it came to be regarded as axiomatic that the Government must respond to a Parliamentary defeat on a major issue. Peel resigned in 1835, saying that he considered "that the Government ought not to persist in carrying on public affairs... in opposition to the decided opinion of a majority of the House of Commons."<sup>39</sup> Since then, the collective responsibility of the Cabinet to Parliament became a cardinal feature of British politics. The last instances where a single Minister resigned on an adverse vote of the House of Commons were those of Mr. Lowe in 1864, and Lord Chancellor Westbury in 1864. It does not, however, mean that no Minister does resign individually if ever he incurs the wrath of Parliament or his public transactions prove highly unpopular with the public. If the causes of complaint were an official indiscretion or misconduct on the part of a Minister, he would be asked to resign voluntarily before his conduct comes under fire and is forced out of office by a hostile vote in the House. J.H. Thomas was asked to resign in 1936, because of the leakage in the budget.<sup>40</sup> Sir Hugh Dalton, the Chancellor of the Exchequer, had to resign because of a similar indiscretion.<sup>41</sup> Sir Samuel Hoare resigned in 1935 before the House could

35. Lord Morrison, *British Parliamentary Democracy*, p. 13.

36. *Ibid.*, p. 14.

37. Jennings I., *The Queen's Government*, p. 119.

38. Birch, A.H., *Representative and Responsible Government*, An Essay on the British Constitution, p. 131.

39. As quoted in above p. 135.

40. J.H. Thomas was the Colonial Secretary. He betrayed budget secrets to two friends. The information so conveyed enabled them to save themselves from some taxes.

41. Sir Hugh Dalton gave a reporter some advance information in the budget and this appeared in the reporter's newspaper fifteen minutes before the Chancellor of the Exchequer rose in his place in the House of Commons to deliver his budget speech.



condemn his Italo-Ethiopian proposals." John Profumo, the War Secretary in the Macmillan Government, resigned because he had lied to the House of Commons in denying improper relations with the model Christine Keeler. In a letter to the Prime Minister, Profumo wrote, "I have come to realize that by this deception, I have been guilty of a grave misdemeanour."

"It is not possible", says Finer, "to operate collective responsibility without a safety valve: individual scapegoats," and he assigns two reasons for it. First, there are more departmental policies and it becomes unreal to impute responsibility to all of them jointly. Secondly, if a Cabinet could be overthrown every time on trivial matters or if it involved some error on the part of an individual Minister and Parliament was not prepared to condone it, it may mean too many reorganizations of the Cabinet. "It could not be tolerated," concludes Finer, "in the British economic and social system, where a high degree of stability and continuity of policy is essential to the standard of living and the peace of mind of the population."<sup>42</sup>

If the question were on policy, then, the Government would, save in very exceptional cases, assume the responsibility of that policy, treating a hostile vote as a vote of no confidence in itself. Ogg graphically sums up this aspect of ministerial responsibility. He writes: "When a Minister either because of his own action or because of actions of a subordinate for which he is responsible—falls into such a predicament, he is not left by his colleagues merely to sink or swim while they look on from the distant shore. Either they jump in and push him under, or they haul him into their boat and accept his fate as their own, in other words, they repudiate him and throw him out before his trouble drags him down or they rally to his support and make common cause with him. The latter course is pursued far more frequently than the former—so much so that Cabinet solidarity and, therefore, collective responsibility, may normally be taken for granted."<sup>43</sup> L.S. Amery, a Cabinet Minister at various times between 1922 and 1945, puts it rather more succinctly. "The essence of our Cabinet system", he says, "is the collective responsibility of its members. All major decisions of policy are, or are supposed to be, those of the Cabinet as a whole. They are supported by speech and vote by all its members, and, indeed, by all the members of the Government in the wider sense of the word. The rejection or condemnation by Parliament of the action taken upon them affects the Cabinet as a whole, and is followed, if the issue is one of sufficient importance, by its resignation. The secrecy of Cabinet proceedings, originally based on the Privy Councillor's oath and antecedent to collective responsibility, is in any case the natural correlative of that collective responsibility. It would obviously be impossible for ministers to make an effective defence in public of decisions with which it was known that they had dis-

42. Sir Samuel Hoare concluded a secret pact with Premier Laval of France that about half of Ethiopia be given to Italy with a view to ending the war then going on between Italy and Ethiopia.

43. Finer, H., *Government of Greater European Powers*, op. cit., p. 151.

44. Ogg, F., and Zink, H., *Modern Foreign Governments*, op. cit., p. 103.

agreed in the course of Cabinet discussion."<sup>45</sup>

Birch, however, is of the opinion that while the doctrine of collective responsibility remains unchanged, its practical importance has been greatly reduced with the diminution of Parliamentary power as a result of the growth of party discipline.<sup>46</sup> "The idea underlying the doctrine of collective responsibility," he maintains, "is that the government should be held continuously accountable for its actions, so that it always faces the possibility that a major mistake may result in a withdrawal of Parliamentary support. In the modern British political system it does not happen."<sup>47</sup> A major blunder in the policy of the Government may lead to an immediate and sharp swing in the public opinion, but the Government thrives upon its Parliamentary majority and firmly holds on to office. The Government, thus, gets an "ample opportunity to recapture public support before the next general election is held." The Labour Government of 1945-50 survived through the fuel crisis of 1947, the collapse of its Palestine Policy in 1948, and the fiasco of the ground-nuts scheme in 1949. In 1950 it was returned to power, though with a reduced majority. The Conservative Government of 1955-59 succeeded not only in surviving after the debacle of Suez, but winning an increased majority at the next election.<sup>48</sup>

Birch, therefore, concludes "that the doctrine of collective responsibility does not occupy the place in the present political system that it commonly claimed for it." A crisis that would have brought down a Government "a hundred years ago now acts as an opportunity for its Parliamentary supporters to give an impressive display of party loyalty, and stimulates its leaders to hold on to the reins of power until public attention is diverted to a sphere of policy which puts the Government in a more favourable light." It, no doubt, ensures a common front, but in the zeal to maintain it, the traditional sanctity which collective responsibility carried with it does not exist any more. According to the new usage of responsibility, "a government is acting responsibly, not when it submits to Parliamentary control but when it takes effective measures to dominate it."<sup>49</sup> If ever it permits its members, as it did in 1956 on the question of free capital punishment and in 1959 on the Street Offences Bill, a free vote, the Government is accused of "evading responsibility."<sup>50</sup>

**Secrecy and Party Solidarity.** The Cabinet is, therefore, a secret body, collectively responsible for its decisions. It deliberates in secret

45. *Thoughts on the Constitution*, p. 70.

46. Birch, A.H., *Representative and Responsible Government*, An Essay on the British Constitution, pp. 136-37.

47. *Ibid.*, p. 137.

48. *Ibid.*

49. *Ibid.*, p. 138.

50. "On some issues where there is no clear party line, the members of government are sometimes allowed to join in the 'luxury' of a free vote, uninhibited by the Party Whips or by the doctrine of collective responsibility. Even on some occasions when back benchers are allowed a free vote, however, the government's collective view is often made clear. The government is expected to give lead on practically all issues, and for the government not to do so can be seen as an abdication of duty." Punnett, R.M., *British Government and Politics*, p. 180.

and its proceedings are highly confidential. The secrecy of Cabinet proceedings is safeguarded by law and convention. The Privy Councillor's Oath<sup>51</sup> imposes an obligation not to disclose Cabinet secrets. The Official Secrets Act of 1920, forbids communication to unauthorized persons of official documents and information and provides legal penalties for disclosures made as such.<sup>52</sup> But the effective sanction is neither of these two. The rule is primarily one of practice. Its theoretical basis is that a Cabinet decision is advice to the King and the monarch's sanction is necessary before its publication. Its practical foundation is "The necessity of securing free discussion by which a compromise can be reached, without the risk of publicity for every statement made and every point given away."<sup>53</sup> There must be, as Lord Salisbury said, "irresponsible licence in discussion,"<sup>54</sup> if mature, rational and independent contribution to the process of policy making is desired from men who are engaged in a common cause and who come together for the purpose of reaching an agreement. It is, therefore, essential that Ministers deliberating in a Cabinet meeting should speak freely and frankly, "toss their thoughts across the table, make tentative propositions and withdraw them when the difficulties are pointed out, express their doubts without reserve, discuss personalities as well as principles."<sup>55</sup> This kind of discussion cannot be conducted in the public. Nor can anybody express his opinions without reserve if he knows that it is likely to be quoted in Parliament or in the press. Publicity reduces the independence of mind of Ministers in relation to each other and harmony of views becomes impossible if there is a chance that whatever they speak will be broadcast. Moreover, a knowledge of divergence of opinion offers vulnerable points to the attacks of the Opposition which is always on its toes to plague the party in power. Secrecy is of special urgency in these days of high nationalism and warlike friction between impassioned nations "so that the Cabinet's state of mind may not be made the subject of distracted and inflammatory debate until it has arrived at a considered policy". Secrecy is, thus, an essential part of the Parliamentary system. Secrecy helps to produce political unanimity and political unanimity is a

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51. The main terms in the oath of the Privy Councillor deserve notice:

"You shall swear to be a true and faithful servant unto the Queen's Majesty, as one of Her Majesty's Privy Council.... You shall, in all things to be moved, treated and debated in Council, faithfully and truly declare your Mind and Opinion according to your heart and conscience, and shall keep secret all Matters committed and revealed unto you or that shall be treated of secretly in Council. And if any of the said Treaties or Councils shall touch any of the Councillors, you shall not reveal it unto him, but shall keep the same until such times as, by consent of Her Majesty, or the Council, Publication shall be made thereof."

52. Mr. Edgar Lansbury, son of a former Cabinet Minister George Lansbury, was fined in 1934 for publishing a memorandum submitted to the Labour Cabinet of 1929-31 by his father.

53. Jennings, I., *Cabinet System*, op. cit., p. 248.

54. Lord Salisbury declared that privacy of discussion "could only be made completely effective if the flow of suggestions which accompanied it attained the freedom and fulness which belonged to private conversations—members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future." Cecil, Gwendolen, *Life of Lord Salisbury*, Vol. II, p. 223.

55. Jennings, I., *The Queen's Government*, p. 121.

very important condition of party solidarity, which in its turn assists secrecy. Both "help to concentrate responsibility on a single unit, the Cabinet, and since no exact discrimination appears before the real and supposed authors of a policy until long after the event, the more care has to be taken about the inclusion of people in the Cabinet, for no one may be included who is so incapable as to cause its better members to fall."

A difficulty obviously arises when a Minister or Ministers feel bound to resign as a result of serious Cabinet division. A Minister who resigns from the Cabinet usually desires to make an explanation in Parliament. Since this involves an explanation of Cabinet discussion, the Minister concerned must secure the permission of the King through the Prime Minister,<sup>56</sup> and it is always given. But the Minister's right is limited to the explanation of the circumstances which led to his resignation. It "gives no licence to make further disclosures."<sup>57</sup> He must not disclose other occasions on which he differed from the rest of the Cabinet. This is an important precaution. "Usually the issue on which a Cabinet Minister resigns is not an isolated incident. It is the culmination of a series of disagreements, the straw which broke the camel's back. If he gives a long history of disagreements the other members must disclose why they disagreed with him, and much of the procedure of the Cabinet will inevitably come into public discussion. Such discussion is not merely unfortunate for the party in power; it is undesirable in the public interest; for if there is a risk that his remarks will be disclosed, no Minister will be able to speak freely and frankly."<sup>58</sup>

Some other means also exist by which more or less reliable information respecting views expressed or decisions taken often get out. "There are few Cabinet meetings," observes Laski, "in which the modern Press is not a semi-participant."<sup>59</sup> During the War of 1914-18, the representatives of the press were able to secure information from the Prime Minister's Secretariat in the "Garden Suburb". Since then the Prime Minister or some other Minister, on his behalf, gives to the press a guarded statement in order to promote opinion about the policy they intend to pursue. Professor Laski makes a bold statement when he says, "and there have been fewer Cabinets still in which some member has not been in fairly confidential relations with one eminent journalist or another."<sup>60</sup> Revelations

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56. Lord Melbourne objected in 1834 to the King's giving consent without consultation with the Prime Minister. He maintained that for the King to act direct would be "subversive... of all the principles upon which the government of this country has hitherto been conducted."

57. Lord Derby in 1878 received the Queen's permission to make an explanation to Parliament after his resignation. In reply to Lord Derby's explanation, General Ponsonby wrote: "Her Majesty expects that, whenever a Privy Councillor makes any statement in Parliament respecting proceedings in Her Majesty's Council, the Queen's permission to do so should first be solicited, and the object of the statement made clear; and that the permission thus given should only serve for the particular instance, and not be considered as an open licence."

58. Jennings, *The Queen's Government*, p. 121.

59. Laski, H.J., *Parliamentary Government in England*, p. 255.

60. *Ibid.*



also occasionally appear in the writings of former Cabinet Ministers, especially when in a Cabinet crisis like that of 1901. Ministers are keen to have their position and the stand they took clarified.

Down to the time of the First World War no record was kept of matters discussed or actions taken in the Cabinet meetings. The taking of notes other than by the Prime Minister was long forbidden. The Ministers would simply indicate to their departments what the decisions were, if they could remember what exactly occurred. This system of Cabinet proceedings, however complete, broke down under the stress of War and, one of the first acts of Lloyd George was to institute a Cabinet Secretariat to organize the business of the War Cabinet. The Machinery of Government Committee in 1918 recommended that the Secretariat should be permanently maintained for the purpose of collecting and putting into shape agenda of proceedings, the information and the material necessary for its deliberations, and of drawing up the results for communication to the departments concerned. In 1922 Balfour Law desired to abolish it, but its utility by then had been clearly established and it was decided to continue with it though its function were narrowly defined.<sup>61</sup>

Cabinet records are strictly confidential and no formal reports of proceedings are published.<sup>62</sup> Great care is taken to ensure the secrecy of the Cabinet minutes. The Secretary to the Cabinet has instructions that while drafting minutes he should avoid reference to opinions expressed by any individual member and to limit the minutes "as narrowly as possible to the actual decision agreed to." The minimum staff is employed in the reproduction of the minutes and all notes are destroyed as they are transcribed. Then, the copies are sealed immediately in special envelopes addressed to the Ministers, and law officers entitled to receive them. These envelopes are locked in the Cabinet boxes and delivered by special messengers. A record copy is kept in the Cabinet office under the immediate control of the Secretary.<sup>63</sup>

61. During Asquith's Government it was quite common for a minister's private secretary to telephone to the Prime Minister's private secretary to ask what the decision had been.

62. As quoted in Jennings' *Cabinet Government*, op. cit., p. 226.

63. The functions of the Cabinet Secretariat are:

(a) to circulate the memoranda and other documents required for the business of the Cabinet and its Committees;

(b) to compile under the direction of the Prime Minister the agenda of the Cabinet and, under the direction of the Chairman, the agenda of a Cabinet Committee;

(c) to issue summons of meetings of the Cabinet and its Committees;

(d) to take down and circulate the conclusions of the Cabinet and its Committees and to prepare the reports of Cabinet Committees; and

(e) to keep, subject to the instructions of the Cabinet, the Cabinet papers and conclusions.

Attached to the Cabinet office, and an integral part of it, is the Central Statistical Office.

64. Two partial reports were, however, published in 1917 and 1918.

65. Jennings, I., *Cabinet Government*, p. 254.

## CHAPTER V

# THE CABINET AT WORK

**Meetings of the Cabinet.** The Cabinet now meets usually twice a week during session of Parliament and once a week out of it or possibly not at all during the autumn recess. Additional meetings may be called by the Prime Minister at any time, if a matter urgently requiring discussion should arise. It is not tied to any one place but ordinarily meets at 10 Downing Street, the official residence of the Prime Minister. Sometimes it meets in the Prime Minister's room at the House of Commons. The agenda for the meeting is prepared by the Cabinet Secretariat which is circulated among the members before they meet. A Minister who wishes to place an item on the agenda, after setting it with his officials that the matter is worth the Cabinet's consideration, writes a paper on it for the use of his colleagues. The Secretariat will print it and circulate it among all the members of the Cabinet, if possible a week before the meeting. The other Ministers look into it, partly for the general principles involved and partly for its probable effects on the Departments under their charge. They may discuss its implications with the Minister initiating the proposal for the policy or his officers in the Department and if they feel necessary print papers of their own on it for the Cabinet. It is from these communications that the Secretariat prepares the agenda in consultation with the Prime Minister.

The Prime Minister opens the meeting informally and he may bring any matter not on the agenda, if he deems it necessary. The members discuss issues and reach decisions, avoiding, of course, details. As a rule, it concentrates on principles only. The Ministers discuss until agreement is reached. Votes are not taken. "That would be shocking!" says Lord Morrison. "That would give the whole thing away. That would exhibit a disunity in the Cabinet."<sup>1</sup>

**Cabinet Committees.** The burden of the Cabinet, as Finer puts it, "is Titanic." It cannot adequately meet its huge task. In its traditional form, it is a general controlling body and it usually meets twice a week and that too far a few, generally two, hours at a time. Then, it has too many members for effective discussion and many of them are depart-

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1. Lord Morrison, *British Parliamentary Democracy*, p. 14. If there is a narrow division of opinion and the Prime Minister does not know which side of the argument is in the minority, the problem is solved by the stratagem of collecting the voices. The Prime Minister "goes right round the table saying to each Minister: 'Are you for or against?'" This is collecting the voices. Somebody under the counter, so to speak, probably the secretary of the cabinet, is making a little slip and counting up these for and against. Certainly he adds up the figure on each side. Now that's not taking a vote. The British will not wish to admit doing naughty things even if we have to remedy matters 'under the counter.' So that is collecting the voices", *Ibid.*

mental Ministers and they are too pre-occupied in their departmental duties. The Cabinet, therefore, neither desires nor is able to tackle all the numerous details of Government. The result is the emergence of the Cabinet Committees.

The origin of the system of standing Cabinet Committees can be traced back to the Committee of the Imperial Defence, which was formed in 1902 as a permanent Committee to supplement the Cabinet's general responsibility for defence. Cabinet Committees had been formed earlier too to deal with particular questions, but the Imperial Defence Committee was the first Standing Committee of the Cabinet. A Home Affairs Committee was created in 1919 and more standing Committees emerged in the inter-War period. With the Second World War an extensive Cabinet Committee system was adopted as the basis of the means of co-ordinating the expanding governmental machine. Attlee retained this Committee system in 1945, and he had some fifteen Committees composed of Cabinet and non-Cabinet Ministers, each presided over by a senior member of the Cabinet.

Some of the Cabinet Committees are continuous and, thus, permanent bodies; others are *ad hoc*, i.e., created for single time-limited matter dealing with a special problem or a critical situation and composed of the Ministers primarily concerned. They deliberate, report and disband. Some important Standing Committees of the Cabinet are: (1) The Legislation Committee, formerly known as the Home Affairs Committee. The functions of the Legislation Committee are to review legislation proposed by individual Ministers, make recommendations to the Cabinet on legislative priorities, set their time-table and to consider the parliamentary procedure to be followed to help the passage of the Bill; (2) The Defence Committee is one of the largest and most important. It was first set up in World War II with the Prime Minister as Chairman. Its membership includes the Minister of Defence, the Lord President of the Council, the Foreign Secretary, the Chancellor of the Exchequer, the Minister of Labour, the Minister of Supply, the First Lord of the Admiralty, and the Secretaries of State for War, Air, Commonwealth Relations, and Colonies. It is advised by the Chiefs of Staff Committees consisting of the professional heads of the three military services. The Defence Committee concerns itself with the present and future defence problems, the preparation of plans over the whole field of government activity, both civil and military, for mobilising the entire resources of the nation in case of war and then the problems of reconstruction in the post-war period; (3) The Lord President's Committee, presided over by the Lord President; (4) The Economic Policy Committee, with the Prime Minister as Chairman; and (5) The Production Committee.

The number and composition of the Cabinet Committees are largely determined by the Prime Minister, "and he is guided by his own working methods, the nature of the problems which his Cabinet faces, and the talents and temperaments of his ministerial associates." Names of the Committee members and their Chairmen are kept private. The Chairmen of the Committees are responsible to the Cabinet, and not to Parliament, for their role as Committee Chairmen. "Despite the anonymity," writes Punnett, "the Chairmanship of a Cabinet Committee involves a lot of

work, and the need to include in the Cabinet sufficient men capable of filling the role is one of the factors that a Prime Minister has to bear in mind when forming his government."<sup>2</sup>

"The Cabinet Committees," says Dr. Siner. "are **deliberative** or **action-integrative**, sometimes both." They provide a means whereby certain problems and issues can be studied and discussed by Ministers most concerned and some kind of compromise reached before they are brought before the whole Cabinet. It obviously assists consideration of a subject in Cabinet meetings if the principal issues involved have been identified and thrashed out by a small ministerial group and agreed recommendations submitted. Cabinet Committees are also useful to co-ordinate policy and administration. The political, economic, social and administrative implications of the most vexed and the complex problems can be investigated and ways and means devised to mobilize efforts for their fulfilment and, at the same time, help to eliminate conflicts or duplication of programmes. Moreover, Committees can be employed to keep a critical problem under continuous review. It is neither possible nor desirable for the whole Cabinet to concentrate its attention on any aspect of national policy for an indefinite period of time. Finally, by including non-Cabinet Ministers the Committee system can extend the Cabinet's co-ordinating activity to wider areas of governmental affairs. It is not also uncommon for senior members of the permanent services to attend as advisers to their Ministers. There are certain Cabinet Committees which have no political importance and civil servants are made full-fledged members of these committees with the right to speak when they are asked for advice, maintaining of course, the responsibility of the Ministers for policy.

The Committees, thus combine two functions: co-ordinating the departments, and decentralizing the policy. They customarily report to the whole Cabinet and seek to submit agreed reports and recommendations. But a Minister who is not satisfied with the recommendations of the Committee can appeal to the Cabinet, where, under the Chairmanship of the Prime Minister, differences are tried to be resolved. If the dissenting Minister still does not reconcile himself to the Cabinet decision, the only course left for him is to resign.

**Cabinet Secretariat.** We traced in the last Chapter the origin of the Cabinet Secretariat. Today, the Secretariat has become an indispensable part of the machinery of government. It prepares an agenda of business, under the guidance of the Prime Minister, to come before the Cabinet and circulates to Cabinet Ministers any memoranda or Committee reports that they must study before undertaking the discussion of items on the agenda of the Cabinet meeting. It keeps a record of the minutes and advises members of the decisions reached in the meetings. It also serves the various Cabinet Committees and integrates their progress.

During the Second World War the Cabinet offices were expanded to include besides the Secretariat proper an Economic Section and a Central Statistical Office. The Economic Section maintains a constant watch on the economic trends and developments and advises the Cabinet as they

2. Punnet, R.M., *British Government and Politics*, p. 209.



affect the country and its people. It prepares the annual **Economic Surveys** of the nation's targets and the planning for production and capital investment. The Central Statistical Office was established "to produce a developing statistical series, general and comprehensive in nature, to be an index to economic, and social trends." It publishes the **Monthly Digest of Statistics**.

### FUNCTIONS OF THE CABINET

"Thus, the Cabinet is surrounded by expert help channelled to it or its committees or to individual Ministers, marshalled as and when the Cabinet needs it to be used as its wisdom requires. Going up to the Cabinet are sifted facts and sifted evaluations and ideas. From it outward and downward to the departmental officials flow will, policies, and desires asking guidance, counsel, facts." This is how the Cabinet is enabled to perform its arduous and complex functions to work the Government. The Report of the Machinery of Government Committee officially defined the functions of the Committee as:<sup>1</sup>

- (i) The final determination of policy to be submitted to Parliament;
- (ii) The supreme control of the national executive in accordance with the policy prescribed by Parliament; and
- (iii) The continuous co-ordination and delimitation of the activities of the several Departments of the State.

**Policy-determining functions.** The Cabinet, as said before, is a deliberative and policy-formulating body. It discusses and decides all sorts of national and international problems, and attempts to reach unanimous agreements among members regarding the Government's policy concerning each. However, much the members may disagree among themselves, they must present to Parliament and to the world a united front. If an individual member finds it impossible to agree with the conclusions of the Cabinet, the only course left for him is to resign.

When the Cabinet has determined on a policy, the appropriate department carries it out either by administrative action, within the framework of the existing law, or by submitting a new Bill to Parliament so as to change the law. Legislation is, thus, the handmaid of administration and the Cabinet is the instrument which, according to Bagehot, links the Executive branch of government to the Legislative. The Cabinet directs Parliament for action in a certain way and so long as it can command a majority in the House of Commons, it gets the approval of the sovereign organ of the State—Parliament. This is how the Cabinet asks Parliament to take necessary steps with a view to carry the policy determined into effect.

These are essentially the legislative activities of the Cabinet. But we

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3. *Finer, H., Governments of the Greater European Powers, op. cit.* pp. 167-68.

4. The Committee was set up in 1918 to review the machinery of government in Britain. It was presided over by Lord Haldane and is popularly known as the Haldane Committee.

cannot make a vivid distinction between legislation and administration. "In the modern State," writes Jennings, "most legislation is directed towards the creation or modification of administrative powers." The Cabinet, accordingly, plans the legislative programme at the beginning of each session of Parliament. Public Bills are introduced and piloted in Parliament usually by a Cabinet Minister or by some other Minister acting on Cabinet's approval. In legislation, the control of the Cabinet over the Ministry is complete, for no Bill can be promoted except with its sanction, and the Legislation Committee of the Cabinet discusses at the beginning of each session what Bills shall be promoted in a session. In short, it is no exaggeration to say that the Cabinet legislates with the advice and consent of Parliament. Summing up the policy determining functions of the Cabinet, we may conclude with Ogg that the Cabinet Ministers "formulate policies, make decisions, and draft Bills on all significant matters which in their judgment require legislative attention, asking of Parliament only that it give effect to such decisions and policies by considering them and taking the necessary votes." So long as the Government has a majority in Parliament, it is rare to challenge Cabinet policy. The Cabinet takes office if it thinks it enjoys the confidence of Parliament, and once in office Cabinets tend to act as masters rather than servants of Parliament.

**Supreme control of the National Executive.** The Cabinet is not an Executive instrument in the sense that it possesses any legal powers. Legally, the Executive power still vests in the King, though practically the Crown is the Executive. But the Crown is rather a concept than a tangible authority. The real authority that acts for the Crown and in its name are Ministers. These Ministers, except for the holders of three or four sinecure offices,<sup>5</sup> preside over the major Departments of government and carry out the policy determined by the Cabinet and approved by Parliament. In carrying out the work of their Departments, Ministers, whether in the Cabinet or not, scrupulously follow the directions of the Cabinet and enforce its decisions and policies. Any deviation therefrom is against the rigid discipline of the party government and may consequently lead to the removal of a Minister.

As heads of the Departments, the Ministers are responsible for the policies pursued by their Departments and for their administrative efficiency. They decide policy issues that arise in their Departments, give instructions to their principal subordinates and supervise the Departmental activities to such an extent as to enable them to know that their Departments work in the desired direction. The Ministers are also answerable to Parliament for all acts of omission and commission and, accordingly, they must look for the efficient management of departmental business and see that it is responsive to the needs of the people.

The Cabinet may adopt the device of Orders-in-Council, instead of going to Parliament for approval, to give effect to some more general line of policy including even a declaration of war. Both the World Wars

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5. Non-Departmental Ministers are: The Lord President of Council, the Chancellor of the Duchy of Lancaster, the Lord Privy Seal, the Paymaster-General and Ministers without Portfolio.

were declared by Orders-in-Council. The supreme national Executive is, therefore, the Cabinet. The power of delegated legislation has still more enhanced Cabinet's Executive authority. Parliament may give to the King-in-Council, to individual Ministers of the Crown or to other persons or bodies the right to make rules and regulations. Legislation, during recent times, has become more voluminous and more technical. Parliament, accordingly, frequently passes laws in skeleton form, leaving it to the Cabinet or Ministers to fill the gaps and make rules and regulations in order to give effect to those laws as and when need arises.

• **The Cabinet as a co-ordinator.** The essential function of the Cabinet is to co-ordinate and guide the functions of the several Departments of Government. Administration cannot be rigidly divided into twenty or more Departments. The action of one Department may affect the work of another Department and indeed every important problem cuts across departmental boundaries. A foreign policy decision must often be made by relation to defence and trade policy. An educational policy decision may affect health, labour or taxation policy. Even if no other Department is affected, it certainly concerns the Treasury Department. The Cabinet does the vital task of co-ordinating policy and its implementation. "This means not only the linking of specific administrative decisions by reference to a general policy, but the expression of the same general policy in legislation." On purely inter-departmental matters, the Departments endeavour to resolve their differences and try to reach agreement. If they cannot agree, the Prime Minister might act as an arbitrator and co-ordinator. In the last resort, there is appeal to the Cabinet.<sup>6</sup>

The emergence of the Cabinet Committees and the increased problem of co-ordination has brought about a significant expansion in the work of the Cabinet office. The Prime Minister and the Chairmen of the Cabinet Committees now primarily rely upon the corps of their expert assistants in the Cabinet Secretariat to supply them with the requisite information and advice in integrating the work of the different Departments. The functions of the Cabinet Secretariat, *inter alia*, are: to take down and circulate the conclusions of the Cabinet and its Committees and to prepare the reports of Cabinet Committees. "The Cabinet Secretariat," writes Herbert Morrison, "has now become an important element in the organisation of Government. It serves not only the Cabinet but also its Committees and at times, *ad hoc* meetings of selected Ministers to settle a particular matter which may be a subject of inter-departmental disagreement."

Apart from the Cabinet Committees, the most ambitious post-1945 experiment in the co-ordination of government Departments was the system of "Overlords" introduced by Sir Winston Churchill in his 1951-55 Government. In 1951 Cabinet of sixteen members formed by Churchill

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6. The Cabinet instructions are that proposals affecting other Departments must not be submitted to the Cabinet until they have been thoroughly discussed with those Departments at the official level, and if necessary with the Ministers. Wherever there is a conflict of interest between Departments, it should not be submitted to the Cabinet unless all possibilities of agreement at lower level have been explored and exhausted. Jennings, I., *Cabinet Government*, p. 228.

there were six Peers three of whom were "Overlords" entrusted with the task of co-ordinating various Departments. Lord Leathers was Minister for the Co-ordination of Transport, Fuel and Power; Lord Cherwell was Paymaster-General and he was to co-ordinate scientific research and development; and Lord Woolton, Lord President of the Council, was to co-ordinate the work of the Ministry of Agriculture and Fisheries and the Ministry of Food. Lord Alexander was made Minister of Defence in 1952 thereby increasing the number of "Overlords" to four. The object of Churchill's scheme was to group and co-ordinate the Departments by means other than the Cabinet Committee system and as such to reorganise the nature and structure of Cabinet composition.

But there were a number of weaknesses in the system, especially the confusion that it caused as to who was the responsible Minister, the Departmental Minister or the 'Overlord'. Since the 'Overlords' were Peers and were thus not accountable to the House of Commons, the Opposition attacked the system as it threatened the authority of the House of Commons. After the 1952 Transport crisis, the experiment of 'Overlords' was gradually abandoned.

Two more functions may be added to those enumerated above:

The Cabinet is responsible for the whole expenditure of the State and for raising necessary revenues to meet it. The annual Budget statement is, no doubt, excluded from the scope of the Cabinet decisions, but being a matter of political importance, it is always brought before the Cabinet and the Chancellor of the Exchequer makes an oral statement about it a few days' before his Budget speech in the House of Commons. The reason for this peculiar procedure is the fundamental importance of secrecy. But it is within the discretion of the Cabinet to ask for longer notice and effective discussion." On the estimates, the control of the Cabinet is complete." With regard to new proposals for taxation, if they involve any major change of taxation policy, they must be considered at length before the Budget is produced. Winston Churchill said in 1937, that "although the general layout of financial policy should emanate from the Chancellor of the Exchequer personally, and should be submitted to the Cabinet only in its final form, there ought to be, and there nearly always has been a special procedure in respect of new and novel imposts . . . It would be, in my opinion, a departure from custom, for any Chancellor of the Exchequer to present to a Cabinet, only a few days before the opening of the Budget, some great schemes of new taxation, which had not been examined." Moreover, the Cabinet can always insist on modifications after the Budget has been presented to Parliament. The Cabinet can also overthrow a Budget altogether, at the risk of the resignation of the Chancellor of the Exchequer, in deference to parliamentary or public opinion.

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7. The usual time is four or five days.

8. In 1860 the Cabinet asked for details of Gladstone's Budget a month before it was announced. As the financial year had not then closed, Gladstone was unable to agree, but he gave a week's notice.

9. It was a result of Cabinet disagreement on the estimate that Lord Randolph Churchill resigned in 1866, and Gladstone in 1894.



Appointments do not normally come before the Cabinet. But all major appointments to great offices of the State, at home and abroad, are the responsibility of the Cabinet. The employment of a member of the Royal Family as Governor-General must always be dealt with by the Cabinet. Similarly, certain key positions like the Secretaryship to the Treasury, or the Office of the Chief Planning Officer might be made with the approval of the Cabinet. In the case of the Viceroy of India, the Cabinet had on several occasions intervened because this post had always been considered of special importance. In the case of Mr. Sinha's appointment to the Governor-General's Council the Cabinet was consulted. "The King objected to the principle of appointing to that Council any Indian, and only agreed to the appointment when the Cabinet unanimously advised that the appointment should be made as part of the reform scheme in India."<sup>10</sup>

**Dictatorship of the Cabinet.** "A body which wields such powers," observes Ramsay Muir, "as these may fairly be described as 'omnipotent' in theory, however, incapable it may be of using its omnipotence. Its position, whenever it commands a majority, is a dictatorship only qualified by publicity. This dictatorship is far more absolute than it was two generations ago."<sup>11</sup> A Government which has a real majority can be reasonably certain of maintaining itself in power as long as Parliament lasts. This almost mechanical source of power makes Cabinet a powerful institution. It determines how most of the time available in the House of Commons shall be used. It decides which proposals to change the law it will submit to Parliament. Then, it possesses the means to see that all measures so submitted become the Acts of Parliament. The rigidity of the party discipline enjoins upon all members to attend Parliament at the crucial moment of voting and the "energy of whip's organisation" assures blind support to the party. Woe betide a member who has no satisfactory explanation for ignoring a three line whip. But the most effective weapon to keep the House under control is the Prime Minister's power of dissolution. The dissolution, as Jennings says, "can hold the member's head like a big stick." No individual member likes to take the risk of an election contest. It demands both time and money and at the end of it he may not be returned. There is, therefore unflinching obedience to the Whip and so long as the rank and file of the Government supporters obey the Whip, the Cabinet will remain supreme. Amery had maintained that Parliamentary Government was already dead and had been replaced by Cabinet Government. Summing up the whole process of development Brogan and Verney maintain, "The struggle of the seventeenth century was between the House of Commons and the King. More recently the Commons have fought the Lords, and in both battles the Commons was triumphant. Or at least it appeared to be. It is apparent today, as it was not to Bagehot a hundred years ago, that much of the power has in fact been transferred not to the Commons but to the Cabinet."<sup>12</sup>

10. Keith, A.B., *The British Cabinet System*, p. 91.

11. Ramsay Muir, *How Britain is Governed* (1938), p. 89.

12. Brogan, D.W., and Verney, D.V., *Political Patterns in Today's World*, p. 75.

Flushed with the majority and intoxicated with power a Government, it is further argued, can press unpalatable measures on the House of Commons. It might even violate the solemn pledges which it made at the time of the general elections, as it happened in 1938. The Conservative Party in 1935 won a heavy majority in the House of Commons on its professions of fidelity to the League of Nations and its unequivocal condemnation of the rape of Abyssinia by Italy. The Party's election manifesto, *inter alia*, stated, "The League of Nations will remain, as heretofore, the keystone of British foreign policy.... We shall, therefore, continue to do all in our power to uphold the Covenant and to maintain and increase the efficiency of the League. In the present unhappy dispute between Italy and Abyssinia, there will be no wavering in the policy we have hitherto pursued." In later years, the Government followed a policy which was a grave departure from the principles of the League and a complete violation of the promises given by the Conservatives at the time of the general elections. Britain was negotiating under an ultimatum with Italy, although the latter had violated the League Covenant in Abyssinia and was making frantic efforts to bring Spain under its protectorate in pursuance of its policy of establishing Italian hegemony in the Mediterranean, and replacing Britain in control of Egypt and the Suez Canal. "If this is to be taken as a precedent," rightly observes Keith, "then, any Government can feel fully entitled boldly to ignore, if in power, any limitation imposed upon it by the terms of its election promises."<sup>13</sup>

Then, once in power the Government is subject to no parliamentary limitation, except the Standing Orders under which the House of Commons functions. These Standing Orders are not Statutes. They are passed by the House of Commons alone by means of majority resolutions. A Government can, so long as it continues to command its majority, alter these orders when it wishes in order to facilitate the passage of its measures. This danger was much in evidence during the tenure of office of the Labour Government of 1945-50. The Government wedded to a programme of nationalisation pushed it too fast in Parliament. It applied guillotine to the proceedings on the Transport Bill and the Town and County Planning Bill both in the Standing Committee and in the subsequent stages in the House of Commons. It was for the first time in the history of the House of Commons that such a drastic procedure had been applied to proceedings on a Bill in Standing Committee. "As a result, 37 Clauses and 7 Schedules of the Transport Bill were not discussed at all in Standing Committee, and the discussion on several more was cut short by the guillotine. In the case of the Town and County Planning Bill, about 50 Clauses and 6 Schedules were not discussed at all in the Committee. On the Report stage the guillotine was applied again."<sup>14</sup> While summing up these episodes Professor Keith remarked, "What is clear, however, is that a Government with a large majority is limited in its legislative programme only by its own good sense and its respect for those rules of debate which generations of men in all parties have agreed upon."<sup>15</sup> It is further argued that debates are mere formalities, tolerated

13. Keith, A.B., *The British Cabinet System*, p. 248.

14. *Ibid.*

15. *Ibid.*, p. 249.

by the Government only because they do not affect the result in the lobby division.

There are bitter criticisms of the growth of delegated legislation and of the consequential growth of Administrative Law and it is maintained that the Rule of Law and freedom of the citizens are gravely menaced by these developments. "When the legislature confers," says Barker, "a measure of legislative powers on the executive it takes something away from itself; but when it confers upon the executive a measure of judicial power, it is diminishing not itself, but an organ other than itself."

It does not, however, follow, and "it is not true," as Jennings observes, "that a government in possession of majority forms a temporary dictatorship." The House of Commons is not a place in which a victorious party exhibits its unchecked authority and dictates to the defeated and politically impotent minority. Nor can it remain oblivious of outside influences. The process of Parliamentary government involves parliamentary forbearance. The minority agrees that the majority should govern, and the majority agrees that the minority must criticize. The Standing Orders are, no doubt, constructed to ensure that the will of the majority shall prevail. But the Orders do not present the complete picture of the Government's position. They are supplemented by the customs of the House. The customs of the House demand a scrupulous observance and respect by the majority for those rules of debate "which generations of men in all parties have agreed upon." Originally, these customs arose for the protection of the individual member of the House and today they continue for the "Private Member," as he is still called, and, as such, for His Majesty's Opposition. The Speaker is the impartial custodian of the rights of the members of the House. His conduct really reflects the spirit which, according to Brier, is ultimately more important than the forms of government.

The customs of the House very considerably modify the rigours of the majority rule. Take, for example, the Standing Order relating to a private member's right to put questions to government in order to elicit information on any matter of public importance or with regard to administration. So important is this right that the Select Committee on Parliamentary Procedure maintained in its Report that the exercise of the right of asking questions "is perhaps the readiest and most effective method of parliamentary control over the action of the executive." But custom goes much further. Parliamentary time is allowed to the Opposition so that it may criticise the Government's work. The various stages through which a Bill passes in its career in the House—the First and Second Readings, Committee Report, and Third Readings—are arranged with this end in view. In the Committee of Supply the choice of subjects for discussion rests with the Opposition. The actual time to be spent on various stages of business is, so far as possible, arranged "behind the Speaker's Chair" or through the usual channels; that is to say, the Government and Opposition Whips, in consultation with their respective leaders, settle the time to be allowed by informal discussion. They

even settle the subjects to be debated, the information to be provided and the line of attack.

His Majesty's Opposition is second in importance to His Majesty's Government. The public duty of the Opposition is to oppose. It must attack upon the Government and upon individual Ministers. Diligent performance of this duty by the Opposition is the major check which the Parliamentary system of Government provides upon corruption and defective administration. It is also the means by which individual injustice can be prevented. The Government, too, recognizes its duty that it must govern openly and honestly, and that it should meet criticism not by suppressing Opposition, but by rational arguments which should have the approbation of the electorate. A Government which does not respect the traditions of the House and neglects the Opposition does so at its own peril. His Majesty's Opposition is the prospective Government. The lapses of the Government are its opportunities and it uses them to appeal to the public opinion. "The House is its platform, the newspapers are its microphones, and the people is its audience." The Government which loses the popular support will ultimately lose its majority and when majority disappears, the government, too, will disappear. The Cabinet, no doubt, is normally the master of the House of Commons, but, as Laski says, "there are always limits to its mastery of which it must take account."<sup>17</sup>

Nor is the Government insensitive to the reactions of its own followers. It is true that a member of Parliament is returned on the party support and his political career depends upon the support he gives to his party. But it does not mean that he is entirely docile and immune to influences other than of his party leaders. He is in constant touch with his constituency and keeps himself abreast with the flow of public opinion therein. If he feels that the popularity of the Government is receding, he becomes clamorous because it means a fall in his electoral support. Then, there are interested groups within the party. These groups maintain a constant watch on the activities of Government and they are vocal on issues that concern them. "Thus the government works against a background of constant outside appraisal which also finds its echo in the lobbies of the House and it is a function of the Whips to keep informed on trends of opinion both in the country and in the House. Signs of unrest in the constituencies, amongst interested groups, or on the part of a sufficient number of back-benchers, may lead to changes in a Government's plans and proposals." A Government which is not susceptible to these influences and does not alter its direction is not a government of the people and by the people.

The Cabinet is, therefore, the supreme interpreter of majority opinion and it rules both majority and minority. It dare not ride rough-shod over public opinion. The ultimate appeal rests with the people, and it must remember those to whom it will have to account in the future as well as those who entrusted it with power. In 1934, there was a great outcry against the provisions of the Incitement to Disaffection Bill. The National Government had an unprecedented majority and, no doubt, the

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17. Laski, H.J., *Reflections on the Constitution*, p. 96.



Bill was passed, but the Bill as passed "was very different from the Bill as presented; and public opinion had amended it." So spontaneous was the outburst against the Anglo-French proposals for a settlement of the Italo-Ethiopian dispute in December 1935, that the Cabinet was forced to reverse its decision. It "felt that there could not be that volume of public opinion which it is necessary to have in a democracy behind the Government in a matter so important as this." Sir Samuel Hoare, the Foreign Secretary, resigned because, as he put it, he had not "got the confidence of the great body of opinion in the country, and I feel that it is essential for the Foreign Secretary, more than any other Minister in the country to have behind him the general approval of his fellow-countrymen. I have not got that general approval behind me today, and as soon as I realized that fact, without any prompting, without any suggestion from anyone, I asked the Prime Minister to accept my resignation." In 1940, public opinion compelled the Government under Neville Chamberlain to resign. Again, in 1946 the Government had to concede considerable alterations over the powers and functions of the Steel Board. The dictatorship of the Cabinet is, accordingly, not a matter of reality if government by consent is to be accepted as the formula of democracy. The "public feeling", Laski cogently writes, "is always a factor in determining the breaking-point of members' loyalty to the Cabinet they normally support."<sup>18</sup>

The fate of the Government today as before is normally determined by a general election than by a vote in Parliament. The real function of Parliament is not to govern but to see that it governs according to the wishes of the people. The Cabinet leads Parliament and the country on the clear understanding that the Government is not the master but the servant of the people. It was cogently said by Bagehot that the real function of Parliament was to "express the mind of the people", to "teach the nation what it does not know" and to make the people "hear what we otherwise should not." This Parliament does admirably.

### THE PRIME MINISTER

**Informal basis.** "The Prime Minister", said John Morley, "is the keystone of the Cabinet arch." It would, however, be more accurate, says Jennings, "to describe the Prime Minister as the key-stone of the Constitution." The phrase is as precise as it is picturesque, for, as Jennings again says, "All roads in the Constitution lead to the Prime Minister. From the Prime Minister lead the roads to the Queen, Parliament, the Ministries, the other members of the Commonwealth, even the Church of England and the Courts of law."<sup>19</sup> The Prime Minister is by far the most powerful man in the country. He has been the principal beneficiary of the Cabinet's growth in power. The prerogatives lost by the King have fallen for the most part into the Prime Minister's hands. Those which have not been acquired by him have gone to the Cabinet. But the Prime Minister "is central to its formation, central to its life, and

18. *Ibid.*, p. 96.

19. Jennings, I., *The Queen's Government*, p. 140.

central to its death."<sup>20</sup> He forms it; he can alter it or destroy it. "The Government", as Greaves puts it, "is the master of the country and he is the master of the Government."<sup>21</sup>

And yet the office of the Prime Minister remained unknown to the law until recently. Like the various other institutions of the country, it is the result of mere accident, the child of chance. No statute settled the status of the Prime Minister and his salary is still drawn in part as First Lord of the Treasury, an office bound up with Premiership since 1721.<sup>22</sup> Not until 1878, did the term make its appearance in any public document when Lord Beaconsfield who signed the Treaty of Berlin was referred to in the opening clause as "First Lord of Her Majesty's Treasury, Prime Minister of England." This designation, in the opinion of Sir Sidney Low, was just "a concession to the ignorance of foreigners, who might not have understood the real position of the British plenipotentiary if he had been merely given his official title."<sup>23</sup> It was only in 1906 that the formal position in the order of precedence in State ceremonies was accorded to the office. The Prime Minister was made the fourth subject of the realm, just after the Archbishop of York. The Chequers Estate Act, 1917, referred to "the person holding the office popularly known as Prime Minister" and provided for the use of Chequers by the incumbent of the office.<sup>24</sup> The Ministers of the Crown Act, 1937, recognised, for the first time, the office of the Prime Minister by giving him the salary of £10,000 a year as Prime Minister and First Lord of the Treasury and the Ministerial salaries and Members' Pensions Act, 1965 reiterated it.<sup>25</sup> But these provisions do not confer any powers on the Prime Minister. "These are casual recognitions of a constitutional situation, not the legislation of that situation." The Prime Minister has no legal powers as such. His powers are derived from, and are limited by constitutional conventions. Basically, therefore, it is as true today as when Gladstone said it that "nowhere in the wide world does so great a substance cast so small a shadow; nowhere is there a man who has so much power, with so little to show for it in the way of formal title or prerogative."<sup>26</sup>

**The choice of the Prime Minister.** The formation of a Cabinet de-

20. Laski, H.J., *Parliamentary Government in England*, p. 228.

21. Greaves, H.R.G., *The British Constitution*, pp. 108-09.

22. "The Prime Minister", declared Mr. Balfour, in his speech at Haddington, somewhere in 1902, "has no salary as Prime Minister, his name occurs in no Acts of Parliament, and though holding the most important place in the constitutional hierarchy, he has no place which is recognised by the laws of his country. This is a strange paradox." As quoted in Marriot's *English Political Institutions*, p. 85.

23. Sidney Low, *The Government of England*, p. 156.

24. Chequers is now the official country house of the Prime Minister.

25. "...There shall paid to the person who is Prime Minister and First Lord of the Treasury an annual salary of ten thousand pounds." (Clause 4). The present salary of the Prime Minister is £14,000 a year. The Lord Chancellor, who, as the chief Law Officer, has a salary of £14,500 (£500 more than the Prime Minister). The salaries of the senior Ministers are £8,500, and Junior Ministers £3,750.

26. Quoted in Marriot's *English Political Institutions*, p. 86.

pendes essentially on the Royal choice of a Prime Minister. During the eighteenth century, it frequently happened that there was no proper cohesion within the Cabinet and the royal favour was as necessary as the popular support for the Chief Minister of the Crown. In the early part of the reign of George III an attempt was made to reassert the power of the King, the object being to choose such Ministers as were acceptable to himself. This attempt failed and by 1832 the position of the Prime Minister as the leader of the predominant party in the House of Commons had become recognised.<sup>27</sup>

- It is a well-settled rule now that the Prime Minister must be either a peer or a member of the House of Commons. Every Prime Minister since Sir Robert Walpole has been in one of the Houses. No peer has been Prime Minister since the resignation of Lord Salisbury in 1902. In 1923, the question, whether a peer should be a Prime Minister, was definitely raised. The resignation of Bonar Law left the King with a choice between Lord Curzon and Stanley Baldwin. Long ere this, it had been felt that the Prime Minister must belong to the House which makes and unmakes a government. It had also been asserted that the House of Commons had a right to expect that "its chief representative should be within its sphere of influence and personally accountable to it."<sup>28</sup> Curzon, no doubt, was a peer. But it was not the only issue. The scales were heavily weighted against him because of his personality. Both these factors put together resulted in the selection of Stanley Baldwin, whose Cabinet experience was limited to eight months of Bonar Law Government, as Prime Minister. It is claimed that the decision of the King was finally determined by the advice given by Earl Balfour, although George V had also consulted other prominent Conservatives including Lord Long, Lord Salisbury, and Mr. Amery. Lord Stamfordham on behalf of the King explained to Lord Curzon that "since the Labour Party constituted the official Opposition in the House of Commons and were unrepresented in the House of Lords, the objections to a Prime Minister in the Upper Chamber were insuperable."<sup>29</sup>

A single precedent, however, does not create a rule that a Prime Minister must necessarily be from the House of Commons. But "the selection of a peer," as Keith rightly remarks, "for that office would be abnormal."<sup>30</sup> If the Government owes responsibility to the House of Commons alone, a vote in that House only can compel the government either to resign or to advise a dissolution. Moreover, the Prime Minister is also responsible for the party organization. Party organization matters only in the House of Commons and not in the House of Lords. If, in brief, the Prime Minister is to correctly feel the pulse of Parliament and

27. For the choice of the Prime Minister see chapter III, ante.

28. Herecourt quoted in Jennings' *Cabinet Government*, p. 22.

29. The defects of Lord Curzon's character are immortalised in the lines,  
"George Nathaniel, Viscount Curzon,  
Is really a very popular person."

30. Keith, A.B., *Cabinet System of Government*, p. 29.

31. Jennings, I., *Cabinet Government*, p. 23.

32. Keith, A.B., *Cabinet System of Government*, op. cit., p. 29.

in the ultimate analysis that of the electorate, he can do so in the House of Commons. The precedent that the Prime Minister should belong to the House of Commons must, therefore, be regarded as decisive. Baldwin did not show the slightest desire to continue his Premiership on his transfer to the House of Lords. Professor Keith is of the opinion that had Baldwin decided to continue, "such a decision would certainly have been popular enough in the country after he had established his reputation by his brilliant handling of the abdication of Edward VIII."<sup>33</sup> He holds that "it remains possible that a Prime Minister might retain that office after transfer to the Upper House."<sup>34</sup> But it is doubtful if any Prime Minister will ever venture it now.

**Functions of the Prime Minister.** The Prime Minister, as said before, is the corner-stone of the Constitution. In his hand is the key of Government. His duties are onerous and his authority enormous. Gladstone described these thus: "The Head of the British Government is not a Grand Vizier. He has no powers, properly so called, over his colleagues: on the rare occasions when a Cabinet determines its course by the votes of its members, his vote counts only as one of theirs. But they are appointed and dismissed by the Sovereign on his advice. In a perfectly organised administration as that of Sir Robert Peel in 1841-46, nothing of great importance is matured, or would even be projected, in any department without his personal cognizance; and any weighty business would commonly go to him before being submitted to the Cabinet. He reports to the Sovereign its proceedings, and he also has many audiences of the august occupant of the throne."<sup>35</sup> There is much truth in what Gladstone had said. But nearly all recent developments have tended to increase the authority of the Prime Minister. Indeed, the tendency of the British politics has been to steadily transfer power, not only from the House of Commons to the Cabinet, but within the Cabinet to a small group and from that small group to one man, the Prime Minister."<sup>36</sup> There are and were very many good reasons for this change. The extension of the franchise, the prestige which Gladstone and Disraeli conferred upon the office, give to the Prime Minister position and authority almost comparable with the President of the United States. He is even likened to a dictator, not perhaps the 'ideological dictator' of our times, but the 'benevolent despot' of the eighteenth century history with his all pervasive influence in society. This is, indeed, an exaggeration, although the powers of the Prime Minister are very wide, and his status and prestige enviable.

1. The Prime Minister makes the Government. With the selection of the Prime Minister the essential work of the King is completed, for it rests with the former to make up his list of Ministers and present it for the Royal assent. Technically, the last word rests with the King, because it is he who appoints them. But in practice, the decision belongs

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33. *Ibid.*

34. *Ibid.*

35. Quoted in Keith's *British Cabinet System*, p. 65.

36. Brogan, D.W., and Verney, D.V., *Political Patterns in Today's World*, p. 75.



to the Prime Minister and the Royal assent is more or less a formality. Even Queen Victoria never carried her objections on political grounds.

The Prime Minister in constituting his Government has to consider the claims and views of leading members of his party in both Houses. But, as Amery puts it, "subject to Parliament putting up with his selection of his colleagues and his arrangement of offices, he has a very free hand in shaping his government according to his own view of what is likely to work best and according to his personal preferences." It is for him to decide on the size of the Cabinet and the Ministers to be included in it. In fact, the British Prime Minister has never been under any sort of direct dictation either "from Parliament or from a Party Executive in making his government." He may even select colleagues outside the ranks of his party, or even outside Parliament, if in his judgment a particular person is specially fitted for a particular job. For example, in 1903, Balfour offered the Colonial Office to Lord Milner when he was still the High Commissioner in South Africa and had no parliamentary experience to his credit. MacDonald in 1924, made Lord Chelmsford a non-party ex-Viceroy of India, First Lord of the Admiralty. The most remarkable example is that of Baldwin's appointment in 1924 of Winston Churchill as Chancellor of the Exchequer. The Conservative Party was vehemently opposed to this appointment. But "the appointment was made and the Conservative Party in Parliament, though never quite reconciled to it, grumbled and submitted." Harold Wilson appointed Patrick Gordon-Walker to such an exalted office as the Foreign Secretary, though defeated in the General Election. L.S. Amery while summing up this power of the Prime Minister says, "Few dictators, indeed, enjoy such a measure of autocratic power as is enjoyed by a British Prime Minister while in process of making up his Cabinet."<sup>37</sup>

All the same, many of the choices of the Prime Minister are obvious. He must include among his Ministers men of standing within the Party. The history of how Arthur Henderson became Foreign Secretary in 1929, shows that in a party's government a vital member of the party can always set limits to the discretion a Prime Minister can exercise. He must include 'essential men'. This is perhaps particularly important in face of the diverse elements within the British parties. In 1964 Harold Wilson included in his Cabinet Ministers drawn from various sections of the Labour Party, including 'militants' like Frank Cousins and Barbara Castle. Harold Macmillan included in his Cabinet in 1957 both the left and right wingers like R.A. Butler and Lord Salisbury. The Prime Minister, while composing his Cabinet has often to decide whether a particular extremist in the party would be a threat to party in or out of the Cabinet. He may decide to 'buy silence' from a potential rebel by entrusting him with Ministerial office. This perhaps influenced Attlee's inclusion of Aneurin Bevin in his Cabinet, and Wilson's inclusion of Cousins. Nevertheless, that discretion, as Laski puts it, "is both wide and mysterious."<sup>38</sup> The Prime Minister, cogently remarks Dr. Finer, "has to make the Cabinet

37. Campion and others, *Parliament: A Survey*, p. 63.

38. *Ibid.*

39. *Thoughts on the Constitution*, p. 97.

work; it is his: he must give it cohesion; he must arbitrate differences of view and personality; he must fit all the necessary talents together into a reputable team."<sup>40</sup>

In the allocation of offices, as well, the Prime Minister offers posts in his discretion, although politicians of standing can safely decline what is given, if they command so much support in the party as to make it unwise to dispense with their services. But rarely the Prime Minister's final allocation is rejected, because refusal may mean exclusion from office not merely for the term of that Parliament, but, perhaps, for ever. Sir Robert Horne, who had been a successful President of the Board of Trade and Chancellor of the Exchequer, refused in 1924 the Ministry of Labour that Baldwin offered him and he was never considered again for any future office. "It is only exceptionally forceful or fortunate political rogue elephants," says Amery, "that once extruded from the governing herd, can find their way back into it, as both Mr. Churchill and the present writer (Amery himself) discovered for a decade after 1929."<sup>41</sup>

2. If the machinery of the government is to work efficiently and effectively, then, it is the undoubted right of the Prime Minister to appoint, reshuffle, or dismiss his colleagues. He is free, in the exercise of his impartial judgment, to make what appointments may seem good to him. He must also, from time to time, review the allocation of offices among his various colleagues and consider whether that allocation still remains the best that can be effected. Both as captain of the team and at the helm of administration, it is his duty to request any of his colleagues, whose presence in the Ministry is, in his opinion or judgment, prejudicial to the efficiency, integrity or policy of the government, to resign.

The Prime Minister can also advise the Sovereign to dismiss a Minister. According to law a Minister holds office at the pleasure of the Crown and, accordingly, he can be dismissed whenever it pleases His Majesty. It is now a well-established custom that the prerogative of dismissal is exercised solely on the advice of the Prime Minister. It is, however, doubtful if ever a Prime Minister would advise dismissal except in very extreme cases. All the same, the right of the Prime Minister is there. Sir Robert Peel, while referring to this right of the Prime Minister, said that, "under all ordinary circumstances if there were a serious difference of opinion between the Prime Minister and one of his colleagues, and that difference could not be reconciled by an amicable understanding, the result would be the retirement of the colleague, not of the Prime Minister."<sup>42</sup> But such a crisis would never come. In Britain "there is a tradition—a kind of public school fiction—that no minister desires office, but that he is prepared to carry on for the public good."<sup>43</sup> This tradition implies a duty to resign when a hint is given. There are many instances of such resignations, Mr. Lowe and Mr. Ayrton resigned in 1873, Coloney Seeley in 1914, and Mr. Austen Chamberlain in 1917, Mr. Montagu in 1924, and Sir Samuel Hoare in 1935.

40. *Governments of the Greater European Powers*, p. 144.

41. Amery, L.S., *Thoughts on the Constitution*, p. 64.

42. Quoted in Keith's *British Cabinet System*, pp. 82-83.

43. Jennings, I., *Cabinet Government*, p. 197.

To sum up, it is a purely personal authority of the Prime Minister to ask a colleague to resign or to accept another office. Removal from office is always a stronger step and it may have its repercussions in the House of Commons and in the constituencies.<sup>44</sup> It may even lead to the breaking up of the Cabinet. Moreover, it is a declaration of weakness and defective judgment in placing the Minister in office, or suggests error of policy on the part of the Prime Minister. No Prime Minister will, therefore, go to the extreme of dismissing a colleague. There are other polite methods of doing things. The Prime Minister can rid himself of an undesired colleague by a general reshuffle of the Ministry and it is the best way of avoiding a slight on a person who may have considerable parliamentary and popular support.<sup>45</sup> The recent tendency, begun by Churchill and continued by Attlee, has been to make changes more frequently. And to remain still more dignified the Prime Minister may "elevate" him and so get rid of an offending colleague. This is one of the chief, though least used, arguments for the retention of the House of Lords.

3. Then, the Prime Minister is the leader of his party. The general election is in reality the election of a Prime Minister. The wavering voters who decide elections support neither a party nor a policy. They support a leader. The Prime Minister has, therefore, to give effective leadership. He must feel the pulse of the people and try to know true and genuine public opinion on matters which confront the nation. He must also guide public opinion by receiving deputations, and discuss issues by public speech at party conferences, and on other important occasions which demand proper attention. He should also give the Opposition a feeling that the Government will not ride rough shod over the wishes of the minorities. For all this, he needs strength of character, the gift of leadership, patience, tact and a devotion to principles. He must also guide and inspire those he has chosen as Ministers and should enjoy the confidence of a majority in the House of Commons. In short, the Prime Minister must be a capable evaluator of public opinion and at the same time an expert in propaganda. He must know what to say, when to say, and when not to say anything.

Jennings gives a graphic picture of the qualities which a Prime Minister should possess. He says, "Since his personality and prestige play a considerable part in moulding public opinion, he ought to have something of the popular appeal of a film actor and he must take some care over his make-up—like Mr. Gladstone with his collars, Mr. Lloyd George with his hair, Mr. Baldwin with his pipes, and Mr. Churchill with his cigars. Unlike a film actor, however, he ought to be a good inventor of

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44. Lord Salisbury dared not dismiss his Home Secretary, Mr. Mathews, in 1890. In this connection he wrote to the Queen: "At present Lord Salisbury does not think that a bare dismissal would be admissible. It would be looked upon as very harsh and beget numberless intrigues.....There is no instance of dismissal, and it would require some open and palpable error to justify it."

45. In September 1947, on rearranging the government, Attlee asked Greenwood, one of his senior colleagues, to retire on grounds of age. Some quarters hold the opinion that Attlee exercised a clear power of dismissal.

speeches as well as a good orator. Even more important, perhaps, is his microphone manner, for few attend meetings but millions look to broadcasts. Finally, it is essential that he should be able to retain the loyalties of his political friends, and it helps considerably if he remembers their names, asks the right questions about their families, realizes when sympathy or congratulation is required, and generally is good mixer with exactly the right measure of condescension."<sup>40</sup>

A party which has not a leader cannot function. Its condition, in fact, becomes hopelessly chaotic. In the same way, a party with a weak leader is in a weak position. It is not possible for it to attract popular support and be in a position to form government. It has been claimed that in 1964 and 1966 the Labour Party won and the Conservatives lost the elections largely because of the impression, made by their leaders. During the winter of 1965-66 the Rhodesian crisis had raised Wilson's stature as a Prime Minister, whereas by March 1966 Heath had been leader of the Conservative Party for only seven months, "and was still very much the 'new boy'." In the Conservative Party the leader is the party. He controls the party organisation and its funds. He also carries with him disciplinary authority and uses this weapon of decisive power against anyone who dare challenge his authority. The Chairman and Leader of the Labour Parliamentary Party is recognised as the Leader of the Labour Party not only in Parliament but also in the country; he is *ex officio* a member of the National Executive Committee of the Labour Party and he is free to attend any of the Sub-Committees of the Executive as an *ex officio* member if and when he wishes to do so. In fact, the prestige of the Prime Minister and the party are closely intertwined. It is the party which makes the leader, but once the leader has been elected the party support is concentrated in the leader. The majority which the party receives at the polls is a party majority, but it owes its allegiance to the leader and it is spoken of as his party. Party prestige with the electorate demands it and this is the real strength of the Prime Minister. A Prime Minister must, therefore, strive for the unity of his party and his personality should be capable of inspiring loyalty in his colleagues and trust in the country.

4. The Prime Minister is the Chairman of the Cabinet. He must pick a team and keep it as a team, and, accordingly, the Prime Minister's task as Chairman of Cabinet meetings, in which Government policy is hammered into shape and decisions taken, is of crucial importance. The Prime Minister is leader of the Party and his colleagues in the Cabinet owe him a personal as well as a party allegiance. He controls agenda and it is for him to accept or reject proposals for discussion submitted by Ministers. The Ministers always consult him before important proposals are put forward and his support solicited. It is also well recognized that in Britain and the Anglo-Saxon countries generally "the Chairman of any committee attracts a special kind of loyalty engendered by the vague feeling that business is expedited and improved by order and that one must be prepared to suffer the Chairman's ruling for the sake

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40. *Cabinet Government*, *op. cit.*, p. 163.



of the collective enterprise." A casting vote, too, is inherent in the Chairman's. All this gives pre-eminent authority to the Prime Minister as Chairman of the Cabinet. But Cabinet in Britain does not take decisions by votes now.<sup>47</sup> Since votes are not taken the Prime Minister's power to sum up in Cabinet discussions is very important. Jennings says, "A team of politicians is probably the most difficult to handle because, though each of them knows that his political future depends on the success of the team, there will usually be a few who are anxious to become captain."<sup>48</sup> The management of the Cabinet is thus certainly the Prime Minister's most difficult function "because it compels him to take difficult decisions not only on the substance but also on the tactics." The Prime Minister may seek to persuade a minority or convince a majority. He may feel it necessary sometimes to give way to the majority even when he does not agree or try to force his own opinion on the Cabinet as Gladstone almost always did. But in the latter case the Prime Minister must run the risk of splitting the party. He must reconcile the differences of opinion between Ministers. If he fails, he may shatter the Government and the Party and "leave his leadership self-condemned, as Balfour's was by 1905."<sup>49</sup>

Some Prime Ministers had really been good Chairmen. They had always striven to see the main issues and the questions of principle. By dint of their commonsense and good judgment they guided the discussions towards a definite conclusion ensuring thereby harmonious and efficient teamwork. Lord Samuel has given an excellent description of Ramsay MacDonald as Chairman of the Cabinet. He says, MacDonald "was a good Chairman of Cabinet, carefully preparing his material beforehand, conciliatory in manner and resourceful. In the conduct of a Cabinet, when a knot or a tangle begins to appear, the important thing is for the Prime Minister not to let it be drawn tight; so long as it is kept loose it may still be unravelled. MacDonald was skilful in such a situation — and there were many."<sup>50</sup>

5. As the guide of the Cabinet the Prime Minister is the chief co-ordinator of the policies of the several Ministers and Ministries. He, more than anyone else, must endeavour to see the work of the Government as a whole and bring the variety of Government activities into reasonable

47. Finer, H., *The Theory and Practice of Modern Government* (1954), p. 592.

48. The decision to arrest Dillon in 1881 was carried by Gladstone's castling vote.

49. The practice of taking votes and deciding by a majority did not originate until 1880. The question of the removal of the Duke of Wellington's statue from Hyde Park in 1883 was decided by a show of hands. But votes are not taken now. "Now this is not done by voting for the holding up of hands or the calling of 'Aye' and 'No'," says Herbert Morrison, "would not only be regarded as a breach of Cabinet decorum but would also be felt to symbolize and demonstrate, nakedly and unashamedly, a lack of Cabinet unity and solidarity which is always deprecated." *Government and Parliament*, op. cit., p. 5.

50. Jennings, I., *The Queen's Government*, p. 137.

51. *Ibid.*, p. 138.

52. Brasher, N.H., *Studies in British Government*, p. 39.

53. Quoted by Jennings, *Cabinet Government*, op. cit., pp. 176-77.

relationship with one another. He is, in fact, the Manager-in-Chief of the Government's business. Sir Robert Peel is universally acclaimed the model Prime Minister. He supervised and was genuinely familiar with the business of each department. Though he had an able Chancellor of the Exchequer, in whom he had full confidence, he himself introduced the budgets in 1842 and 1845. The War Office, the Admiralty, the Foreign Office, the administration of India and Ireland felt his personal influence as much as the Treasury and Board of Trade.

Such close attention is no longer possible now. The functions of Government have expanded so widely and its activities have become so complex that even if a Prime Minister is to regard Sir Robert Peel as a model and intervene when he considers it necessary, the result will be equally disastrous to him and to the country. But the Prime Minister must keep an eye on what goes on in the Departments and must know enough to be ready to intervene if he apprehends that something is going wrong. Usually, he exercises supervision through the eagerness of the Ministers to consult him, but he must have the ability to give sound advice almost on the spur of the moment. "If he is intellectually lazy like Baldwin or difficult of approach like MacDonald, he cannot exercise these functions properly."<sup>54</sup>

The work of co-ordination is done by the various Committees of the Cabinet, but the Prime Minister is, as Herbert Morrison says, "eminently a co-ordinating Minister." He decides what Cabinet Committees there will be, appoint the Chairmen and preside over some Committees himself. Attlee was Chairman of the Committee for Commonwealth Affairs, Far Eastern Affairs, Economic Policy, Housing, National Health Service, Food and Fuel, and Indian Affairs, during the two Ministries, 1945-51. The Prime Minister must also keep in touch with the work of the other Cabinet Committees, where he does not preside himself, and advise and guide the Chairmen of these Committees. He can do it more admirably and effectively since, of modern British leaders, Harold Wilson, Sir Alec Douglas-Home, Harold Macmillan, Sir Anthony Eden, Attlee, and Sir Winston Churchill, all had ministerial experience before they became Prime Ministers.

The Prime Minister must be in the closest contact with the Foreign Secretary and the Chancellor of the Exchequer. For the rest, his door must ever be open, "his mind clear and his judgment rapid and efficient." Foreign affairs are always on the agenda and decisions of great importance demand speedy determination. There may be no time to summon a meeting of the Cabinet. In such cases the Prime Minister and the Foreign Secretary consult each other and a decision is reached. The Prime Minister may even man the entire policy. Neville Chamberlain adopted a foreign policy of his own, forced it on the Foreign Office and compelled the Foreign Secretary, Anthony Eden, to resign. But foreign policy cannot be divorced from the defence and trade policy. Chamberlain used the Principal Economic Adviser to the Government as his principal assistant in the conduct of his foreign policy. Churchill's task was fundamentally different. In war-time there is one supreme function of the Govern-

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54. Jennings, I., *The Queen's Government*, p. 139.

ment and it is to win the war, and it must inevitably be the Prime Minister's personal concern. All else is subordinated to it. In the main the nature of international relations today, with summit meetings of Heads of States and the need for speedy military decisions in an atomic age, forces the direct and personal involvement of the Prime Minister in foreign affairs. The effect of two Wars on the machinery of Cabinet government was to concentrate power in the hands of the Prime Minister and his close advisers. This increased authority has been retained to some extent in peacetimes too.

The Prime Minister's responsibilities for the co-ordination of the administration are further indicated by the fact that he leads the civil service establishment as the First Lord of the Treasury. Since 1920 the Prime Minister's consent has been required for the appointment of the highest staff officers, including permanent heads, deputy heads, principal financial officers and principal establishment officers of the Departments.

6. The Prime Minister is the real leader of the House of Commons. Now the tendency is that he designates another colleague as Leader of the House and delegates to him the specific function of arranging the business of the House, but this delegation cannot deprive the Prime Minister of his function as leader of the Government. The problem is not," as Jennings says, "that the Government runs the risk of defeat - for unless the party breaks up, or has no majority, or has a very small majority, the Government cannot be defeated - but that it runs the risk of being worsted in the argument. The House is 'the finest platform in Europe', the only debating society in Britain whose debates are read, or at least glanced at, by millions. If the Government is to keep its majority in the country, it must consistently make a good case."<sup>55</sup> All principal announcements of policy and business are made by the Prime Minister and all questions on non-departmental affairs and upon critical issues are addressed to him. He initiates or intervenes in debates of general importance, such as those on defence, foreign affairs, and domestic issues of primary character. In fact, the House always looks to him as the fountain of policy. He is, also, recognised to have an immediate authority to correct what he may consider the errors of omission and commission of the colleagues.

The party Whips in the House are under the Prime Minister's direct supervision and through them he issues orders to the rank and file of the party. He assists the Speaker and the Chairman in maintaining order and decorum in the House. In brief, the House comes to a large extent under the control of the Prime Minister. The management of the Government's majority and the maintenance of smooth relations with the Opposition depend upon his inspiring lead and parliamentary skill. The Prime Minister ought to be what is called 'good House of Commons' man', "a man who observes its traditions and knows how to handle it, a man like Baldwin or Churchill."<sup>57</sup>

55. Asquith separated the offices of Prime Minister and Leader of the House of Commons in 1915. Since 1945 no Prime Minister has attempted to combine the two roles.

56. Jennings, I., *The Queen's Government*, p. 139.

57. *Ibid.*

7. The Prime Minister wields the supreme power of dissolution and, thus, "holds the security of Members on both sides of the gangway in the House in his hands." It means that the members of the House of Commons hold their seats at the mercy of the Prime Minister's use of this "terrifying power," for it means new elections without certainty that they will be elected. "Men do not like to run the risks," rightly observes Byrum Carter, "which are involved in this process if little is to be gained from incurring the danger."<sup>58</sup> The threat of dissolution, thus, hangs over their heads, "restraining them, restricting their independence, leading them into the government's body."<sup>59</sup>

There is some divergence of opinion among the authorities on the question whether the King can refuse a dissolution to a Prime Minister who asks for it. Winston Churchill stated during the course of the debate on the Education Bill in March, 1944, that although advice to dissolve comes from the Prime Minister, it is only advice and may, in exceptional circumstances, be disregarded.<sup>60</sup> What those exceptional circumstances can be, have been explained by Sir David Keir in his **Constitutional History of Modern Britain**. He writes: "The King's prerogative, however, circumscribed by convention, must always retain its historic character as a residue of discretionary authority to be employed for the public good. It is the last resource provided by the Constitution to guarantee its own working."<sup>61</sup> It is, however, difficult to imagine circumstances in which the King could refuse dissolution to a Prime Minister. Laski has clearly stated that this part of the royal prerogative is as obsolete as the royal veto power.<sup>62</sup> If the King refused a dissolution to a Prime Minister, he would be substituting his judgment about the need for and timing of a general election for that of his Chief Minister. The Prime Minister, under such circumstances, will presumably resign, though he had with him a clear majority in the House of Commons. When the Prime Minister resigns, the King will naturally send for the Leader of the Opposition and commission him to form the Government. Such a Government cannot continue in office unless it is supported by the House of Commons. As there is not a majority for the new Government, the King will be compelled to dissolve Parliament and general elections held. But the King could hardly grant a dissolution to the second Prime Minister after refusing to the first. If he does, and he must do it, his neutral position will be fatally compromised. Jennings rightly concludes that "thus, while the King's personal prerogative is maintained in theory, it can hardly be exercised in practice."<sup>63</sup> During the last hundred years there has been no instance of a refusal of a dissolution by the King when advised.

The right to advise a dissolution was long assumed to belong to the Cabinet. The decision to dissolve now rests with the Prime Minister and

58. Carter, Byrum E., *The Office of Prime Minister*, p. 274.

59. *Ibid.*, p. 275.

60. Keith, *The British Cabinet System*, p. 301. Also refer to Asquith's affirmation in 1924. But Asquith had a design to put MacDonald into difficulty while in office, so that the King would turn to him to form the Ministry.

61. P. 491.

62. *Reflections on the Constitution*, op. cit., p. 72.

63. Jennings, I., *Cabinet Government*, op. cit., p. 395.



this has been done since 1918. In fact, since that time no decision to dissolve "has been brought before the Cabinet, and Prime Ministers now assume a right to tender advice to dissolve on their own account."<sup>64</sup> This aspect was further explained by Sir John Simon in 1935. He wrote that "the decision whether there shall be an immediate general election, and, if so, on what date the country shall go to the polls, rests with the Prime Minister, and until the Prime Minister has decided, all anticipations are without authority."<sup>65</sup> Keith is of the opinion that the Cabinet should be consulted and decide the issue of dissolution and if the older practice has been departed from, to some degree, it is no ground that further departure should take place. "It is derogatory," he says, "to the dignity of other Cabinet Ministers, and tends to make them appear in the public eye the servants, rather than equals, of the Prime Minister. It runs counter to the best aspects of the Constitution, the doctrine of collective responsibility and deliberation, and it presumes that for some reason or other, in this vital issue, the Prime Minister has pre-eminence in other issues denied to him."<sup>66</sup> Lord Morrison said that the presence of members of the Secretariat at Cabinet meetings precludes the discussion of such matters as the political factors involved in a dissolution.<sup>67</sup> But in 1966 and on other past occasions, informal discussions took place between the Prime Minister and some of his colleagues.

8. The Prime Minister is the only channel of communication with the Crown on matters of public concern, although there are many examples of the Crown's connection with individual Ministers "behind the back of the Prime Minister."<sup>68</sup> What it is meant to emphasise here is that apart from the Cabinet conclusions, which are drawn by the Cabinet Secretariat and a copy sent to him, the King has no official means of knowing of the Cabinet discussions, except what the Prime Minister may choose to tell him. This account "is not revised by his colleagues." He is also the chief adviser of the Sovereign and in emergencies the Monarch will first consult the Prime Minister. The Prime Minister advises the King on royal activities of an official character such as a visit to a foreign country, or tour of a part of the Kingdom or empire or Commonwealth countries. Stanley Baldwin regarded it both a duty and right to offer counsel to Edward VIII on his contemplated marriage with Mrs. Simpson. He consulted the Cabinet only at that stage when differences of an irreconcilable nature had developed between him and the King. The Prime Minister, then, became "as usual the link between the King and Cabinet interpreting the opinions and decisions of one to the other."<sup>69</sup>

9. The Prime Minister has wide powers of patronage, including the appointment and dismissal of Ministers. In 1962, Harold Macmillan dismissed a third of his Cabinet. In an age "when professional politicians predominate, the Prime Minister's ability to affect directly the career

64. Keith, *The British Cabinet System*, p. 304.

65. *Ibid.*

66. *Ibid.*, p. 305.

67. Morrison, Lord, *Government and Parliament*, p. 24.

68. Finer, *The Theory and Practice of Modern Government*, p. 592.

69. Greaves, H.R.G., *The British Constitution*, p. 110.

of ambitious M.Ps. inevitably gives him considerable power and authority." The distribution of general patronage through the Honours List gives the Prime Minister an influence in many sectors of national life. Though Lloyd George's abuse of patronage discredited the whole system, and since 1922, a Committee of the Privy Council has vetted all proposed awards, but no grant is made without the Prime Minister's recommendation. The patronage, therefore, remains a valuable political weapon in the hands of the Prime Minister.

10. The Prime Minister's power of appointment is not as extensive as that of the President of the United States, but it is considerable nevertheless. All Ministerial positions are his gifts. So are the allocation of Ministerial offices. He will either himself select new occupants or be consulted by the Minister concerned when there are vacancies in the chief diplomatic, military, judicial and ecclesiastical offices. Though Departmental Ministers have particular responsibility for their departmental officials, the Civil Service as a whole is controlled by the Treasury under the direction of the Prime Minister as First Lord. The Permanent Secretary of the Treasury advises the Prime Minister and he himself makes appointments of the Permanent Secretary or the Permanent Under-Secretary, Deputy Secretary or the Deputy Under-Secretary and the principal establishment officers in each of the Government Departments. Thus, as with the Ministerial hierarchy, the Prime Minister can be seen as head of the permanent administrative structure. Then, there are a good many special appointments in which the Prime Minister is interested—Governors-General in the Dominions, High Commissioners in the Commonwealth countries, British representatives to important international organizations, and Board members of nationalised industries. He will certainly be consulted about many of these, and frequently the choice is his.

The Prime Minister also recommends to the Sovereign for the appointment of Church of England Archbishops, bishops and certain other senior clergy, as well as for appointments to high judicial offices, such as Lords of Appeal in Ordinary, Lord Chief Justice and Lord Justices of Appeal. He also advises the Crown on appointment of Privy Councillors, Lord Lieutenants of countries<sup>70</sup> and certain civil appointments, such as Lord High Commissioner of the General Assembly of the Church of Scotland, Poet Laureate, Constable of the Tower and some University appointments which are in the gift of the Crown.

11. The Prime Minister may occasionally attend and participate in international conferences or meetings. Lord Beaconsfield attended the Congress of Berlin. Lloyd George participated in the Peace Conference at Paris, and Neville Chamberlain led the meetings in Germany preceding the Munich Agreement. Churchill attained new heights during the Second World War in his six meetings with President Roosevelt and two with Stalin. Ramsay MacDonald personally discussed with Mr. Dawes in 1929 on the most important phase of Anglo-American relations. He also went to the United States to confer with President Hoover on the limitation of armaments.

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70. The office of the Lord Lieutenant of the country was first created in the sixteenth century. Its holder was chief among the country justices and commander of the county militia.

12. He conducts relations in matters of Cabinet rank with the Commonwealth countries. A classical example was afforded by the negotiations over the mode in which effect was to be given to the abdication of King Edward VIII.

13. The Prime Minister acts, though infrequently, either without authorization by the Cabinet or even against previously determined Cabinet policy. Lloyd George decided upon his own initiative to call a session of the Imperial War Conference and announced it in Parliament without receiving the proper authorization of the Cabinet. Stanley Baldwin raised in 1923 the issue of protection without previously consulting his Cabinet. Baldwin also took the initial steps in the action which led to abdication of Edward VIII without previously consulting his Cabinet. In the Second World War, Winston Churchill made a speech on 22nd June 1941, offering all possible assistance to the Soviet Union without consulting the Cabinet and he added, "nor was it necessary."<sup>71</sup>

Whenever the Prime Minister acts as such, the Cabinet is rather in a difficult position, for it must either accept the policy enunciated by the Prime Minister or run the risk of losing its leader "unless it is possible to find a compromise which will save the prestige of both." But such a course of action, as said before, is unusual as it endangers Cabinet unity and at the same time the security of the Prime Minister.

**The Prime Minister's Position.** Such is the magnitude of the powers of the Prime Minister. But what is his position as compared with his colleagues? Lord Morley described him as *primus inter pares*. He said, "Although in Cabinet all its members stand on an equal footing, speak with equal voice, and, on the rare occasions when a division is taken, are counted on the fraternal principle of one man and one vote, yet the head of the Cabinet is *primus inter pares*, and occupies a position which so long as it lasts, is one of exceptional and peculiar authority." Herbert Morrison also holds the same estimation of the position of the Prime Minister. He says, "As the head of the Government he (Prime Minister) is *primus inter pares*. But it is today far too modest an appreciation of the Prime Minister's position."<sup>72</sup> Ramsay Muir, a contemporary writer, considers such a description as "nonsense" when "applied to a potentate who appoints and can dismiss his colleagues. He is, in fact, though not in law, the working head of the State, endowed with such a plenitude of power as no other constitutional ruler in the world possesses, not even the President of the United States."<sup>73</sup> Another writer says if one must have a Latin phrase, a better one, no doubt, is Sir William Vernor Harcourt's *inter stellas luna minores*—a moon among lesser stars—although even this may not really be strong enough."<sup>74</sup> Jennings says that the Prime Minister is not merely *primus inter pares*. He is not even *inter stellas luna minores*. "He is, rather, a sun around which planets revolve."<sup>75</sup>

71. Winston Churchill, *The Grand Alliance*, p. 370.

72. Morrison, H., *Government and Parliament*, p. 97.

73. Ramsay Muir, *How Britain is Governed*, op. cit., p. 83.

74. As quoted in Ogg and Zink, *Modern Foreign Governments*, op. cit., p. 90.

75. Jennings, I., *Cabinet Government*, op. cit., p. 183.

The earlier conception of the Prime Minister as first among equals, *primus inter pares*, does not reflect the real difference in status and responsibility between the person who holds the first position, and is the Prime Minister, and even his senior colleagues. Sir Winston Churchill clearly expressed this distinction and it bespeaks of the Prime Minister *vis-a-vis* his Cabinet colleagues. He says, "In any sphere of action there can be no comparison between the positions of number one and number two, three, or four. The duties and problems of all persons other than the number one are quite different and in many ways more difficult. It is always a misfortune when number two or three has to initiate a dominant plan or policy. He has to consider not only the merits of the policy, but the mind of his chief; not only what to advise, but what it is proper for him in his station to advise; not only what to do, but how to get it agreed, and how to get it done. Moreover, number two or three will have to reckon with numbers four, five, and six, or may be some bright outsider, number twenty...."

"At the top there are great simplifications. An accepted leader has only to be sure of what it is best to do, or at least to have made up his mind about it. The loyalties which centre upon number one are enormous. If he trips, he must be sustained. If he makes mistakes they must be covered. If he sleeps, he must not be wantonly disturbed...." Among his colleagues the Prime Minister has never been the first among equals at any time since Gladstone became Prime Minister in 1868. If he is described first among equals even now, it is simply to stress the democratic nature of his position. The Prime Minister is really a sun around which planets revolve and in the blaze of the sun the planets even lose their identity. The actual power of the Prime Minister, however, varies according to his personality and the extent to which he is supported by his party. "But within the limits of prudence and commonsense", as Byrum Carter observes, "he may exercise a directing authority which is the envy of political leaders of other states."<sup>77</sup>

At the root of the primacy of the Prime Minister is the fact that since the Reform Act of 1867, the elections have become the issues of personality. Many members of the electorate equate the party with its leader. The party leader has become the hub of the party's appeal and the centre of the party loyalty. A general election is now a plebiscite between alternative Prime Ministers. Gladstone, while referring to the election of 1857, rightly said, "it is not an election like that of 1784, when Pitt appealed on the question whether the Crown should be slave of an oligarchic faction, nor like that of 1831, when Grey sought a judgment on reform, nor like that of 1852, when the issue was the expiring controversy of protection. The country was to decide not upon the Canton river, but whether it would or would not have Palmerston for Prime Minister." Again, in the elections of 1880, Gladstone, in his famous Midlothian campaign, carried a relentless criticism of Beaconsfield Government. The only question which electors asked themselves was whether they wished to be governed by Lord Beaconsfield or Gladstone, though the latter was no longer the

76. Winston Churchill, *Their Finest Hour*, p. 15.

77. Carter, A.E., *The Office of the Prime Minister*, p. 334.



leader of his party. It was the personal triumph of Gladstone and he became Prime Minister by the choice of the people. The general elections of 1945 was a personal appeal to the electors by Churchill to re-elect him. The Conservative Party hoped to "cash in" on his personal popularity. Every boarding had a picture of the Prime Minister headed by the slogan "Help him finish the job" and underneath in comparatively small letters was the almost irrelevant injunction to "vote for the Bloggs."

The Conservative Party did not even issue its manifesto. But Churchill issued one of his own and it began appropriately with the word "I". Candidates, too, ignored their party labels and called themselves "Churchill candidates." The newspapers played their own part by emphasising that the issue lay between "Churchill or Chaos" or "Churenill and Laski, Mr. Harold Laski being the current bogymen."<sup>78</sup> The electorate was, in other words, asked to choose for or against Churchill and they chose against.

The object of this sort of electioneering, "necessarily, is to give the Prime Minister a national standing which no colleague can rival so long as he remains the Prime Minister."<sup>79</sup> It strengthens his hands against his colleagues in the Government and Parliament. And, then, he appoints and dismisses his colleagues. He can shuffle his pack as and when he pleases. He alone determines whether and when Parliament shall be dissolved. In the inter-departmental disputes he is the arbitrator and if these disputes become a Cabinet question, his voice carries weight. To defy authority of the Prime Minister, therefore, and to challenge his position is suicidal to the political ambitions of a Minister unless the Prime Minister "has handled his job so badly that there is a widespread feeling" of his unfitness for it.

But the Prime Minister's position is bound up with the party system. His prestige, no doubt, is one of the elements that make for the success of the party. He is also responsible for party cohesion. But, without his party, he is nothing. He goes to the electorate not as an individual, but as a leader of the party. Whatever he is and whatever he can claim to be is due to what the party has made him. So long as he retains the hold of his party, "he is able, within limits, to dictate his policy." Once the party disowns him, he meets the fate of Ramsay MacDonald. Sir Robert Peel lost his party in 1845 and it ended his career. Gladstone returned to power in 1892, because he had never left his position in the party. The Prime Minister's power in office, thus, "depends in part on his personality, in part on his own prestige, and in part upon his party support." Defined powers legally conferred do not determine the position of the incumbent. "The office is," as Jennings says, "necessarily what the holder chooses to make it and what other ministers allow him to make of it. His authority is great, but his authority is a matter of influence in the context of the party structure. If he is a popular and dynamic figure, it is difficult for his colleagues to oppose him. Even the resignation of a leading Minister, as that of Lord Salisbury in 1957, and of Thorneycroft, Powell and Birch in 1958, may not unbinge the Prime Min-

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78. *Ibid.*, p. 186.

79. Laski, H.J., *Parliamentary Government in England*, p. 241.

ister from his position. But he can be forced from office when faced with a substantial discontent in his Cabinet or his party. The resignations of Asquith in 1916, Lloyd George in 1922, MacDonald in 1935, and Chamberlain in 1940 came primarily as a result of discontent within the Government. Anthony Eden in 1957 and Harold Macmillan in 1963 were widely criticised within the party before illness brought their resignations.

**Comparison with the American Presidency.** The office of the Prime Minister is very often compared with the Presidency of the United States of America. The comparison is significant, for both resemble in many respects. But it would be too much, as Laski says, "to say that the position of a modern Prime Minister has approximated to that of an American President."<sup>80</sup> Even Churchill who attained new heights of power and authority had not the personal powers of the President of the United States. Harry Hopkins, in a report to President Roosevelt, wrote "Your 'former naval person' is not only the Prime Minister, he is the directing force behind the strategy and the conduct of war in all its essentials. He has an amazing hold on the British people of all classes and groups. He has particular strength both with the military establishments and the working people."<sup>81</sup> Churchill, too, admitted that "never did a British Prime Minister receive from Cabinet colleagues the loyal and true aid which I enjoyed during the five years from these men of all parties in the State. Parliament, while maintaining free and active criticism, gave continuous, overwhelming support to all measures proposed by the Government, and the nation was united and ardent as never before."<sup>82</sup> But Churchill accomplished all this because he had a united Cabinet, a united Parliament, and a united people behind him. Both the Cabinet and Parliament supported his policy. He could not act without his Cabinet as President Roosevelt could do. To illustrate the difference in the position and powers of the President of the United States and the British Prime Minister, Jennings says that "the President pledged the United States in the realization of the objectives of the Atlantic Charter while the War Cabinet, not the Prime Minister, pledged the United Kingdom."<sup>83</sup>

This is the essence of the difference between the authority of a Prime Minister and a President of the United States. Churchill had to observe the constitutional forms by seeking the approval of the Cabinet and the Cabinet was dependent upon the unswerving support of the House of Commons. The Prime Minister is not the master in his Cabinet as the American President is in his. The Cabinet of the President is essentially a group of advisers appointed by and responsible to him. They are bound to give advice to the President should he ask for it, but have no authority to it. They do meet regularly and consider what the President likes to put before them, but they have no corporate rights which are recognised by custom. The difference between the British Cabinet and the American becomes clear by these two anecdotes. Melbourne ending the discussion

80. *Ibid.*

81. Quoted in Jennings' *Cabinet Government*, p. 181.

82. Churchill, W., *The Second World War*, Vol. II, p. 24.

83. Jennings, I., *Cabinet Government*, p. 181.

on Corn Laws said, "It does not matter what we say, but we must all say the same story." Lincoln, on the other hand, could say on putting the question in his Cabinet, "Noes seven, ayes one, the ayes have it."

The Prime Minister can less easily brush aside the opinions of his colleagues. His powers are large, but he has to secure the collaboration of his colleagues. His Cabinet consists of the party's most important leaders. They all share publicity with him to a greater extent. Sometimes one of them may even attract greater public interest and popular enthusiasm. Then, the Prime Minister is still officially not the first among equals in his Cabinet. His status must not, therefore, be thought of involving his superiority to and independence of his Cabinet, though in time of crisis or when he happens to be a man of outstanding personality, he may become the complete master of the situation. All the same, the Prime Minister "is solid with his colleagues; the party has cemented them together as a multiple but a corporate executive."<sup>81</sup> Churchill had such effective power that no British Prime Minister had had before. But the War Cabinet or Parliament could have ejected him if he would have lost the confidence of either of the two. The thought, therefore, that the Prime Minister stands high above and aloof from his colleagues and that he orders and decides "top policy," like the President of the United States is, according to Dr. Finer, "ridiculous; it is wishful thinking; it is misleading for Britain and for the United States." Even Harry Hopkins, who had reported in 1941 to President Roosevelt that "Churchill is the government in the every sense of the word,"<sup>82</sup> could find the difference between the authority of the Prime Minister and the President of the United States when he observed during three days of the Conference in the Atlantic that Churchill was constantly reporting and consulting the War Cabinet.<sup>83</sup> Whereas Roosevelt took all the decisions by himself, subject only to the advice of his immediate and self-selected entourage, which advice he could accept or reject, Churchill could do so only by inspiring those whom he had chosen as Ministers, and carrying them with him.

In his recent book, *The Office of Prime Minister*, Byrum E. Carter observes, "Comparisons between unlike systems are always inherently misleading, but it does seem safe to say that the power of the Prime Minister and his senior colleagues is substantially greater than that of the American President."<sup>84</sup> Carter assigns two reasons for his conclusion. First, the American President has no power to dissolve Congress and it sits for its specified period of time in the Constitution. The Congress may and it very often does drastically amend proposals which emanate from the administration. The President has, no doubt, certain means by which he can attempt legislation, "but they are not comparable in effectiveness to those wielded by the Prime Minister."<sup>85</sup> Secondly, the President is the head of a party, "but it is a party in which the central organisation has

81. Finer, H., *The Theory and Practice of Modern Government*, op. cit., p. 593.

82. Sherwood, Robert E. Roosevelt and Hopkins, p. 243.

83. More than thirty communications passed between Churchill and Clement Attlee, the Lord Privy Seal.

84. Carter, B.E., *The Office of the Prime Minister*, p. 336.

85. *Ibid.*

little control."<sup>89</sup> The real basis of party organisation in the United States has historically rested in the States and it is difficult for the central party to exercise discipline. The Prime Minister, on the other hand, heads a disciplined party and since general elections are now fought on personalities this "inevitably enables the party leader to extend his power against that of the rank and file members of the party, and even as against those individuals who exercise substantial intra-party influences themselves."<sup>90</sup> Summing up the difference in the powers and position of the British Prime Minister and the American President, Punnett says, "Certainly, the Prime Minister's power is greater than the authority of the President within the United States system, where the federal nature of the Constitution and the separation of powers raise barriers to the President's authority which do not exist for Prime Minister in Britain."<sup>91</sup> In Britain, the unitary nature of the Constitution, and the unification rather than separation of powers make the authority of the Prime Minister, no matter how much he may be limited by the Cabinet, necessarily greater than that of the American President. But the President, wrote Woodrow Wilson, just before his first inauguration, "is expected by the Nation to be leader of his party as well as the Chief Executive officer of the Government, and the country will take no excuses from him. He must play the part and play it successfully or lose the country's confidence. He must be Prime Minister, as much concerned with the guidance of legislation as with the just and orderly execution of law, and he is the spokesman of the Nation in everything, even in the most momentous and most delicate dealings of the Government with foreign nations." Laski puts it in a matter of fact way when he says that "The President of the United States is both more and less than a King; he is also both more and less than a Prime Minister. The more carefully his office is studied, the more does its unique character appear."<sup>92</sup>

**Prime Ministerial Government.** The confusion in not clearly demarcating the powers and position of the Prime Minister and the American President is closely linked with the popular belief that Britons no longer have Cabinet Government, but instead live under Prime Ministerial Government. Crossman argues that "...The post-war epoch has seen the final transformation of Cabinet Government into Prime Ministerial government..."<sup>93</sup> Mackintosh has also said, "...Now the country is governed by a Prime Minister, his colleagues, Junior Ministers and civil servants with the Cabinet acting as a clearing house and court of appeal."<sup>94</sup>

Is it true that the Prime Minister, for all practical purposes is the Executive in Britain? Are the members of the Cabinet little more than his dependants, selected at his will and hold office so long the Prime Minister wishes them to? What real influence other Ministers exercise in the formulation of Cabinet policy in the context of the individual responsibility for the Departments under their charge as well as collective responsibility for Cabinet decisions?

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89. *Ibid.*

90. *Ibid.*

91. Punnett, R.M., *British Government and Politics*, p. 307.

92. Laski, H.J., *The American Presidency*, p. 11.

93. Crossman, R.H., *Introduction to English Constitution*, p. 51.

94. Macintosh, J.P., *The British Cabinet*, p. 524.



It is now generally agreed that the Prime Minister's powers are today great, and in many respects are growing. The post-war period has many instances to prove the primacy of Prime Minister's power. For example, the decision to make the atom bomb by the first Labour Government was not taken in the Cabinet but in the Defence Committee of the Cabinet. The Suez adventure of 1956 was largely the personal policy of the Prime Minister, Anthony Eden. The decision to try to take Britain into the Common Market in 1961 was essentially that of the Prime Minister, Harold Macmillan. The decision of the Labour Government in 1965 to attempt a new approach to Europe also rested ultimately on the Prime Minister, Harold Wilson. The first seventeen months of Labour Government's regime after the 1964 General Elections disclose how greatly the Prime Minister was personally responsible for the tone and decisions of the Government as a whole.

Even then it does not mean that the Prime Minister is assuming the role of 'Presidential' authority, and that the increase in the authority of the Prime Minister has produced a basic change in the system of the Cabinet Government in Britain. Herbert Morrison rejects the thesis of Prime Ministerial Government and says that the Prime Minister, "...is not the master of the Cabinet", and he "...ought not to, and usually does not, presume to give directions or decisions which are proper to the Cabinet or one of its Committees."<sup>95</sup> Morrison is supported by many other writers and statesmen. They all accept that the Prime Minister is powerful, yet assert that he is not overwhelmingly supreme as he Cabinet remains a collective executive body. A Prime Minister cannot ride rough shod over the will of the Cabinet. And as stated earlier, he is both a captain and a man at the helm.<sup>96</sup> But he can remain at the helm only if he plays the game of politics like a captain. A captain must carry the team with him. Without a team there can be no captain just as without a captain there can be no team. The reality of collective responsibility, therefore, is not disproved by the great power of the Prime Minister in modern political conditions. Prime Ministerial power, therefore, must be understood as varying with political circumstances and with the personal fortunes of the man who wields it. "The fundamental fact about the position of the Prime Minister is that he must operate flexibly within parliamentary and Cabinet system in which power is distributed and which gives the Prime Minister as much command of the political situation as he can earn."<sup>97</sup> If his influence is as great as that of the American President, even then he is very far from having the powers of the President who is accountable to nobody except the electorate and that too after a specified period of four years. The Prime Minister, in varying degrees is, on the other hand, accountable to his Cabinet colleagues, his party and even, in some degree to the Opposition, as he considers it his duty to consult with the Leader of the Opposition at moments of national crisis.

95. Morrison, Lord, *Government and Parliament*, p. 52.

96. Amery, L.S., *Thoughts on the Constitution*, p. 72.

97. Ronald Butt, *The Power of Parliament*, p. 427.

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## CHAPTER VI

# THE MACHINERY OF GOVERNMENT

### THE DEPARTMENT AT WORK

**The Working of Government Departments.** We have now seen how the Cabinet does its work. But the Cabinet is only policy-formulating body. All details with the working out of policies so formulated and all routine business connected thereto are left to the various Ministries or Departments of the State located in the Whitehall, just in the vicinity of Parliament. These Departments are presided over by Ministers—usually, but not without exception Cabinet Ministers, no matter what they are called, First Lord, Chancellor of the Exchequer, Foreign Secretary, President of the Board, or by any other designation. The Minister is responsible for all activities of organisation within the Department with a view to successful implementation of policy of the Government. As the Minister cannot himself know about all the activities and operations of a large government Department, he must rely upon subordinates in whom he has confidence. A successful Minister is one who can develop a competent team of principal assistants and who can infuse the entire staff in the Department with his personality so that the organisation functions in a desirable and creditable manner. Harold Nicholson has written, "A minister of strong personality immediately alters the whole atmosphere of his department and in the shaping of events, atmosphere is a far more important element than the written word."

Below the Minister in a typical Department are one or two Junior Ministers designated as Parliamentary Under-Secretary of State or Parliamentary Secretary, who is also a member of the Ministry. It is a frequent practice for one of those two Ministers to be chosen from the Lords and the other from the Commons in order that there may be some person in each House competent to represent the Department and answer queries with regard to its work.<sup>1</sup> They all go in and out of office with the change in the party control of Government. Hence their tenure of office is temporary and is dependent on the life of the Ministry. The function of the Junior Ministers is to relieve their senior Ministers of their burden by taking part in parliamentary debates and answering parliamentary

1. Where a senior Minister is a Secretary of State, the Junior Minister has the title of Parliamentary Under-Secretary.

2. The Ministers of the Crown Act, 1937, specified that only eighteen out of twenty-one Ministers listed in the Act could serve in the House of Commons at one time. The House of Commons Disqualification Act, 1957, declared that not more than twenty-nine senior Ministers listed in the Act, and not more than seventy Ministers in all, could serve in the House of Commons at one time. The Ministers of the Crown Act, 1964 increased from seventy to ninety-one the total number of Ministers to serve in the House of Commons and abolished the limit on the number of senior Ministers.

questions, and by assisting in their departmental duties. Writing about the duties of an Under-Secretary, Winston Churchill says, he is often changed, "but his responsibilities are always limited. He has to serve his chief in carrying out the policy settled in the Cabinet, of which he is not a member and to which he has no access." He cannot dictate or determine policy that is the function of the Minister alone. This point came into prominence during the investigations of the Lyskey Tribunal in 1949. The Tribunal brought out that one Parliamentary Secretary had on occasion overruled the advice of the permanent officials in his Department without consulting the Minister. When this was revealed, Prime Minister Attlee laid down the definite ruling that a Junior Minister should not override the advice of the permanent officials in his Department without reference to his political chief, who alone is responsible to Parliament.

Below in the departmental chain is the Permanent Secretary<sup>3</sup> who occupies a position of the very highest responsibility and importance. Then, there are a Deputy Secretary, Under-Secretary, Assistant Secretaries, Principals, Assistant Principals, and many others who do merely secretarial work of a purely routine character. Highest and lowest, these non-political agents of administration make up, in general, the Civil Service. Civil Servants are those servants of the Crown, other than holders of political or judicial offices, who are employed in a civil capacity, and whose remuneration is paid wholly and directly out of moneys voted by Parliament.<sup>4</sup> Their tenure of office is permanent and they continue to function regardless of all political changes in the country. They are outside the domain of party politics and this is one of the most characteristic features of the Civil Service. The permanent heads have in most cases been so long attached to their respective Departments that they acquire a complete grasp of affairs within their own spheres. With their expert knowledge they help the Ministers to see that the Department works efficiently and in a particular direction determined by the policy of the Government. Lord Balfour has given a true picture of the position which Civil Servants occupy in Britain. "They do not control policy; they are not responsible for it. Belonging to no party, they are for that very reason an invaluable element in Party Government. It is through them, especially through their higher branches, that the transference of responsibility from one party or one minister to another involves no destructive shock to the administrative machine. There may be change of direction, but the curve is smooth."<sup>5</sup> Indeed, to a large extent they direct the actual working of the Department, and the Minister who controls the Department relies mainly upon the Civil Service for any new course of action which he desires to take.

The Permanent Secretary of the Department is the chief civil servant of the Department and he occupies a pivotal position. In the first place,

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3. Known as the Permanent Under-Secretary of State in those Departments where the Minister is a Secretary of State.

4. Based on a definition given by the Royal Commission on the Civil Service 1929-31 (The Tomlin Commission).

5. Introduction to Bagehot's *English Constitution*, p. xxiv.



he is the General Manager in charge of the administrative work of the Department. He is the head of the entire administrative hierarchy and, as such, is responsible to the Minister for the proper functioning of the Department. Secondly, he serves as chief adviser to the Minister on all matters of departmental policy and administration. Between the Minister and the Permanent Secretary there must exist mutual trust and confidence.

Below the Permanent Secretary the organisation of the Department fans out. Usually he has below him one or two Deputy Secretaries who supervise various branches of Ministry. They in turn have under them one or two Under-Secretaries each controlling several Assistant Secretaries, and below the Assistant Secretaries come the Principals and Assistant Principals. All lines of responsibility within the Department converge inward and upward to the Permanent Secretary and through him to the Minister.

**Functions of the Departments.** The functions of the Departments may be said to be four. First, a Department must answer for its administration to the public. To put it more accurately, the officials of the Department must provide to their political chief all relevant information so that he may defend the actions of his Department in Parliament and on the public platform. That is to say, the policy of the Department is so framed that it must be capable of "articulate rational defence". The second function of the Department is the drawing up of its policy. It performs this both from its own administrative experience and from the direction given to it by its political chief. The Department prepares the draft of the scheme, works out its details in accordance with the general policy of the Ministry and consults the interests likely to be affected by it. If the scheme of policy cannot be carried out within the existing framework of the law, then, it passes into the stage of proposals for the Bill. After its approval by the Cabinet Committee, it is sent to the Parliamentary Counsel to the Treasury to be drafted as a Bill to be laid before Parliament. The Bill is sponsored and piloted by the Minister and it is his responsibility to see it through. But permanent officials of the Department will have to be in attendance in the "box" of the House and Committees to assist him with information and advice. It will, thus, be clear that even if the inspiration for the Bill may have come from the Minister, the preparatory work is the task of the Departments and in great part the result of the influence exerted by the Civil Servants.

Finally, it is the implementation of the policy. When the policy has been determined, presented, and sanctioned, it becomes the duty of the permanent officials of the Department to see that it is faithfully carried out, even if it is not exactly what they might have advised. There is little evidence in Britain on civil servants sabotaging the policy of the responsible political head of their Department.

Most modern statutes are "skeleton legislation." Parliament legislates in general terms only, empowering the Department concerned to work out the detailed regulations necessary to give effect to the Statute. It may also merely empower a Department to make rules with regard to a specific matter. The regulations made by the Department have the force of law. The "statutory instruments" are so numerous that ever since 1890, Parliament has provided for the publication of an annual volume

of "statutory rules and orders." Thus, the Department will, probably, concurrently with its preparation of the Bill, have been working out regulations and other acts of subordinate legislation, and shortly after the Bill becomes law will issue them in a form drafted by its own lawyers. This process of delegated legislation had been the subject of severe criticism and Lord Hewart, in his book, **The New Despotism**, characterised this practice, coupled with administrative adjudication, as "the new despotism" of the civil service. We will discuss this point a little more elaborately at a later stage.

Some administrative policy-making takes a quasi-judicial form. For example, the Minister of Town and Country Planning is empowered to decide what "development charge" shall be levied on land developers and where a new town shall be located. Similarly, it is for the President of the Board of Trade to determine what regions of the country shall be declared "development areas" in which industry will be financially encouraged to locate. Decisions of these kinds are not truly judicial as they do not determine legal rights. "They are, however, an extremely important means by which administrators make policy and shape the nation's future, within the framework of powers agreed to by Parliament."

**Departments of Government.** It is not possible within the compass of this book to give a thorough description of the work done by each Department. It is worthwhile, however, to glance at the Departments arranged in groups by reference to similarity of work undertaken. The main Departments may be grouped thus:

(1) **General Departments:**

The Treasury.  
The Home Office.  
The Scottish Office.

(2) **Economic Departments:**

Ministry of Agriculture, Fisheries, and Food.  
Board of Trade.  
The Board of Customs and Excise.  
Ministry of Fuel and Power.  
Ministry of Labour and National Service.  
Ministry of Supply.  
The Post Office.  
The Ministry of Works.  
Ministry of Housing and Local Government.  
Ministry of Transport and Civil Aviation.

(3) **Social Welfare Departments:**

Ministry of Education.  
Ministry of Health.  
The Department of Technical Co-operation.  
Ministry of Pensions and National Insurance.  
The Department of Scientific and Industrial Research.

(4) **Imperial and Foreign Departments:**

The Foreign Office.

The Colonial Office.

The Commonwealth Relations Office.

**(5) Defence Departments:**

The Admiralty.

The War Office.

The Air Ministry.

The Ministry of Aviation.

The Ministry of Defence.

This is not a comprehensive list. A full list is published at intervals by the Stationery Office under the title "His Majesty's Ministers and Heads of Public Departments." The Ministry formed by Sir Winston Churchill in 1951 contained the holders of thirty-eight offices. In October 1961 there were thirty-five in the Government of Harold Macmillan. The Labour Government of Harold Wilson created five new Departments and also made certain major adjustments in the jurisdiction and functioning of the already existing Departments. The newly created Departments were: The Department of Economic Affairs, The Ministry of Technology, The Ministry of Overseas Development, The Ministry of Land and Natural Resources, and the Welsh Office.

The "Senior" Department is the Treasury. Nominally the heads of the Treasury are the Lords Commissioners: The First Lord of the Treasury (now always the Prime Minister), the Chancellor of the Exchequer and five junior Lords. In practice, the Lords Commissioners never meet as a Board and their responsibilities are carried by the Chancellor of the Exchequer assisted by the Financial Secretary and the Economic Secretary. There is also a Parliamentary Secretary to the Treasury, who is the Chief Government Whip in the House of Commons.

The functions of the Treasury fall under four main headings: finance, control of expenditure, general civil service establishment matters, and co-ordination of economic policy. Since the Treasury has "the power of the purse", it has won for itself a position of supremacy and from the very early stage it is the most powerful Department of the Government. "The power of the purse of the Treasury," Sir Robert Chalmers, the Permanent Secretary to the Treasury, told the MacDonnell Commission, "means that all acts of administration requiring money (and practically all do in one form or another) come before the Treasury, and as a sort of shadow of that, there necessarily follow, and there are, intimately connected with it, all the staff questions as to how to carry out the administrative problems that come before the Treasury." One of the Permanent Secretaries of the Treasury is the Head of the Civil Service.

**Parliamentary Counsel to the Treasury.** The office of the Parliamentary Counsel is responsible for the drafting of all Government Bills, except those Bills or provisions of Bills extending exclusively to Scotland, which are handled by the Lord Advocate's Department. The office drafts all financial and other parliamentary motions and amendments

moved by the Government during the passage of the Bills. It advises Departments on questions of parliamentary procedure, and attends committees and sittings in both Houses. It also drafts subordinate legislation when specially instructed, and advises the Government on legal, parliamentary and constitutional questions falling within its special experience.

**Advisory Bodies.** There are several hundred Committees and Councils attached to Government Departments for the purpose of consultation or expert advice, of which about 500 are permanent bodies attached to the main Departments. The advisory bodies are appointed by the Minister concerned and their membership includes civil servants, industrialists, trade unionists, university and industrial scientists, local government officials and experts from many other walks of life. There are three main types of such bodies: consultative bodies, in which representatives of the Government meet representatives of groups outside Government; expert bodies, which formulate recommendations for action in a particular field; and bodies which have advisory status but which in practice decide matters themselves, e.g., the Central Training Council in Child Care, the Air Transport Advisory Council, the Air Safety Board, etc.

In addition to these advisory committees there are *ad hoc* committees which the Government frequently sets up to examine and make recommendations on specific matters. For certain important inquiries a Royal Commission, whose members are selected on the grounds of their wide experience and diverse knowledge of the subject under study, may be appointed by Royal warrant. A Royal Commission examines written and oral evidence from government Departments and other interested organisations and individuals. The Commission makes recommendations which the government may accept in whole or in part or may take no action thereupon. Public inquiries are also undertaken by departmental committees appointed by the head of the appropriate department.

## CIVIL SERVICE

**Growth of the Civil Service.** The Civil Service, as Graham Wallas truly called it, "is the one great political invention in nineteenth century England."<sup>8</sup> Originally, the work of Government was done by persons of the Royal Household. With the development of the Cabinet system of government they came to be recruited by patronage, though it did not assume the form of Spoils System as it had prevailed in the United States. Once appointed, an official could expect to be retained so long as he was in good health and reasonably efficient. But in the late eighteenth and early nineteenth centuries such a system of recruitment was severely condemned by persons like Burke, Bentham and Carlyle. The Hailebury experiment which aimed to give a rigorous training for youngmen destined to go to India in the service of the East India Company, provided an impetus for immediate reform of the British Civil Service. By the middle of the nineteenth century competitive examinations were introduced, first for the Indian Civil Service, and then, in 1870, for the British Civil Service. A Civil Service Commission was established through the initiative

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8. *Ibid.*



of Gladstone, which was alone empowered to admit persons to the service. Since that time several careful studies and a number of Orders-in-Council have furnished the basis of increased efficiency in matters of recruitment, division of the services into different grades, admission of women, determination of pay scales, etc. The result has been a large degree of unification.

Fundamental changes in the structure and practices of the Civil Service to equip it for the most efficient discharge of the present and prospective responsibilities of Government have been recommended by a Committee set up by the Government in 1966 under the Chairmanship of Lord Fulton, Vice-Chancellor of the University of Sussex.

The number of civil servants is about a million and of these about two-fifths are industrial civil servants (primarily post office Engineers and employees in naval dockyards and Royal Ordnance Factories). But the term of civil servant is generally used to cover non-industrial members of the staffs of the various Government Departments in the United Kingdom or working overseas. The total number of non-industrial civil servants employed in all Departments, at home and overseas, is about 855,000, nearly one-third are women. The great expansion in State planning is essentially responsible for this huge number of civil servants. It has also led to further reorganization.

**Organisation of the Service.** The guiding principles of Civil Service organisation are very simple and obvious. They are three: a unified service; recruitment by open competition, and classification of posts into intellectual for policy and clerical for mechanical work, to be filled separately by separate examinations. In 1920, as a result of the recommendations of the Reorganization Committee—a Committee of the National Council—Civil Service was reorganized and an executive grade was interposed between the administrative and clerical. The report set out a simple two-fold division. "The administrative and clerical work of the civil service," it reported, "may be said, broadly, to fall into two main categories. In one category may be placed all such work as either is of a simple mechanical kind or consists in the application of well-defined regulations, decisions and practice to particular cases; in the other category, the work which is concerned with the formation of policy, with the revision of existing practice or current regulations and decisions, and with the organization and direction of the business of Government." Each of these two main categories contains two of the four existing general classes.

**1. The Administrative Class.** The administrative class is the pivotal and directing class of the whole civil service, which numbers about 3,900.<sup>9</sup> From the Permanent Secretaries down to the Assistant Principals—the descending order of officers in this cadre being: Permanent Secretary, Deputy Secretary, Under-Secretary, Assistant Secretary, Principal and Assistant Principal, the last type is just a cadet being trained by one of the Principals—they are responsible for transmitting the impulse from their political chief, from the statutes and declarations of

9. Including part-time staff—two part-time officers being reckoned to one whole time officer.

10. As in September 1968.

policy through the rest of the service and out of the public."<sup>11</sup> On this group rest the responsibilities for advising Ministers on questions of policy, and for controlling and directing Departments. It is a body of advisers, "a permanent brains trust," who find solutions for various administrative problems that arise outside the normal routine of departmental work, supply suggestions which may form the ingredients of supreme policy, and interpret regulations applying them to difficult cases. Sir Warren Fisher has cogently explained the principles on which civil servants act: "Determination of policy is the function of Ministers, and once a policy is determined it is the unquestioned and unquestionable business of the civil servant to strive to carry out that policy with precisely the same goodwill whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time, it is the traditional duty of civil servants, while decisions are being formulated, to make available to their political chiefs all the information and experience at their disposal, and to do this without fear or favour, irrespective of whether the advice thus tendered may accord or not with the minister's initial view. The presentation to the minister of relevant facts, the ascertainment and marshalling of which may often call into play the whole organization of the department, demands of the civil servant greatest care. The presentation of inferences from the facts equally demands from him all the wisdom and all the detachment he can command."<sup>12</sup>

The Administrative Class itself formulated its duties in a statement submitted to the Tomlin Commission.<sup>13</sup> These duties have been succinctly summed up by Jennings. He writes that the civil servant's function is "to advise, to warn, to draft memoranda and speeches in which the Government's policy is expressed and explained, to take the consequential decisions which flow from a decision on policy, to draw attention to difficulties which are aiming or are likely to arise through the execution of policy, and generally to see that the process of government is carried on in conformity with the policy laid down."<sup>14</sup> Sir Horace Wilson, then Permanent Secretary in the Ministry of Labour, defined the duties of the Administrative class to the Tomlin Commission. He said, "Broadly speaking, the main quality that is required seems to me to be a capacity to take the facts about a particular subject, to put them into shape, to suggest the deductions that might be drawn from them, to propose the lines of policy that might be adopted in relation to them, and generally to apply a constructive analytical mind to what I would call the policy of the Ministry."

For the efficient performance of these arduous duties the Administrative Officers must necessarily possess a trained mental equipment of a high order capable of the ready mastery of complex and intricate problems. The qualities exactly wanted in an Administrative Officer are judgment, *savoir faire*, insight and fairmindedness. For, the men who enter this class are not, as Finer says, "merely secretarial; they are the young shoots who

11. Finer, H., *The Theory and Practice of Modern Government*, op. cit., p. 767.

12. As quoted in Jennings' *Cabinet Government*, op. cit., pp. 114-115.

13. It is reproduced in full in Finer's *The Theory and Practice of Modern Government*, pp. 769-770.

14. Jennings, I., *Cabinet Government*, op. cit., p. 116.

may twenty years hence be permanent heads of the departments or very closely associated with it." Its members are, in majority of cases, university graduates who attained front rank eminence at the universities. After having entered service, through competitive examination, they get a general training, in more or less every branch of administration up to a comparatively late age. This is, according to the argument of Macaulay and Jowett, a better qualification for intellectual work than a special training, and that success in that training is likely to indicate desirable qualities of character. It also accounts for the liberal outlook of the civil servants in England.

The members of the Administrative class are recruited between the ages of 20½ and 24 by a severe competitive examination, and normally 100 are appointed to the Service every year. New recruits serve a two-year probationary period and, then, if considered satisfactory, advance as rapidly as their industry and talents justify.

Recruitment into the class is by no means confined to ordinary competition entrants and to candidates of University standard who entered by special competition in the two post-war periods. About 40 per cent of the total are recruited from other classes, mainly the Executive class, by promotion, limited competition, or transfer. This is partly due to the pressure from staff associations representing the other classes, anxious to secure opportunities of promotion for their members and partly due to the greater needs of government than could be met from the regular planned intake into the class.

**2. The Executive Class.** The next is the executive class. It is mainly recruited from both men and women between the ages of 17½ to 19, who have completed secondary education, and pass the competitive examination. If the members of the clerical classes show resourcefulness, initiative and judgment, they may also be promoted to this class. The duties of the Executive Class can best be understood in the words of the Reorganization Committee. "To this class," reported the Committee, "we would assign the higher work of supply and accounting departments, and of other executive and specialised branches of the civil service. This work covers a wide field, and requires in different degrees qualities of judgment, initiative, and resource. In the junior ranks it comprises the critical examination of particular cases of lesser importance not clearly within the scope of approved regulations or general decisions, initial investigations in matters of higher importance, and immediate direction of small blocks of business. In its upper ranges it is concerned with matters of internal organization and control, with the settlement of broad questions arising out of business in hand or in contemplation, and with the responsible conduct of important operations." Members of this class, in brief, undertake preliminary investigations of the problems before the Department, collect data, arrange and classify it, and make observations thereto. They may have some direction in matters of minor importance. Their functions, thus, may be compared to those of the non-commissioned officers in the army. Members of this class may, after entry, be trained for

specialist work such as that of auditor, actuary or statistician. The Executive class numbers some 80,000.

3. **The Specialist Classes.** The specialist classes (General and Departmental), which number about 130,000, include Scientific, Professional and Technical classes and other classes which carry out the wide range of specialised activities now undertaken by the Government. The categories include Accountants, Architects, Doctors, Economists, Engineers, Lawyers, Librarians, Statisticians, Surveyors and Scientists in all branches of science. The recruitment to such jobs is not subject to competitive examination. Specialists who possess duly recognised qualifications and a particular standard of training and experience are appointed for individual jobs. Vacancies are advertised and the selection is made through the method of interview.

4. **The Clerical Class.** This is the largest of the main classes, comprising about 120,000 officers, both men and women. The age limits are sixteen and seventeen years and the competitive examination corresponds to the point at the intermediate stage of a secondary school course. Considerable number of members of those who are admitted to this class enter by promotion. Apart from the routine clerical duties which they may be required to perform in their early career, the duties of this class involve the preparation of accounts and the keeping of records, the handling of particular claims in accordance with known rules, and the summarising and annotation of documents for the assistance of senior officers.

5. **The Ancillary Clerical Classes.** They number some 97,000 and include clerical assistants, shorthand typists and typists, duplicator operators.

6. **Messengerial and minor classes.** They number some 26,000 which, in addition to messengers, include paper keepers, office cleaners and similar workers.

In addition, there are many other departmental classes where employment is peculiar to one department, for example. Post Office, Factory Inspectorate of the Department of Employment and Productivity, School Inspectorate of the Ministry of Education and Science, the Inspectorate of Children's Department of the Home Office, and the Mines Inspectorate of the Ministry of Power.

**The Diplomatic Service.** The Diplomatic Service is a separate self-contained service of the Crown, which provides the staff (comprising some 6,200 civil servants) for services in the Foreign Office and Commonwealth Office and at United Kingdom diplomatic missions and consular posts in foreign and in independent Commonwealth countries. Its functions include advising on policy, negotiating with overseas governments and conducting business in international organizations promoting British exports and the advancement of British trade; presenting British ideas; and protecting British interests abroad.

The Service has its own grade structure, corresponding by salary with the grades of the Administrative, Executive and Clerical classes of the Home Civil Service. It also has Secretarial, Communications and Security Guard branches. Various specialists and advisers from Home De-



partments or the armed forces may serve at overseas posts on secondment or attachment to the Diplomatic Service.

### CIVIL SERVICE EVALUATED

**Role of Civil Service.** The growth of the Civil Service in Britain is a comparatively modern phenomenon. During this period the British Civil Service has assumed a great constitutional prominence. Three factors are of particular importance in this respect. The first is the change from the negative State to the positive State. As the functions of the State increased, the services of a professional staff were increasingly recognised necessary and the complexity of the work involved compelled the Ministers to leave to their officials all but the largest decisions on major policy. But when the issue is one which must be submitted for the Minister's personal decision, it has even then to be fully and fairly presented to him so that all the material facts and considerations are before him. Civil Servants matter in the determination and presentation of the relevant material.

Here is a hierarchy of decisions given by Jennings in his book. *The British Constitution*.<sup>16</sup>

"Routine and minor discretion	.. Executive Class.
Discretion within a policy	.. Assistant Secretary.
Departmental policy	.. Permanent Secretary and Minister.
Government policy	.. Cabinet."

This is, indeed, a rough classification, but the fact remains that a very large number of decisions is taken by senior Civil Servants. Even if the decision is taken by the Minister or the Cabinet, the case must be prepared. Information is collected by the Principal or an Assistant Principal, and he gives his suggestions, if he is asked to do. His memorandum goes to the Assistant Secretary who gives his own comments and if he does not approve the work of the Principal he may prepare it anew. Then, the file may travel to others in the same Department or in other Departments, if it concerns any other, for their remarks and all concerned may add their comments of agreement or disagreement. At the end, when the file goes to the Minister, it contains "a definite statement of the practicable alternatives, with the arguments for and against each of them. He can see the files if he wishes, but generally there is no need, because the combined wisdom of the Department has brought the question down to an issue where commonsense and political *savoir faire* are the qualities required. If he says that he must consult the Cabinet, he makes up his own mind and gets an Assistant Secretary (who perhaps gets a Principal) to state the case in a Cabinet Memorandum."

The second is the method of recruitment by open competition conducted by an independent body, the Civil Service Commission. The open competitive examination is not an examination in special and professional subjects deemed necessary as a preparation for a career of professional

administration. Such a system of examination has, no doubt, certain tangible defects. But the British system of competitive examination aims at testing the general ability of candidates. Coupled with the written test is the *viva voce* test. The object of the interview is to fathom their intelligence and alertness, vigour and strength of their character, and potential qualities of leadership so that the administrators of tomorrow may not only think, argue, and write, but also devise, act and lead.

It does not, however, mean that there is in Britain no political or purely personal influence on appointments or promotions. But the grossest forms of patronage are certainly absent. This is one of the very important reasons of the high standard of efficiency maintained by the Civil Service. The civil servant in Britain is not so ruthlessly subjected to the disappointment and irritation caused, as for instance in Canada, and for many reasons in India, by the imposition over their heads of ministerial proteges of minor capacity. The British public service traditions encourage honest opinion and fearless criticism. But so long as politicians can influence in any vulgar sense appointments, promotions and the distribution of honours there is, as Jennings aptly says, "a risk of toadying, flattery and self-seeking."

The third important reason is the ethics of the British Civil Service or the code of conduct which every civil servant is required to observe. This is a code laid down partly in Acts of Parliament and partly in orders, regulations, and instructions issued by the Government and by Departments of the Government. "It is a stringent code," as Barker puts it, "designed to prevent any chance of economic corruption and any opportunity of political influence." The principles it enjoins and the standards it sets work as effectively as the professional codes of the doctor and the lawyer in that country and like them the British administrative code of ethics, too, rapidly became a model for the whole world.

The British civil servant is rigidly neutral and rigorously impartial in economic and party political issues. He "may not make political speech, print a partisan article or tract, edit or publish a party newspaper, canvass for a party candidate or serve on a party committee." He probably by nature, but most certainly by training, stands somewhat aloof from political parties. He has neither any personal motive nor any design. By virtue of his security of tenure he represents the principle of continuity in government. He is, in fact, a link between successive Ministries and the repository of principles and practices which endure while governments come and go. He serves with equal fidelity whatever be the complexion of Government. In 1932, when Britain became protectionist the officials of the Treasury and the Board of Trade did their best to produce the most efficient protective system that their ingenuity could devise. When MacDonald succeeded Lord Curzon, in 1924, at the Foreign Office, the official who had served Lord Curzon continued as MacDonald's Private Secretary. The Labour Party had really no occasion in 1924, in 1929 or in 1945, as also in 1964 and in 1966 to change the occupants of some of the key positions in public service. "To prevent any possible difficulty in Foreign policy," writes Jennings, "Mr. Arthur Henderson, who became Foreign Secretary in 1929, circulated in the Foreign Office copies of the official Labour Party programme, **Labour and the Nation**.

By 1945, however, the views of Labour politicians were sufficiently well understood to make such a proposition unnecessary. The fact is that the civil servants are servants of Her Majesty the Government, whatever the political colour of that Government may be, and of the nation as a whole.

There is no evidence to show any kind of intrigue between civil servants and the Opposition. All civil servants feel a temporary allegiance to the party in power and its programme, no matter what their class or personal conviction. All do their jobs with loyalty. The men at the top give their advice frankly until their chief has reached his decision. But once the decision is there they deem it their duty to carry it out loyally. The British Civil Service is loyal to the Government of the day. Herbert Morrison relates an important incident to illustrate this. 'Some American officials', he writes, 'in attendance on the United States Government representatives at the Potsdam Conference in 1945 had an experience which to them was surprising. During the first part of the Potsdam discussions between representatives of the Governments of the United States, the Soviet Union, and the United Kingdom, the British General Election was proceeding. Some of the Americans said to some of the British: "If there is a change of Government as a result of the election in your country there will be, we suppose, changes in your important civil servants." So may be we shall see these British civil servants any more.' They were assured, though they were not wholly convinced, that this would not happen; they were genuinely surprised and could not follow it when Mr. Attlee turned up as Prime Minister and head of the British delegation in the second part of the Conference instead of Mr. Churchill, accompanied by the same civil servants as served Mr. Churchill.<sup>17</sup>

Confidential communications—and they are numberless—the Civil Servants treat as sacred even from their next parliamentary chief. If one Minister prepares a scheme which never materialises, the Permanent Secretary of the Department may refuse to show the relevant documents to the succeeding Minister and the beauty is that the latter would recognise the propriety of such a course. Here is an anecdote given by Mr. Morrison. He writes, "In talking in my younger days to a high civil servant who had formerly worked under me I was vigorously, perhaps in the circumstances too vigorously—denouncing the policy of his new master, my successor in office. At a moment when it became clear that I was somewhat embarrassing him, he said, "Well, Mr. Morrison, I can only say that different Ministers have different ways", which illustrated the meritorious loyalty which the civil service quite properly owes and practises towards Ministers." Nor must the civil servant use any information gained through his work to improve his personal position or to gain pecuniary benefits. Examples are very rare when a Permanent Secretary, as it happened in 1936 when Secretary of the Air was dismissed for using his knowledge of public negotiation for his own private advantage, may be removed from office for violation of the principles of the civil service code. Morrison says, "We are proud of the British Civil Service. As a

17. Morrison, H., *Government and Parliament*, pp. 319-20.

18. *Ibid.*, pp. 38-39.

whole, they are efficient, public spirited, incorruptible; very, very rarely does a British Civil Servant get convicted of bribery, corruption, nepotism, treachery or favouritism."<sup>19</sup>

**Should the Ministers be experts?** It is very often complained that Ministers are amateurs in the art of government and the administration is actually carried on by the civil service. It is, no doubt, true that Ministers are laymen<sup>20</sup> with no knowledge of the Department they have to preside.<sup>21</sup> Then, their appointment and allotment of portfolios is a matter of political consideration and expediency rather than their liking or aptitude for the work they are expected to perform. Even if a Minister is able to get a Department of his own choice, it is impossible for him to qualify as an expert. The work of a Department is a vast mass of administrative details. It is not possible for the Ministers to follow all the details and go into the heaps of files to master the case, particularly when their attention is largely engrossed in the more active field of politics; the Cabinet, Parliament, and the platform. They have, therefore, the critics argue, no decisions of their own to make and simply endorse what their subordinates tell them to do. It is, accordingly, suggested that only those persons should be appointed Ministers and Departments assigned to them who have adequate professional experience related to the work they will be expected to supervise. It is further asserted that if in France and other Continental countries it is not uncommon to put military and naval men in charge of War and Marine Ministries, why cannot a similar practice be followed in Britain? Another example cited is that of the United States where there is now a growing tendency to place at the head of at least a few of the Executive Departments, like agriculture and labour, experts in the work with which they are concerned.

But this is not the problem of the Parliamentary system of government. The essence of Cabinet Government is Ministerial Responsibility; responsibility for which the electorate had given its verdict at the time of the general elections and responsibility which the Government must conscientiously own and discharge during the tenure of its office. The Government is wedded to a particular policy and its first concern is to see it through to the satisfaction of those who have returned them to authority. Perhaps the best simple statement of the basic principle involved is that of Sir George Cornewell. It is quoted by Bagehot and has

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19. Lord Morrison, *British Parliamentary Democracy*, p. 17.

20. Sir Winston Churchill was successively Under Secretary of State for Colonies, President of the Board of Trade, Home Secretary, First Lord of the Admiralty, Chancellor of the Duchy of Lancaster, Minister of Munitions, Secretary of State for War and Air, Secretary of State for the Colonies, Chancellor of the Exchequer, First Lord of the Admiralty, and Prime Minister.

21. "We require," wrote Sidney Low, "some acquaintance with the technicalities of their work from the subordinate officials, but none from the responsible chiefs. A youth must pass an examination in arithmetic before he can hold a second-class clerkship in the Treasury, but a Chancellor of Exchequer may be a middle-aged man of the world who has forgotten what little he ever learnt about figures at Eton or Oxford". *The Government of Britain*, p. 201. Disraeli, while forming a Ministry, offered the Board of Trade to a man who wanted instead the Local Government Board. "It does not matter", said Disraeli, "I suppose you know as much about trade as the First Lord of the Admiralty knows about ships."



been times out of number repeated: "It is not the business of a Cabinet Minister to work his department. His business is to see that it is properly worked." The late Mr. Ramsay MacDonald put it still more graphically. "The Cabinet," he said, "is the bridge linking up the people with the expert, joining principle to practice. Its function is to transform the message sent along sensory nerves into command set through motor nerves. It does not keep the departments going; it keeps them going in certain directions." The work of a Minister is, thus, to help framing general policies and to see that they are carried out by the staff employed for the purpose. The authority of the Civil Service and for that matter of the experts is, accordingly, one of influence, not of power. "It indicates," as Laski says, "consequences; it does not impose commands. The decision which results is the Minister's decision; its business is the provision of the material within which, in its judgment, the best decision can be made."

There are many advantages if the head of Department is a layman. A layman sees the Department as a whole. His vision is broad and his attitude compromising and, accordingly, progressive. The mental attitude of an expert is narrow and he is apt to exaggerate the importance of technical questions. When an expert supervises the work of an expert, there is likely to be friction and disagreement, for it is the habit of experts to disagree. In order to produce really good results, and avoid the dangers of friction, and consequently inefficiency and bureaucracy, it is necessary "to have in administration a proper combination of experts and men of the world."<sup>22</sup> An amateur Minister may, again, serve as an intermediary between one Department and the other and his own Department and the House of Commons, to which body he is responsible for carrying out a certain policy. Government is one single whole and there is and must be organic unity in the various aspects of administration. A layman who takes a general view of a Department, considers himself and his Department a part of the bigger whole and endeavours to shape his policy in accordance with the general policy, and will see that its various parts keep in line, and in particular watch that experts remember that they are to work as members of a team as servants of the Crown, that is to say, of the Queen's Ministers and that they provide a store of knowledge and experience.

It is true that the political head of a Department should be well informed of the work to be carried on under his direction. But it does not mean that he is expected to qualify as an expert. In every Department there is division of labour and scores of problems come which demand high order of practical and technical proficiency, and even departmental experts with permanent tenure cannot claim specialisation in all those problems. How can, then, it be possible for a Minister, whose tenure of office is short and precarious, to master everything which concerns his Department? The permanent heads of Departments cannot be experts in the sense that a great physicist, a great surgeon, or a great artist is an expert. "They do not live in a realm", in the words of Prof. Laski, "into which the ordinary cannot enter." Any one who remembers the intellect and power of grasping details of Sir John Simon or Sir Staf-

ford Cripps will agree that these are the qualities which a Minister requires in his relation with his Department. "We send men into the Treasury," concludes Laski, "not because they are trained economists: so also in the Ministry of Agriculture or the Board of Education. They are valuable as administrators less because they have expert knowledge of a technical subject-matter but because we believe, on the evidence rightly, that their training will endow them with qualities of judgment and initiative without which no Government can be successfully run. But these are exactly the qualities a politician must have if he is to be successful, normally in the struggle for place."<sup>23</sup>

**Growing tendency towards Bureaucratic Government.** A further criticism against Whitehall is the danger of bureaucracy. Ramsay Muir maintains that "bureaucracy" in Britain "thrives under the cloak of ministerial responsibility." He asserts that the continuous and persistent influence of the permanent civil service in the three functions of administration, legislation and finance is the dominating fact of British governance today and, as such, the element of bureaucracy is of vital importance, "though its strength is marked by the doctrine of ministerial responsibility."<sup>24</sup> This criticism implies that permanent officials control the life of the nation. Various, and not without much truth, arguments are advanced in this connection. First, it is contended that in the carrying out of established policy, many acts are done every day which involve a policy. The Minister simply conveys the general directions of a policy approved by Parliament and directs the Department to carry it through. He has no time to look to the daily working directions. The permanent civil servant is an expert tully conversant with the details and their implications and he, accordingly, tends to shape the day-to-day policy of the administration.

Secondly, in devising new policy, which may take the form of Bills to be put before Parliament, the influence exercised by the civil servants is supreme. Ministers simply receive vague indications of policy from their party or Cabinet. But the material to serve the basis for a draft Bill has to be provided by officials of the Department concerned. Then, the actual drafting of a Bill is a complicated and a difficult task. A layman will make the worst of a job if he attempts it. It is done by the officials of the Parliamentary Counsel under the Treasury. "Only an expert can fit the new policy into the old administration; and the permanent official may often have to suggest to the political Ministers what can and what cannot be done, as well as how to do what can be done. Thus new policy is very often the actual product, and still more often the result of corrections and suggestions of the permanent civil servants."<sup>25</sup> It is not the civil servants at the top who exert the influence alone and shape policy. There are many less important decisions and even some elements of policy which are influenced by the lower ranks of the civil service. In every Government Department responsibility must be delegated. This involves giving some control over policy to civil servants lower on the ladder.

23. Laski, H.J., *Parliamentary Government in England*, op. cit., p. 293.

24. Refer to Ramsay Muir's *How Britain is Governed*, Chap. 11.

25. Burns, C.D. *Whitehall*, p. 69.

[illegible]

Then there is usually a clear and hard hierarchy of authority from the Minister down to the lowest office, and the system is called what is popularly known as red tape. It seems that in the past the law is taken by rather wooden rule of thumb, and the people feel aggrieved, because of the stereotyped method of disposal of the case and rigid application of the rules without taking cognizance of the peculiarities involved therein. The system also takes pretty long time to dispose them off finally. All this is nothing short of bureaucracy which defeats the purposes of a democratic government more so than any other factor. "The faults most commonly enumerated are over-elaboration of precedent, remoteness to the rest of the community, inaccessibility and faulty handling of the general public, lack of initiative and imagination in effective organization and misuse of man-power, procrastination and aimlessness." The officials regard the routines more important than the results and value the means employed more than the needs aimed at. The trained official," as Bagehot said, "hates the rude, untrained public. He thinks that they are stupid, ignorant, reckless."

But the real danger of bureaucracy, it is pointed out, is the process by which the Departments have been made a source of legislation in the shape of orders and regulations issued in supplement of the legislation passed by Parliament, and a source of jurisdiction, in the sense of issuing decisions on a number of contentious issues which arise in the course of their work. In other words, the exercise of what is described as delegated legislation and administrative adjudication are really a great enhancement in the powers of the Executive. It is true that, in form, such powers of legislation are exercised in the name of the political chief of the Department, but, in fact, they are actually exercised by administrative officials. Then, the Executive goes a step further by establishing departmental tribunals or quasi-tribunals, which decide disputes arising under the orders and regulations. As long as the decision is within the scope of broad grant of powers given by Parliament, it is legal and the justice or wisdom of the Minister's decision cannot be questioned in a court of law; it is final. But at the back of this final decision of the Minister is some anonymous

26. Report of the Committee on the Training of Civil Servants (1944).

27. *The English Constitution*, p. 172.

mous civil servant. Moreover, the Minister, or rather the civil servant, is not governed by the rules of judicial procedure, which are incumbent upon the courts, and may, therefore, make decisions without giving an opportunity to the affected party to submit evidence or to plead and argue his case. It would, accordingly, seem that both these powers of legislation and jurisdiction have made the authority of the administrative departments arbitrary and unduly free from restraint. For, both these methods oust Parliament and the courts of law from the exercise of their respective authority and the natural outcome is omni-competent bureaucracy."

But this is, again, not a correct appraisal. Lowell suggested in his now classical book, *The Government of England*, that in England the danger of bureaucracy had disappeared through the particular type of relationship between amateur and professional involved in the clear distinction of political from non-political agents.<sup>28</sup> Bureaucracy, according to Laski, "is the term usually applied to a system of government, the control of which is so completely in the hands of the officials that their power jeopardizes the liberties of ordinary citizens." The permanent officials in Britain are not the masters of the situation. The Civil Service is, no doubt, the reservoir of experience and knowledge. They furnish the Cabinet and Parliament with much of the information and material which is required in shaping and enacting policies on a multitude of subjects. But they do not dominate the administration and fix the tone and character of the Government. At the head of every Department is a responsible political chief who really rules. It is he who is responsible to Parliament and the people for carrying out the policy, and the civil servants must adjust themselves to carry out that policy. If a Member of Parliament, who represents the people, feels that an injustice has been done to an individual, or a wrong principle is being applied, he may ask the Minister privately for an explanation. And all Ministers do it readily. If the explanation offered does not satisfy him, he can ask the question in the House. If the answer, again, does not meet his criticism, he may raise like subject in a debate. But a responsible Minister will like to avoid such an eventuality, because, as Jennings correctly remarks, that "even more important than the fact that questions are asked is the fact that questions may be asked."<sup>29</sup> This fact makes the Minister alert. He must not make mistakes because he is responsible. He will exercise a greater degree of care and caution because he can be questioned in Parliament about the mistakes of the most junior official. The Civil Servants, also, know the precarious position of their political chief, and, therefore, they, too, must not make mistakes. This they have to remember all the time and at every step.

A bureaucracy, therefore, controlled by Parliament, and subject to Parliamentary chiefs is not a bureaucracy. The Civil Service in Britain is part of a democratic and responsible form of government in which abuse of power would lead to a quick and drastic public reaction which would cause some "heads to roll". The responsible Minister, who is at

28. Hewart, Lord, *The New Despotism*.

29. Vol. I, Chap. VIII.

30. *The British Constitution*, *op. cit.*, p. 134



the head of the civil servants, would continue reminding them the inner meaning of Sir William Herecourt's remark "what the public won't stand." This is the primary function of a Minister and this is the real meaning of Cabinet Government. The whole development is, accordingly, permissive development proceeding from Parliament, subject to Parliament, and terminable by Parliament. The difficulties created by 'red tape' are perhaps a small price to pay for compensating advantages.

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31. As quoted in Laski's *Parliamentary Government in England*, op. cit., p. 288.

## CHAPTER VII

# PARLIAMENT

**The origin of Parliament.** Parliament is often described by its critics as a mere "Talking Shop". This description is used opprobriously and yet that is what the word Parliament means and to a great extent it describes the actual institution. It is a place where people talk about the affairs of the nation.

The earliest document in which the word 'parliament' is found is the eleventh-century **Chanson de Roland**, where it is used simply to refer to a conversation between two persons. But the word early acquired a derivative meaning, that of an assembly of persons in which discussion took place. A contemporary referred to the meeting at Runnymede as the parliament in which King John "gave his charter to the barons." Anyway, by 1258 Parliament had evidently begun to acquire a special meaning. In June, of the same year, one of the reforms demanded by the barons at Oxford was three parliaments a year "to treat the business of the King and Kingdom." Clearly, therefore, the essence of Parliament is discussion and when the word was first applied to the great councils of the English Kings it was with the view to emphasise their deliberative function.

The origin of Parliament may be traced to two ideas and both these ideas are of great antiquity. The one is that the King, though himself the supreme law-giver, always sought the advice and counsel of the wisest and most experienced of his subjects. In Saxon times Kings governed with the advice and counsel of the "Witanagemot", or meeting of wise-men. The other idea is that of representation. The Norman Kings held their courts in different parts of the country, and summoned therein for discussion of national affairs prominent members of the Church, big land-lords, and Knights. They were really not representatives of the people in the sense in which we understand them today. But it does indicate the idea of selecting some prominent individuals, even by the Norman Kings whose power was unlimited, for purposes of consultations. This kind of consultation took a significant shape in 1213 when King John, who was hard pressed for money, ordered the Sheriff of every Shire to send up four 'Knights' from his Shire to discuss the affairs of the realm with the King. Here are the seeds of a modern idea of Parliament; a representative assembly of the people where their affairs are discussed and laws made for them.

**Growth of Parliament.** We have referred to the growth of Parliament in a previous Chapter.<sup>2</sup> Its growth was more or less spontaneous,

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1. Mackenzie, K.R., *The English Parliament*, p. 12.

2. See *ante* Chap. II.

slow, and sometimes haphazard. But its form was very different from what it is today. And so were its powers. It took eight centuries to transform Parliament into a governing body resting on the suffrage of all adult persons in the country and the process has only been completed in our own times. All these eight centuries had been a period of struggle which had been more intense during the reign of evil Kings. It began with King John. All of us know how the barons, in desperation, took the King prisoner and made him sign at Runnymede, on June 15, 1215, **Magna Carta or the Great Charter.**

This was not a victory of the people over the King, but a victory of the rich and powerful men of Britain over the King. The **Magna Carta**, all the same, gave them, *inter alia*, assurances against arbitrary arrest and it provided that the King could not impose taxes on his chiefmen without the common counsel for the realm. For the next eighty years the struggle was between the Kings who were anxious to get money, and the other great men of the land who claimed the right to meet, and consider whether the King's demands were reasonable or not, and get their grievances redressed. Out of this struggle emerged the present political dogma of no taxation without representation, and the conversion of these assemblies into legislative bodies.

The original idea of calling 'Parliament' was, thus, associated with the pressure of the money demands of the Kings. It was called when the King wanted it and its primary business was to hear from the King why money was needed, how it was going to be spent, and to consult those who had been summoned as to the best means of raising it. This is still the most important business of Parliament.

The 'Parliament' summoned by Simon de Montfort in 1265, is generally described as the first Parliament in anything like the modern meaning of the word. For, he called two knights from each county and also representatives from certain towns, although much of the credit for its being representative is lessened by the fact that he summoned only his own supporters. In 1295, Edward I, who needed money for wars, called together, what has been named, the 'Model Parliament'. To this were summoned archbishops, bishops, abbots, earls and barons; all of whom attended as land-holders on personal writs. General writs were also issued to the Sheriffs for the election of two knights from each county, two citizens from each city, and two burgesses from each borough. Representatives of the lesser clergy were also summoned through the bishops. Thus, a large representative element was added to the feudal council.

Two important things, however, emerged out of this transaction of business. The persons summoned to the King's Parliament only discussed the best way of raising money by taxes. They grumbled, no doubt, but they could hardly afford to come into conflict with the King and question the propriety of his demands. But whenever they came to attend the meetings of Parliament, they brought with them their local grievances and presented petitions to the King detailing the wrongs and injustices done in their part of the country and prayed for their redress. If the King refused to redress the grievances, the apprehension was that the representatives of the tax-payers might create difficulties about meet-

ing the financial needs of the King. Gradually, therefore, was established the principle that the redress of grievances should precede the grant of supply. With the lapse of time another development took place. The grievances were at first personal and particular. But it was soon discovered that many people and many localities had common grievances. They, accordingly, began talking about it in Parliament and if other members supported them in their requests, then, they would send a petition from Parliament to the King. If the King agreed to grant what they asked, he would send back the petition with the words **Le roy le veut** (the King wills it) written on it. If he did not accept it, he would send the petition back with the words **Le roy s'avisera** (the King will think about it). Even today public Bills are assented to with the words **Le roy le veut**. **Le roy s'avisera** has not now been used to a measure for more than two hundred years, as it amounts to vetoing a Bill.

Even more important was the second development. There began a custom that the King could not tax his people unless Parliament voted him the money and devised ways of raising it. This finally became a mighty law, and the struggle between Cromwell and Charles is the culminating point in this connection. Another important result of this struggle was the decision of the issue: who was to govern in Britain—King or Parliament. The struggle ended in the execution of King Charles by Parliament and subsequently the suppression of Parliament for some years by Cromwell. But the Glorious Revolution of 1688 finally decided the supremacy of Parliament. With the abdication of the last Stuart King, Parliament turned to the Hanoverian dynasty. It had two definite results of constitutional importance. First, Monarchy became the gift of Parliament, and, secondly, any future Monarch of Britain would be a constitutional Monarch acting on the advice of his Ministers responsible to Parliament. This ended four centuries old conflict between the Kings and Parliament, and, then, followed the process of democratization of Parliament.

The **Magna Carta** had curtailed the King's powers over his barons. The struggle between Cromwell and Charles had represented the claim to a share in power of the new rising class. The Revolution of 1688 had established the sovereignty of Parliament by reducing Monarchy to dependence upon it. But Parliament was still very far from being a democratic Parliament. Before 1832 there were only a few thousands of voters spread all over the country, and parliamentary seats—"pocket boroughs" or "rotten boroughs" as they were called—were in the gift of rich men, and were bought and sold like shares on the Stock Exchange. The First Reform Act of 1832 was a cautious measure which left the working class completely unrepresented. After all it added only 1,00,000 persons to the voters' lists and it represented just the partial acceptance of the claim of the middle class. Parliament was, therefore, still a long way from being a people's Parliament.

At intervals after 1832 extending to 1928 there had been successive electoral reforms. First to the more substantial middle class, then to the lower middle class and the workmen in the towns, then to the mass of householders, then to adult males over twenty-one years of age and most women over thirty and afterwards to almost every person over twenty-one



of either sex. The age of voting has now been reduced from January 1, 1970, to 18, thus, adding another two million to the voting population of the country.

**Summary of the changes brought about.** The essential changes which these eight centuries have brought may, thus, be summarised:

1. Eight centuries ago Parliament was called when the King wanted it. When it met, it could not make laws. All that it had to do was to grant the King the money he asked for, and to discuss the best way of raising the money by taxes. Today, the King must call a Parliament. It has become now a regular thing and its meetings, except for intervals of recess, go all the year round.

2. From being a selected thing it is now an elected thing. The King does not select whom he will call to a Parliament. Members are elected by the people at regular intervals.

3. The right to take part in the election of members of Parliament, instead of restricted to a small section of the people, is enjoyed by all adults, men or women in the country who had attained the age of eighteen. This right they express through a system of secret ballot.

4. That power has passed from King to Parliament. The King is only a constitutional head of the State who acts on the advice of his Ministers and they in turn are responsible to Parliament.

5. That within Parliament, power has passed from Upper to Lower Chamber—from the Lords to the Commons.

**Sovereignty of Parliament.** This brief survey of the development of Parliament discloses how Parliament conducted a struggle with the Kings to determine the residence of authority and to vindicate sovereignty for itself. The issue of the struggle was practically determined in the seventeenth century and consolidated in the eighteenth. Three landmarks illustrate the result. It was Parliament, mutilated and under the control of the army but, nevertheless, Parliament, that resolved in December 1648 to bring Charles I to trial<sup>3</sup> and to his subsequent execution in 1649.<sup>4</sup> It was, again, the same Parliament that abolished<sup>5</sup> Monarchy by an Act and declared Britain to be a Commonwealth.<sup>6</sup> In 1660, it was, again, Parliament which restored Charles II to the Throne, and on the condition of his co-operation with Parliament.

The second landmark is the Revolution of 1688, when James II, failing to co-operate with Parliament, was made to abdicate, and it was again Parliament which supported the invitation to William of Orange to come over to defend Britain's rights against James II.<sup>7</sup> Parliament also deter-

3. Act Erecting a High Court of Justice for the Trial of Charles I, Adam and Stephens, *Selected Documents of English Constitutional History* op. cit., p. 389.

4. Sentence of the High Court of Justice upon Charles I, *Ibid* pp. 391-393.

5. Act abolishing the office of the King, *Ibid.*, pp. 397-399.

6. Act declaring England to be Commonwealth, *Ibid.*, p. 400.

7. It was called the *Convention Parliament*. The assembly resembled Parliament in every way, except that it was not convened by the King's writ;

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mined, by the Bill of Rights of 1689, not only who should reign next, but also on what express conditions he should reign.<sup>8</sup> In 1701, Parliament made the Act of Settlement, an Act which, *inter alia*, actually determined the succession to the Throne.<sup>9</sup>

The third landmark is 1783, when, with the accession of Younger Pitt to office, the Cabinet system in all its essentials was finally fixed, and the King ceased to choose and dismiss his Ministers. Henceforth, in reality if not in form, Ministers came to be chosen and dismissed by Parliament.

The power of Parliament, thus, is supreme and unlimited. It embraces a vast field including the making of laws, levying of taxes, the sanction for declaring of war and the making of peace. It controls and supervises all governmental machinery. Moreover, it can dethrone Kings; it can elect Kings; it can abolish Kingship. The power and jurisdiction of Parliament, says Sir Edward Coke, "is so transcendent and absolute, as it cannot be confined either for persons or causes within any bounds. Blackstone held the same view and used language to the same effect. De Lolme said that, "Parliament can do everything but make a woman a man, and a man a woman." But like various other remarks made by De Lolme this statement also involves confusion. If the power of Parliament be envisaged wholly from the legal point of view, the proposition that Parliament cannot make a man a woman is inaccurate. Should Parliament enact a law causing a confusion in the sexes, legally speaking, a man would be a woman and no other body can set the law aside on the grounds that it is unconstitutional or undesirable. Parliament is not legally subject to any physical limitation.

"The Sovereignty of Parliament," says Dicey, "is from a legal point of view the dominant characteristic of our political institutions," and the principle of Parliamentary Sovereignty, he adds, "means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make and unmake any law whatever, and further no person or body is recognised by the law of England as having a right to override and set aside the legislation of Parliament." Dicey, thus, sets the following propositions:—

- (1) That there is no law which Parliament cannot make; and
- (2) That there is no law which Parliament cannot unmake.

From the above two follows the third:

- (3) That there is under the British Constitution no marked or clear distinction between laws which are fundamental or constitutional and laws which are not; and

- (4) That there is no authority recognised by the law of England which can set aside and make void such legislation.

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a state of affairs rendered inevitably by the flight of James II, and by the fact that William had not yet been crowned as King. The proceedings were however validated by the Confirmation Parliament Act passed on February 20, 1689, *Ibid.*, pp. 454-456.

8. *Ibid.*, pp. 462-69.

9. *Ibid.*, pp. 475-79.

10. Dicey, A., *Introduction to the Law of the Constitution*, pp. 39-40.

Finally, Dicey adds:

(5) That Parliamentary Sovereignty extends to every part of the King's Dominions.

To sum up, Parliament can legislate what it pleases, as it pleases, and that what Parliament enacts is law. What Parliament has enacted, the courts interpret and apply unless Parliament has otherwise provided. Parliament is both a legislative body and a Constituent Assembly. No formal distinction is made in Britain between constitutional and other laws, and the same body, Parliament, can change or abrogate any law whatsoever and by the same procedure. An Act of Parliament cannot be called into question in any court of law. Nor can it be declared invalid, for no law exists in Britain higher than that made by Parliament. Although Equity and Common Law are the oldest and most fundamental to the British Constitution, yet neither Equity nor Common Law can overrule the laws enacted by Parliament. If two Acts of Parliament are in conflict with each other, a more recent Act of Parliament takes precedence over a less recent and supersedes any earlier statutory provisions inconsistent with it.

The principle of the legal supremacy of Parliament also helps to explain the status of certain "fundamental and historical documents," like Magna Carta, the Petition of Rights, the Bill of Rights, the Habeas Corpus Act, the several Acts dealing with suffrage, etc., which are accepted as a distinct element or source of the British Constitution. In reality such "documents" possess the general character of statutes, and as they are connected with the structure or functions of government they, undoubtedly carry with them greater sanctity than an average statute. But any recent statute, though it is unlikely to be in conflict with the provisions of these legal landmarks, would nonetheless in law take precedence over them.

Finally, the right to this legislative supremacy resides in Parliament and in Parliament alone. Executive in Britain has not the power of issuing decrees which have the force of law save in so far as that power is conferred on it by Parliament itself and so can be taken away by Parliament.<sup>11</sup> Neither through the Royal Prerogative nor by any other means can any legal limitation be placed on Parliament. As a corollary, the right to impose taxes resides with Parliament alone. Again, Parliament alone has the right to legalise the past illegalities. Legally, therefore, Parliament can make or unmake any law, destroy by statute the most firmly established convention or turn a convention into a binding law, and legalise past illegalities reversing thereby the decisions of courts. It even has power to prolong its own life by legislative means beyond the normal period of five years as determined by the Parliament Act, 1911.

**Sovereignty of Parliament examined.** Sovereignty of Parliament, however, is really nothing but a legal fiction and a legal fiction may assume anything. Dicey, and many others like him, dealt with only legal aspects of sovereignty divorcing it from the realities of actual life. And the reality

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11. The famous exception, the Statute of Proclamations which only remained in force for a few years, is in one sense an illustration itself of this principle, since it was considered necessary to confer the decree-power on Henry VIII by an Act of Parliament.

of actual political life in Britain is that a legal truth very often turns out to be a political untruth. Parliament cannot do any and everything, and make or unmake any kind of law. There are many moral and political checks which limit its powers, and Parliament would find many other things as difficult to accomplish as to make a man a woman. Blackstone has correctly said that, "It (Parliament) can, in short, do everything that is not naturally impossible." All proposals for law are considered on the touchstone of practical utility and moral considerations. In a law-abiding community, such as the British community, the very fact that Parliament has enacted a law is strong presumption that it will be obeyed. The ordinary citizen does not readily set up his own private judgment against that of Parliament. But there are limits to obedience too. "If a legislature decided," as a writer suggests, "that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislature must go mad before they could pass such a law and subjects be idiotic before they could submit to it." In fact, no legislature can even think of such a legislation, particularly in a country like Britain where public opinion is strong and has the ready means of expression. Democracy is a government by consent and laws in a democratic government must necessarily be the manifestation of the will of the people. If they are not, the political sovereign takes his revenge. The supreme legislature, therefore, always takes care to keep itself within the practical restraints, though legally there may be none.

It is true, as Dicey says, that law is a law whether it is moral or not and legislation passed by Parliament may not have any reference to the moral aspect. But Parliament cannot pass a law which is against the facts of nature or is against the established codes of public or private morality. Similarly, it dare not pass legislation against the established customs of the country unless the people want it. Even the supremacy of Parliament is itself nowhere laid down as a fundamental and unalterable law. It is the expression of custom, the result of a long and ultimately successful struggle against the ordinance-power of the King. The will of the people triumphed in making Parliament supreme and sovereign and in this way sovereignty of Parliament became an organic principle of the British Constitution. And so are the Conventions which carry with them the acquiescence of the people, the supreme and sovereign will. The Conventions of the Constitution are, thus, an organic principle of the British Constitution as the Sovereignty of Parliament itself is and, accordingly, are beyond the practical possibility of the competence of Parliament. This is a significant restraint against the Sovereignty of Parliament.

Another important feature of the British Constitution is the Rule of Law. The conception of the Rule of Law was given classical exposition by Dicey as he had given to the Sovereignty of Parliament. The Rule of Law means that the ordinary law of the land is of universal application, that there is no exercise of arbitrary authority, and that there is no division into separate systems of law, one for officials and another for the ordinary citizens. It also carries with it the rule that the remedies of the ordinary law will be sufficient for the protection of the rights and liberties of the citizens, and, there is nothing in Britain as the Fundamental Rights. The Rule of Law is closely inter-woven with the supremacy of Parliament. To put it in another way, Parliamentary



supremacy is, in part, only tolerable, because the Rule of Law is recognised. If Parliament passes a legislation which is contrary to the principles of the Rule of Law, it imperils its own supremacy. Sovereignty of Parliament and the Rule of Law, remarks Barker, "are not only parallel; they are also inter-connected, and mutually interdependent. On the one hand the judges uphold and sustain the sovereignty of Parliament, which is the only maker of law that they recognise 'except' in so far law is made, in the form of 'case law' by their own decisions; on the other hand Parliament upholds and sustains the rule of law and the authority of the judges, who are the only interpreters of the law made by Parliament and of the rest of the law of the land." Rule of Law is, therefore, an effective limitation on the legal Sovereignty of Parliament.

The most decisive proof of the legislative sovereignty of Parliament, it is maintained, are those Acts which fix the limits of its own duration. The Triennial Act provided that no Parliament should last longer than three years, and the Septennial Act of 1716 enacted that it should last for seven years unless previously dissolved by the King. The Parliament Act of 1911 reduced its life to five years, and the same Parliament that introduced the change extended its own life by successive statutes until it had sat for almost eight years. All these extensions were made in times of war with the express approval of all the political parties and the tacit consent of the nation. What is more important to note is that in 1945, after the precedent of the First World War had been followed for almost five years, it was universally recognised that the Conservative majority in Parliament must not get another extension without the consent of the Labour minority. Accordingly, when Churchill asked his Labour colleagues to remain in the National Government without a general election until the end of the Japanese War, he coupled his request with a suggestion that the electorate should be asked to signify its approval of the postponement of General Elections by a referendum. The Labour Party did not agree and though Britain was still in the midst of hostilities, General Elections were held and the electorate returned the Labour in majority to form the Government. No Parliament, therefore, dare extend its duration, permanent or temporary, until it has with it the tacit consent of the nation. While discussing the question of Sovereignty of Parliament, Herman Finer says, "All is true except that, in fact, there are limitations in practice to the authority of Parliament limitations that are embodied in the authority of the electorate, mediated or not through the political parties. The sovereignty of Parliament is limited by the power of the people—but by no other instrument."<sup>12</sup>

Yet, what is Parliament? Jennings says, indeed, we talk in "fictions on concepts even when we mention 'Parliament'. Parliament is not an institution."<sup>13</sup> Parliament consists of the King, the House of Lords, and the House of Commons. All the three functionaries join together to complete the actions of Parliament. We need say nothing about the

12. Barker, Ernest, *Britain and the British People*, pp. 24-25. It should, however, be noted that the Executive has now acquired a power of administrative jurisdiction.

13. Finer, H., *Governments of Greater European Powers* (1956), p. 47.

14. Jennings, W.I., *Parliament*, p. 2.

King, for his part in legislation has become little more than formal. The House of Lords and the House of Commons are two different institutions having different characteristics and different functions. The authority of the House of Lords with the passage of the Act of 1911, as amended in 1949, has become rigorously limited and if today the House of Commons were to pass a law abolishing the House of Lords, it can do and the Queen must give her assent thereto. There is nothing to obstruct it. The conception of the Sovereign Parliament, therefore, now stands fundamentally changed. Under the present circumstances Parliament really is the House of Commons, and in the broader sense it means the majority party in the House which in its turn is the Cabinet. Parliament endorses what Cabinet proposes. And yet it is normally the joint action of the Queen, the Lords, and the Commons which law requires to make legislation possible. This is evident from the words with which an Act of Parliament opens: "Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same...."

Though, Parliament may legally legislate for the Dominions, yet its powers are rigidly limited by constitutional limitations. As a result of these constitutional limitations it is in accord with the constitutional position of all the Dominions, "in relation to one another that any alteration in the law touching the succession to the Throne, on the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of Parliament of the United Kingdom." Moreover, no Act of British Parliament passed after 1931, is to extend to a Dominion unless the Act expressly affirms that the Dominion concerned has requested and assented to it. Legally, North America Act of 1867 can be amended by the British Parliament, but the convention which governs the constitutional amendment is that it proceeds from the Canadian Parliament and the British Parliament quietly and quickly passes the required amendment. The British Parliament is simply an agent in the realisation of the wishes of the Dominion Parliament. Dicey's assertion that the right or power of Parliament "extends to every part of the King's dominions" is fundamentally unrealistic.

But the great inroad made on the Sovereignty of Parliament is by the delegated legislation. Dicey, perhaps, did not visualise this modern development when he maintained that legislative supremacy lies in Parliament and in Parliament alone. Parliament cannot find time for all the work it has to do, and so lightens its task by permitting other bodies to take share in law-making. In some cases the Crown, acting on its prerogative powers, is left to issue orders, usually Orders-in-Council, and in other and numerous cases an Act of Parliament gives some Minister, Department, or other authority, the power to make Orders and Regulations. It is true that it is the Act of Parliament which authorises the issuing of Rules and Regulations, but a great mass of these Rules and Regulations practically remain unknown except to those who administer them. Cecil Carr divides the 'Statutory Instruments', as these Rules and Regulations are now called under the Statutory Instruments Act of 1946, into separate classes, 'general and local' and estimates that their average exceeds

1,200 a year.<sup>15</sup> In 1946, the total just topped 2,287. Their number has since then still more increased. Parliament does not and cannot keep a check on this tremendous increase in the delegated legislation and they have the force of law and the courts can intervene only when the rules and regulations so made are against the delegation of power or when proper procedures have not been used.

Finally, the jurisdiction of Parliament is also limited by the practices of International Law. It is now a recognised principle of the British Constitution that International Law is a part of the Municipal Law of the land. It was decided in **West Rand Gold Mining Co. vs. The King** "that whatever has received the common consent of civilised nations must have received the assent of our country." Any legislation, therefore, which is repugnant to the principles of International Law Parliament cannot enact.

Dicey himself recognised the formal and purely legal aspect of the doctrine of the Sovereignty of Parliament and proceeded to point out that this formal concept operated within two limits, external and internal. Ultimately, the legal sovereign derives its authority from the political sovereign. Political sovereignty is tersely but fully stated in a Labour Party pamphlet circulated in the election of 1945.

"It really does rest with you. You may complain about statesmen and politicians. You may criticise Parliament. But you give statesmen **power**. You elect politicians to Parliament. You determine the membership and thereby the policy of the House of Commons."

You meant the voters, and the House of Commons is really Parliament; it is the principal pillar on which national democratic government rests. Legally, Parliament can make and unmake any kind of law, but in actual practice it must bow to the will of those who determine the membership and policy of the House of Commons. It cannot ignore the wishes and interests of those who are likely to be affected by its legislation. The Sovereignty of Parliament, therefore, operates within the limits imposed by conventions, public opinion, morals of the community, expediency, International Law, and International Agreements.

## THE HOUSE OF LORDS

**Origin and Growth.** Parliament now consists, apart from the King, himself, of two Houses—the House of Lords or the Upper Chamber, and the House of Commons or the Lower Chamber. It was not always so, and on the most formal occasions it is not so even today. When the King opens Parliament, or prorogues it, or when his assent to the Bills is announced, all members of Parliament—Lords Spiritual and Temporal and Commons—assemble in one Chamber, and there listen to the King in his person or his message. Ordinarily, however, the Peers do their business in one Chamber and the Commons in another.

In Britain nothing is arranged. It just grows and the House of Lords is the child of this growth. When Edward I called his Model

15. *Campion and Others, Parliament: A Survey*, p. 241.

16. *Finer, H., Government of Greater European Powers*, p. 59.

Parliament in 1295, all the different classes of people summoned to attend met in one single assembly. But afterwards they broke into three groups or "estates"—Nobles, Clergy and Commons—to hear separately the King's plea for money and "to make such response as they individually chose". Gradually, however, practical interests led to a different arrangement. The greater barons and the greater clergy had many interests in common and they, accordingly, associated together in one body. The lesser clergy found attendance at Parliament very irksome. Moreover, they were jealous of their clerical privileges and preferred to make their money grants to the King in their "Convocations." They soon ceased, therefore, to attend Parliament altogether. Similarly, the Knights, after a good deal of wavering, found their interests identical with the burgesses and finally united with them for all purposes. The result was the division of Parliament into two Houses. In one House sat the Peers—Temporal and Spiritual—in the other the representative Knights of the Shires and the representative Townsmen. The first, which became the House of Lords, was a non-representative House, as it was composed of men who attended in response to personal summons. The second was a completely representative House, called the House of Commons, as it consisted of the representatives of the Shires and the Boroughs.

How and when exactly this arrangement came about, nobody knows. It was accidental and the result of social and economic circumstances. By the close of the reign of Edward III, this bicameral organisation seems to have been fully established.<sup>17</sup> Thenceforward the distinction between the two Houses became political.

The hereditary principle came into being similarly. The term "peer" means equal and originally it referred to the feudal tenants-in-chief of the King all of whom were legally peers of one another. After the division of Parliament into two Houses in the fourteenth century, it was being used for those members of the baronage who were "accustomed" to receive a personal writ of summons when a Parliament was to be held. There is no evidence to show that the Kings had ever a mind to create a peerage of a hereditary character. It was, however, a custom that a King, whenever he summoned a Parliament, would send for the same peers who had sat in an earlier one, or if in the meantime they had died, for their eldest sons. In course of time custom became a right and a seat in the House of Lords descended from father to eldest son, just as did the family estate under the rule of primogeniture.

**Composition of the House of Lords.** Potential membership of the House of Lords is over 1,000, but this number is reduced to about 760 by a scheme which allows peers who do not wish to attend to apply for leave of absence, either for the duration of a particular Parliament or for a single session.<sup>18</sup> Average daily attendance is upwards of 200, but many more may attend when some matter in which they have a special interest is under discussion. Its composition may be divided into the following

17. The greater clergy were not simply clergies, but they were feudal and landholders too.

18. Adams, G.H., *Constitutional History of England* (1951), pp. 194-95.

19. Provision is made for a Peer to terminate his leave of absence on giving a month's notice.

seven categories:

1. The Princes of the royal blood who now do not take part in the proceedings of the House.<sup>20</sup>

2. The Lords Spiritual. There are only 26 of these, the two Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and 21 other senior Bishops of the Church of England. When a sitting Bishop dies, a letter to the next senior of the same rank is sent to a writ.

### 3. The Lords Temporal subdivided into:

- (i) all hereditary Peers and Peeresses now 700 in number who have not claimed their Peerage under the Peerage Act, 1963. Hereditary Peers elect with them a right to a seat in the House of Lords, provided the holder is at least 21 years of age or over. Under the Peerage Act, 1963, however, anyone succeeding to Peerage (or has at her life time) has at her life time. Those who do claim their Peerage lose their right to sit in the House of Lords, but are eligible for election to the House of Commons.
- (ii) until 1963 the Scottish Peers elected for each Parliament sixteen representative Peers to sit in the Lords. The Peerage Act, 1963 now opens membership of the Lords to all Scottish Peers;<sup>21</sup>
- (iii) nine Lords of Appeal in Ordinary (commonly called the Law Lords), appointed under the provisions of the Appellate Jurisdiction Act, 1876 to assist the House of Lords in the performance of its judicial functions. They hold their seats for life, and
- (iv) life Peers and Peeresses created under the provisions of the Life Peerage Act, 1958.<sup>22</sup>

By far the most important and the most numerous are the hereditary Peers and they account for more than seventy per cent of the total membership of the House. A great bulk of them hold their seats simply as a result of chance as they happen to be the eldest son of an eldest son back to an ancestor who was first created a peer. They are the "accidents of an accident", as Bagehot has called them. Nearly one-half of the total of the hereditary Peers are the creation of the twentieth century. Another 300 go to the nineteenth century and the rest go up to the thirteenth century. The bulk of the Peerage is, therefore, of recent origin.

The power of the Crown to create hereditary Peers is unlimited and

20. There are now four peers of royal blood: 1. Prince Charles, 2. Prince of Wales, Dukes of Windsor, Gloucester and Kent.

21. By the Act for the Union of Great Britain, 1706-1707, the Irish Peers were entitled to elect 28 representatives, but no claim was made until 1924 since the creation of the Irish Free State (now the Irish Republic). In 1922, and no Irish Peers now remain.

22. Some of the appointments under the 1958 Act are recommended by the Prime Minister after consultation with the Leader of the Opposition or with the Leader of the Liberal Party. There are at present some 150 Life Peers.



in modern times has been used with great freedom. Normally, it is usual to create anything from two to half a dozen new peers a year and the object is to honour men of distinction in law, letters, science, politics, diplomacy, war, or for any other meritorious services. But it had also been an important constitutional weapon in the hands of the Crown to change the complexion of the House of Lords in order to overcome its resistance to the avowed policy of the party in power. It was actually used by the creation of twelve Tory Peers in 1711 in order to secure approval of the Treaty of Utrecht. In 1832, the continued resistance of the House of Lords to the Reform Bill incurred the threat to create as many new Peers as Earl Grey's Ministry deemed necessary to get the measure passed. A similar situation arose over the Parliament Bill of 1909. Once again, the reluctant House of Lords succumbed to the threat. In view of the provisions of the Parliament Act of 1911 and scrupulous adherence to the "mandate convention" there had been no more occasion to resort to this method of securing the assent of the House of Lords over an issue on which electorate had given its verdict.

Sometimes the Government of the day needs spokesmen in the Lords or must fill Royal Household appointments. Peerage is, accordingly, conferred on men of talent and loyalty. Lord Passifield, formerly Sidney Webb, was raised to peerage in the first Labour Government and a score of others have been elevated since 1945-46.

**Privileges and disabilities.** Members of the House of Lords have certain privileges and are under certain disabilities. They enjoy freedom of speech and are exempt from arrest while the House is in session. The Lords can individually approach the King to discuss public affairs. They have also the right of recording a protest against any decisions of the majority in the House in its Journals. They have the right to commit for contempt of their privileges and that right extends beyond a session. A peer when charged with treason or felony had the right to demand trial by his fellow peers, but the privilege with regard to felony was withdrawn in 1936. The peers have, also, the right to act as a court of final appeal for the realm, but this right is now exercised by the Law Lords only.

The members of the House of Lords had no right to vote at Parliamentary elections, and they were disqualified for election to the House of Commons. They could not divest themselves of their titles or refuse to inherit them when their elders died. Consequently, it was a matter of much tribulation, "when their heir who has made a career for himself in the Commons and Ministry must leave the excitement of these centres of government with the prospects of high office, even the Prime Ministership, to go to the House of Lords". Three recent examples are good to illustrate the point. One is Quintin Hogg, son of Lord Hailsham, an eminent lawyer and once a commoner who bitterly suffered his "promotion". The other is now the Marquess of Salisbury. Lord Stansgate's son and heir, Anthony Wedgwood Benn, in vain fought hard to avoid eventually inheriting his father's title. Winston Churchill was willing to be knighted, but he firmly refused the peerage, for he rejoiced in remaining a "House of Commons man".

With the passage of the Peerages Act, 1963, the old position is chang-

ed. It now enables any hereditary peer with political ambitions to disclaim peerage, and seek election to the House of Commons. Welleswood Benn, Viscount Stansgate, was the first to renounce his title and won back his seat as Labour M.P. The enactment of *Peerages Act* was the result of nearly ten years' struggle of this 'reluctant peer'. Peers who disclaim their peerages lose their right to sit in the House of Lords, but they are able to vote at parliamentary elections and are eligible for election to the House of Commons. Lord Home disclaimed his peerage and became Sir Alec Douglas-Home. He became Prime Minister after the resignation of Harold Macmillan.

The membership of the House of Lords was hitherto entirely male. Although there were some twenty-six Peeresses in their own right, holding titles by virtue of descent from male ancestors, but they were not admitted. Even now those who are allowed to sit and vote in the House of Lords are the life Peeresses. The male Peers, who have not renounced their titles, cannot seek elections to the House of Commons, but the wives of Peers may sit, as did Lady Astor for many years. Similarly, the husbands of new life Peeresses will retain their right to seek election to the House of Commons, as they will get no title.

The Peers receive no salary for their parliamentary work, but they are entitled to travelling expenses from their homes to the Palace of Westminster, provided they attend at least one-third of the number of sittings. They may also claim, with the exception of the Lord Chancellor, the Lord Chairman of Committees, the Law Lords and any member in receipt of a salary as the holder of a ministerial office, payment for expenses incurred for the purpose of attendance at the House (except for judicial sittings) within a maximum of four and a half pence (4 14s. 6d.) a day.

**Procedure and organisation.** The two Houses of Parliament must invariably be summoned simultaneously and both are prorogued together, but adjourned<sup>23</sup> separately. The House of Lords meets only for four days in a week—Monday to Thursday—and normally for two hours or thereabout. The precedent is that, except under direct pressure, discussion must be concluded in time to enable the noble Lords to dress for eight o'clock dinner. The House is sparsely attended. The usual attendance was from 70 to 80 members and that, too, on occasions when a matter of first rate importance was being discussed. Now the average daily attendance at a sitting is over 200. It is one of the results of the Reforms Act of 1957. Three members constitute a quorum, but at least thirty must be present in order to pass any Bill. According to Standing Orders promulgated by the House in 1958, holders of peerage are asked, at the beginning of each Parliament, whether they will attend the sittings of the House as reasonably as they can or whether they desire to be re-

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23. At the end of a session of Parliament, the King dismisses it and tells to reassemble on a certain date to begin a new session's work. This dismissal is called proroguing. Parliament prorogation both ends a session and terminates all pending business.

24. To adjourn means merely to interrupt the course of business temporarily. At the end of each day's work, and whenever it takes a holiday Parliament adjourns.

lieved of the obligation to attend. If they so desire, they are requested to apply for leave of absence, either for the duration of Parliament or for a shorter period, during which they are on their honour not to attend, and not to vote without notice. Failure to send a reply to the Lord Chancellor is tantamount to the wish not to attend. This is a useful step towards rationalising the composition of the House of Lords.

The debate is more leisurely than in the House of Commons. Freedom of speech is virtually unrestricted and the presiding officer, the Lord Chancellor, has far more limited power over debate than enjoyed by the Speaker in the House of Commons. The Lord Chancellor is a Chairman, not a Speaker as in the Commons. The level of debate is high and on certain occasions higher than the House of Commons.

The organisation of the House of Lords closely parallels that of the House of Commons. The Lord Chancellor is the presiding officer. The Crown, by commission under the Great Seal, appoints several Peers to take their place on the "Woolsack" in order of precedence in the absence of the Lord Chancellor. The first to act for him is the Lord Chairman of Committees, who is appointed each session and takes the chair in all Committees, unless the House otherwise directs. He also has important duties in connection with Private Bill Legislation in which he is assisted by his Counsel, who is a permanent salaried officer of the House. The House also appoints a number of Deputy Chairmen of Committees. The permanent officers of the House include the Clerk of Parliament, who is charged with keeping the records of proceedings and judgments and who pronounces the words of assent to Bills; the Gentleman Usher of the Black Rod, who enforces the order of the House, and the Sergeant-at-Arms, who attends the Lord Chancellor.

The Committee system of the House of Lords is more simple than that of the House of Commons. The Lords conduct some of their business in the Committee of the Whole House and it consists of the members present. It is presided over by the Lord Chairman of Committees and it operates under less formal Rules of Procedure than when the House is in regular session. The House has no Standing Committees except one for textual revision to which Bills are referred after passing the Committee of the Whole House. Sessional and Select Committees are utilised for the consideration of special kinds of legislation or for gathering of additional information on pending Bills. Sessional Committees may consist of all members present during the session or of small number as determined by the House. There are a number of Select Committees on Private Bills, consisting of five Peers, appointed in each session.

**The Lord Chancellor.** The presiding officer of the House of Lords is the Lord Chancellor, a member of the Cabinet. He presides while sitting on the traditional "Woolsack" a large and rather shapeless **divan**. The Lord Chancellor is usually a Peer and if he is not, he is created one immediately after his appointment. It does not, however, mean that a Commoner cannot be chosen to that office. The "Woolsack" is technically placed outside the precincts of the House of Lords to enable those who are Commoners to perform their official duties as presiding officers of the House.

The powers and functions of the Lord Chancellor are many and

varied. Here we are only concerned with those connected with the occupant of the Woolsack. His powers as presiding officer are absolutely insignificant as compared with the Speaker of the House of Commons. They even fall far short of those commonly assigned to a moderator. The questions regarding procedure are decided by votes of the House. For example, if two or more members simultaneously attempt to address the House, the House itself, and not the Chair, decides who shall have the floor. The proceedings of the House of Lords are extremely orderly, but if order in debate is to be enforced, it is done by the House and not by the presiding officer. When the members speak, they do not address the Chair, but the House and begin with "My Lords". If the Lord Chancellor is a peer, he may join in the debates of the House. When he does so, he steps away from the Woolsack. He may even vote, on party lines, like any other member, but in no case does he have a casting vote.

### POWERS AND FUNCTIONS OF THE LORDS

**Powers before 1911: Financial.** We have seen earlier that Parliament began its career as an advisory body without legislative powers. We have also seen how Parliament gradually established the principle that the King should not levy taxes without the consent of Parliament, and how Parliament granted supplies to the King on the redress of grievances. But while this struggle between the King and Parliament was continuing, there developed a struggle within Parliament as to which House should speak for Parliament on financial matters. The Commons, in the reign of Richard II, demanded the right to be consulted on money matters, and in the reign of Charles I they claimed that the grants of money given to the King were exclusively their right. Later in 1671, they maintained that though grants of money required the consent of the House of Lords, but it was not within the power of that House to offer amendments to any financial proposals from the Commons.

In 1678, the Commons passed another resolution of a still more comprehensive character. It asserted "that all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons, and all Bills for the granting of such aids and supplies ought to begin with the Commons; and that it is the undoubted and the sole right of the Commons to direct, limit and appoint in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords." The House of Lords never admitted this claim to sovereignty by Commons on financial matters, although by usage gradually the Lords acquiesced to the claims of the representatives of the people. In 1860, however, the House of Lords made a bold attempt to reject a Bill for the repeal of duties on paper. But the Commons made a defence and got it through. Control over financial matters, they reiterated, was the exclusive business of the House of Commons and any attempt on the part of the Lords to tamper with or in any way modify the financial powers of the Commons would be regarded by them as an infringement of their privileges.

The beginning of the present century witnessed another bid on the

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25. For other functions of the Lord Chancellor see Chap. IX



part of the House of Lords to revive its powers. Having become bold by rejecting some legislative measures in 1832, 1889, and 1893, they rejected the proposals of Lloyd George which aimed to levy certain new taxes on landed property and claimed it to be their political right to do so. This became a regular issue of first rate constitutional importance with the Liberal Government which was placed in power early in 1906, by the most sweeping electoral victory. The outcome of this struggle was the passage of the Parliament Act of 1911. This Act not only confirmed the Sovereignty of the House of Commons in money matters, but made it "omnipotent in matters of ordinary legislation too." The Act virtually abolished the power of the Lords either to amend or reject a Money Bill.

**Powers before 1911: Legislative.** With regard to ordinary legislation the House of Lords possessed co-equal powers with the House of Commons. All Bills, except Money Bills, could, and still may, originate with the Lords, although by usage nine-tenths of them start their career in the Commons.<sup>26</sup> The House of Lords could, and it did amend or reject a Bill passed by the House of Commons. It might continue to reject a Bill passed continually by the House of Commons and it did this on various occasions. When after a bitter struggle, Gladstone could see his second Home Rule Bill through the Commons only to have it rejected in the Lords he felt that "the cup of grievances was full." In his last speech in Parliament the retiring Prime Minister referred to the struggle that had begun between the two Houses and predicted that it would have to go forward to an issue. The prediction came out to be true and the issue was brought to a head in 1909 which ultimately ended into the Act of 1911 thereby curtailing its powers over ordinary legislation too.

Before the Parliament Act, 1911, the House of Commons had no means to assert its will. The only alternative with the Prime Minister was to ask the King to create enough peers to swamp the House of Lords. But it was a drastic measure and no Prime Minister would ask for it without being sure that he had the support of the electorate. The only recourse for him, under the circumstances, was to ask for dissolution and put the issue before the public at a general election. If it was ratified by the electorate, the Lords were expected to give way and this they usually did. But when the verdict of the people was sought in 1910, they did not care for the precedent. On November 16, the King agreed that if the Liberals were returned after a second general election and the House of Lords rejected the Government's Bill, to limit the power of the House of Lords to reject Bills, he would create sufficient new peers sympathetic to the Government to ensure the Bill's passage.<sup>27</sup> The general elections held later in the year showed little change, and the Parliament Bill, was accordingly, introduced again. Eventually the news of the King's

26. Most of the Bills which originate in the House of Lords are Private Bills and other non-controversial Bill like the Judicial Bills.

27. "After a long talk (with Asquith)", wrote the King in his diary "I agreed most reluctantly to give the Cabinet a secret understanding that in the event of the Government being returned with a majority at the General Election, I should use my prerogative to make the Peers if asked for. I disliked having to do this very much, but agreed that this was the only alternative to the Cabinet resigning, which at this moment would be disastrous." Nicolson, Sir Harold, *King George the Fifth*, p. 138.



pledge to create sufficient new peers was made public; and when it came to a vote on the Bill in the House of Lords, a number of opponents of the measure abstained, and it became a law of Parliament.

**The Parliament Act of 1911.** The Parliament Act of 1911, is of fundamental constitutional importance. It sealed the victory of the House of Commons statutorily. Under this Act the House of Commons attained a recognition of three principles, and thereby of its own final and conclusive sovereignty. The first principle is that the Commons alone had control of all Money Bills. The House of Lords could only delay and its delaying power was limited to one month only. Out of this emerges the second that the House of Commons alone had control over the Cabinet, and finally, it could pass by itself alone and without the concurrence of the Lords, any legislative measure which is affirmed by its vote in three successive sessions; the Lords exercised only a delaying power for two years. The Act also declared that a Second Chamber constituted on a popular rather than a hereditary basis would be set up. The relevant clauses specified:—

1. "If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is sent up to that House, the Bill shall, unless the House of Commons directs to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal assent being signified, notwithstanding that the House of Lords have not assented to the Bill."

It means, briefly, that should the House of Lords withhold its assent to a Money Bill for more than one month the Bill would be presented to the King and would become law on receiving the Royal assent, notwithstanding that the House of Lords have not assented to the Bill.

2. The term Money Bill was so defined as to include measures relating not only to taxation, but also to appropriations and audits. The Speaker was empowered to certify whether a given measure was or was not a Money Bill.

3. "If any Public Bill (other than a Money Bill or a Bill to extend the maximum duration of Parliament) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, the Bill shall on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes in the House of Commons in the third of those sessions."

This clause provided that a Bill passed three times by the Commons in successive sessions, and each time rejected by the Lords might be presented to the King for his assent provided two years had elapsed between

the initial proceedings of the Bill in the House of Commons and its final passing in that House in the third session.

**The Amending Act, 1949.** In addition to the specific provisions of the Parliament Act, 1911, there was an understanding that the House of Lords would not reject a measure for which there was a mandate from the electorate at the preceding General Elections. But the Labour Party was not satisfied with the statutory limitations which the Act of 1911 imposed, particularly relating to ordinary legislation in forcing a delay of two years before a Bill could be finally enacted. The 1945 manifesto of the Labour Party affirmed: "...We give clear notice that we will not tolerate obstruction of the people's will by the House of Lords." When the Labour Party came into power something dramatic was expected. But nothing actually happened till October 1947, when the Speech from the Throne disclosed the Government's intention to introduce immediately a Bill to amend the Parliament Act by reducing from three sessions to two and from two years to one the maximum period during which measures passed by the House of Commons could be held up. This sudden announcement was necessitated by the Government's determination to nationalise the iron and steel industry. The Government could rightly anticipate the opposition of the House of Lords and it was, accordingly, thought necessary to clear the way for the passage of the measure in the fourth year of its term of office. The Amending Bill was introduced in November 1947, and at all stages it met a stout opposition from the Lords.<sup>28</sup> It, however, passed over the Lords' veto two years later modifying thereby the procedure of the Parliament Act, 1911 relating to ordinary legislation.

According to the Amending Act of 1949, a Bill may now become law despite its having been rejected by the House of Lords if it has been passed by the House of Commons in two successive sessions (instead of three as provided for in the Act of 1911), and, if one year (instead of two) has elapsed between the date of the second reading in the first session in the House of Commons and the final date on which the Bill is passed by the House of Commons for the second time. The 1949 Act, thus, reduced from two years to one the period during which the Lords may delay Bills which had passed the Commons.

**Present Powers and Functions of the House of Lords.** The powers and functions of the House of Lords are, thus, fixed by the Parliament Act, 1911, as amended in 1949. They may be reduced into four main groups:—

(1) The power of amending or delaying legislation other than financial legislation;

(2) The power of influencing Government and people by debate;

(3) Executive powers; and

(4) Certain judicial powers.

1. On Money Bills the power of the House of Commons is absolute.

28. In the House of Commons the vote on third reading was 323 to 195, with Liberals supporting the Government whereas in the Lords it was 204 to 34 for rejection with the Liberals opposing the Government. It was a vote of very unusual size for the House of Lords.

If the House of Lords withhold their assent to a Money Bill and what is a Money Bill is determined by the certification of the Speaker, for more than a month, the Bill would be presented to the King and become a law on receiving the Royal Assent. What is meant by a Money Bill was defined in the Act, but each such Bill has to bear a certificate by the Speaker that the Bill is a Money Bill within the meaning of the Act.

Trough has been said about a Bill other than a Money Bill. A Bill passed by the House of Commons in two successive sessions with an interval of at least one year between its first and second readings and had passage in the House of Commons will become a law after having received the Royal Assent irrespective of its having been rejected by the House of Lords.

2. The second function of the House of Lords is the influencing of Government and the people by its debates. Among the Peers who make a habit of participating in the debates and votes are generally elder statesmen and others who have spent their lives in public service and whose talents place them high in the world's esteem. No Government which is obliged to submit to criticism and to the need for explaining its actions and views can ignore the opinion expressed by such elder, seasoned and veteran statesmen and politicians. The debates are free, outspoken and sometimes reach a much higher dialectical level than in the House of Commons. This is obviously due to many reasons. The Lords are not subject to so many restrictions on debates as the Commons are. Their discussion is all the more free because of the impossibility of overthrowing a Government by an adverse vote in the House of Lords. The furthest that the Lords can do is to delay the passage of legislation for one year. Secondly, their positions are secure. No being subject to dissolution, and not being liable to seek re-election every five years, the Lords do not have to speak with one eye on the reactions of their voters to their speeches. They are responsible to no one but then no one is responsible to them. They need not follow the Party Whip and are free from that form of parliamentary pressure known as "lobbying." Moreover, the House of Lords is an august Chamber, a reservoir of expertise knowledge. It contains amongst the galaxy of its members past Prime Ministers, may be three or four at a time,<sup>29</sup> and Ministers, who had made their mark on the political life of the nation.

As it is, the result is that debates in the House of Lords, which are based upon experience and ability, set a very high standard of discussion and a thorough thrashing of the issues. Lords' debates can and do exercise a very definite influence on Government, and through the press, on the public opinion generally. "It is sometimes a truer sounding board than the House of Commons itself." Herman Finer gives a beautiful summing up of the influence which Lords exercise. He says, "The House of Lords still has important legislative authority, but this is distinctly inferior to that of the Commons. Yet still retains some, far from negligible. Beyond this, it remains one of the most distinguished forums of public debate in the world, for it has the right to discuss any

29. There are two now, Anthony Eden and Harold Macmillan.

30. Brown, W.J., *Everybody's Guide to Parliament* (1952), p. 52.

phase of legislation, policy, and administration, . . . a substantial part of its membership is of exceptional distinction in intellect and political, social, and business experience. These constitute a body of public-spirited experts, able to talk with great intelligence and knowledge, and really to do so with an aloofness from immediate partisan politics because they are not dependent for their status on appeals for popular election, and with abundant time to deliberate, as the Lords are far less pressed with decisive business than the Commons. This candid expertise has influence with the public, the government, and the civil service."

**Executive Power.** The Lords had and still have the power to ask questions, to elicit information from the Government on any aspect of administration and a full right to debate its policies. They exercised and still exercise equal power with the Commons to approve or disapprove the Statutory Instruments and jointly participate with the Commons on the removal of the Judges. In the course of the sixteenth century the Lords lost actual power to control the Executive. But they still enjoy a share in the Cabinet membership, partly because the House of Commons Disqualification Act, 1957, as amended by the Ministers of the Crown Act, 1964, limits the number of Ministers who may sit in the House of Commons, and partly because every Government must be assured of spokesmen of standing to expound its intentions and actions to the House of Lords. In recent years, it has been usual for the House of Lords to include about 20 office-holders, among whom are the Government Whips, who are members of the Royal Household, and act as spokesmen for the Government in debate. The number of Cabinet Ministers in the House of Lords varies; there are usually between two and four out of a total number of about 20. In the Government of June 1955, Lord Chancellor, Lord President, the Minister for Colonies, the Minister for Air, Paymaster-General, Minister without Portfolio, Ministers of State for Foreign Affairs belonged to the Lords. Only the first four were in the Cabinet. In the Labour Government of 1950, three Cabinet Ministers, two outside the Cabinet, and five Under-Secretaries were in the Lords. Prime Minister Harold Macmillan appointed a Peer, the Earl of Home, as the Foreign Secretary. The appointment produced a storm of opposition from the House of Commons. The last Foreign Secretary to sit in the Lords was the Earl of Halifax before the outbreak of World War II. The only other one in this century was Lord Curzon in 1923.

**Judicial Power.** The House of Lords has two judicial functions. One, the trial of the impeachment cases on charges preferred by the House of Commons. With the acceptance of the principle of ministerial responsibility this power of the Lords has become obsolete. The last impeachment occurred in 1805. The second judicial function is that the House of Lords is the Supreme Court of Appeal in civil cases for Great Britain and Northern Ireland. But the whole House now never meets as a Court of Appeal. It is only the Lords of Appeal or the nine Law Lords, with the Lord Chancellor presiding, who do the judicial work of the House. The Law Lords are, so to speak, a small specialised committee of the House of Lords to whom the function of hearing appeals has been delegated.

## REFORMING THE LORDS

No other political institution in Britain has been exposed to such an extent as the House of Lords. The Liberal and Conservative Parties have both sought to change the House of Lords and the Labour Party has sought to abolish it. The Liberal Party, on the other hand, has its political ideas for reforming it, and the Conservative Party, in its turn, has its political ideas for reforming it. The House of Lords is a creature of the Parliament and the Parliament Act of 1911 has been passed. A motion of the House of Lords to abolish it has been passed.

- **Constitutional** parties it would seem, however, the National Union of Teachers, as being one of the most important of the House of Lords, has been exposed to such an extent as the House of Lords. The Liberal and Conservative Parties have both sought to change the House of Lords and the Labour Party has sought to abolish it. The Liberal Party, on the other hand, has its political ideas for reforming it, and the Conservative Party, in its turn, has its political ideas for reforming it. The House of Lords is a creature of the Parliament and the Parliament Act of 1911 has been passed. A motion of the House of Lords to abolish it has been passed.

The arguments advanced against the present constitution and powers either in favour of or against the House of Lords are:

**Arguments Against.** 1. That the House of Lords as at present constituted is a political anachronism in a country with thoroughly democratic institutions. The composition of the House still remains what it has been for centuries and more than seventy per cent of the Peers sit in their places because their forefathers sat before them. There may be hereditary genius on a large and sweeping scale. Even if it may be conceded that all the Peers have the makings of capable legislators, a test of their aptitude has been applied. And even if, at all, the Peers were positively proved "the modern world," as Finer points out, "has rejected the application of ability to government unless it is representative of the interests of those expected to obey the law." No elective principle, in part or exceptional, characterises the composition of the House of Lords. The Peers are responsible to nobody save themselves. They take their seats in their own right. They need no party labels, and no one is constantly watching their votes or takes a note how diligently and regularly they attend to their duties. In other words, as Jennings points out, "They have not to trim their sails to the breeze of public opinion." And yet they claim that they are representatives of the people enjoying their full confidence. Webbs have, therefore, aptly remarked, "Its (House of Lords) decisions are vitiated by its composition: it is the worst representative assembly ever creat-

31. Pinnett, R.M., *British Government and Politics*, 1, 275.

32. *Ibid.*

33. *The Theory and Practice of Modern Government*, by J. A. S. 407.

34. *The British Constitution*, *op. cit.*, p. 90.



ed...." Patrick Gordon Walker, speaking for the Labour Party in the House of Commons on the Peerage Bill maintained (June 19, 1963) that it should be considered only a first step towards complete abolition of hereditary peerage. The Life Peerages Act, 1958 was designed as a means of infusing new life into the House of Lords. But the Labour Party criticised the measure as an attempt by the Conservative Government to give no authority to the Lords, while avoiding the basic problem of the hereditary element. The Peerage Act, 1963 has not at all helped to change the complexion of the House. The hereditary principle remains intact as the Act specified that the title could pass, on the Peer's death, to his heir and that too if the heir also chose to disclaim. In the first twelve months of the operation of the Act, only eight Peers chose to disclaim and among the eight were Lord Home and Lord Hailsham, who were able to disclaim at the time of the Conservative Party leadership crisis in 1963. During the total span of six years the Act did not lead to any attractive figure of exodus. The general effects of both the Acts of 1958 and 1963, are, therefore, that the original basic problem of the composition of the House of Lords is left untouched. On November 21, 1968, the House of Lords approved by 251 to 56 votes planned abolition of its 600-year old aristocratic privilege in law-making. The Labour Government promised detailed legislation in this respect within a year. Till this finally comes about the complexion of the House remains as before.

2. The meagre attendance which the House attracts, and lack of interest which the Lords evince in their legislative duties is an argument by itself for either ending or mending it. Normally sixty or seventy members had participated in its deliberations.\* Now the daily attendance on the average is rather less than two hundred, while one-hundred and fifty are regularly engaged in the work of the House. Many Peers so seldom show their faces in this gilded Chamber that the attendants even do not recognise them.<sup>35</sup> One-half of its membership has perhaps never spoken at all in the Lords. The number who have spoken several times is something like one in eight of the entire membership, and those who speak are largely Ministers or ex-Ministers. It is only on rare occasions that they "bring up the big battalions when the defeat of a progressive measure is desired."<sup>36</sup> And the quorum is only three. The smallness of the number of Peers who participate frequently in the work of the House is a grave defect, as Bagehot pointed out. "The real indifference to their duties of

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35. Sidney and Beatrice Webb, *A Constitution for the Socialist Commonwealth of Great Britain*, p. 63.

36. "In 1932 and 1933, 287 Peers never attended the House. Between 1919 and 1931, 111 Peers never voted, and more than half never spoke; there were only 13 divisions out of over 440 in which more than 200 voted. In the whole period only 98 Peers spoke on an average more than once a year, and those were largely ministers and ex-ministers." Gieves, H.R.G., *The British Constitution*, p. 53.

37. In 1893 when the Lords made a great rally in order to defeat the Second Home Bill, one Peer was stopped by the doorkeeper who asked him if he were really a Peer. He replied, "Do you think if I weren't I would come to this blankety, black hole?"

38. At the second reading of the Bill to amend Parliament Act, 1911 in 1947, the voting in the House of Lords was 204 to 34 for rejection. This was a vote of very unusual size for the House of Lords.

most peers is a great defect, and the apparent indifference is a dangerous defect. An assembly—a revising assembly especially—which does not assemble, which looks as if it does not care how it revises, is defective in a main political ingredient. It may be of use, but it will hardly convince mankind it is so." Lord Samuel's remark on the composition of the House of Lords that the efficiency of that House was seen by the almost permanent absenteeism of most of its members was a telling blow aimed at the Lords.

3. Then, the large and predominant majority of these hereditary members belong to one political party, the Conservative which appears to be permanently entrenched in the House of Lords. Of those whose party membership is known it is computed that two-thirds of the members belong to the Conservative Party and one third are Liberal and Labour. The result is that whatever be the direction of the popular vote, and no matter which party controls the House of Commons, the Conservative Party, and even worst of it, its more reactionary members, remain in unchallenged mastery of the House of Lords. Some members of the House openly admit the claim of Lord Balfour that it was the duty of the Lords to see that the Conservative Party "should still control whether in power or whether in Opposition the destinies of this great Empire." And the Lords have proved true to their professions. A Conservative Government is always certain of its majority. No Bill promoted by a Conservative Government has been rejected by the House of Lords since 1832, "and, for the last fifty years at least, no Conservative Bill has been amended against firm Government opposition." When any other Party is in power, the position is quite different. The Conservative majority in the Lords determines its strategy in consultation with the Conservative leaders in the House of Commons. Nothing passes the House of Lords except what the Conservative Party permits, no matter whether that Party is in office or in Opposition.

4. The House of Lords has become also what Ramsay Muir has termed, the "common fortress of wealth." There is now no great national industry, says Professor Laski, whose leadership, so far as its capitalist side is concerned, does not find its appropriate representation in the House of Lords. In fact, property has always been the basis of the Upper Chamber, and is still adequately represented there. "Over one-third of them are Directors (some multiple) of the staple industries of the nation. One-third of them also own very large estates. Many of them are related by marriage, birth and business connections with the Conservative members of the House of Commons." The Peers are, therefore, predominantly an economic interest. It also provides a sufficient data to establish that the division between parties in Britain is in essence

39. *The English Constitution*, pp. 101-102.

40. Jennings, *The British Constitution*, op. cit., p. 90.

41. Laski, H.J., *Parliamentary Government in England*, op. cit., p. 712.

42. Finer, H., *The Theory and Practice of Modern Government*, op. cit., pp. 407-408. "There were 246 landowners in the House in 1931, while directors of banks numbered 67, railways 64, engineering works 39, and Insurance Companies 112, to name only a few." Greaves, *The British Constitution*, op. cit., p. 54.

a class division and Peers are drawn from one class only. How can it be possible then that this capitalist class with vested interests can look to proposals for radical social and economic reforms with any desirable sympathy? The answer to this question can be found from what Lord Acton wrote to Gladstone's daughter in 1881, when the Lords opposed the Irish Land Bill. He said, "But a corporation, according to a profound saying, has neither body to kick nor soul to save. The principle of self-interest is sure to tell upon it. The House of Lords feels a stronger duty towards its eldest sons than towards the masses of ignorant, vulgar, and greedy people. Therefore, except under very perceptible pressure, it always resists measures aimed at doing good to the poor. It has almost always been in the wrong—sometimes from the prejudice and fear and miscalculation, still oftener from instinct and self-preservation."<sup>43</sup>

5. When the House of Lords is invariably wedded to the principles and policies of a single party, and it has avowedly retarded the forces of progress, then, the existence of the House of Lords, as Finer puts it, is a gross anomaly, "without justification in this era." The views of Abbe Sieyès's, therefore, that if the Second Chamber agrees with the first it is superfluous, while if it disagrees, it is obnoxious, seems to many in Britain, according to Prof. Laski, "commonsense."<sup>44</sup> The formal policy of the Labour Party, though it has not contributed anything towards its realization, is still in favour of a single Chamber. Laski, while arguing his case for abolishing the House of Lords has maintained that an undemocratic institution like the House of Lords cannot survive in a democratic society unless it is always able to adjust its behaviour to the demands of democracy. And the demands of democracy are the speedy responsiveness to the public opinion and the social needs. The House of Lords cannot fulfil the demands of democracy, because, "where it is tempted to be active in defence is just where democracy is tempted to be active in offence."<sup>45</sup> The House of Lords, in simple words, is wealth and privilege personified and the real conflict, therefore, is between wealth and the masses. Democracy stands for the masses and in democracy nothing should exist which comes in conflict with their interests. The need is to end the House of Lords or to radically mend its composition.

**Arguments in favour of the House of Lords.** In spite of the determined policy of the Labour Party to abolish the House of Lords and the vigorous efforts of the Liberals to substitute for it a Chamber constituted on a popular instead of hereditary basis, the House of Lords still remains what it has been for centuries in the past. It is essentially a hereditary Chamber of Peers. The Liberals could not adopt a workable plan to democratize it. Even the Labour Party made no attempt in its four regimes either to end or mend it. The only change which the Labour was able to bring on the Statute book was an amendment to the Parliament Act of 1911.

1. The first and really the most important argument advanced for its preservation is that the British people will not tolerate this historic

43. As quoted in Finer's *Theory and Practice of Modern Government*, op. cit., p. 48.

44. Laski, H.J., *Parliamentary Government in England*, op. cit., p. 123

45. *Ibid.*, p. 136.

institution to be obliterated. In Britain nothing is created new. Everything evolves gradually over a long period of time and so it is that every British institution preserves into the present elements of the past. If the British had ever sat down to re-fashion the whole of their political machinery, it is possible that the hereditary House of Lords would have disappeared. If they had ever set out to reduce their Constitution into writing, the Lords might also have disappeared. But that is not their instinct and their method of doing things. They take everything as it is and put up with it as long as it works tolerably well. When its shortcomings are experienced, they are tried to be remedied as a matter of course. And when the inadequacies become innumerable it is amended to the extent it is necessary to meet the revealed inadequacy or difficulty. It is not obliterated, because the British people intuitively know that life is more than logic. And having admitted that a hereditary House of Lords in a democracy is illogical the practical way of life tells them that on the whole it works well and in some ways surprisingly well. "The very irrationality of the composition of the House of Lords and its quaintness," says Herbert Morrison "are safeguards for our modern British democracy."<sup>46</sup> Because changes intended to make the House of Lords democratic and representative would have undemocratic results. It would tend to make the Lords equal to the Commons, thus creating rivalry, conflicts and deadlocks between the two.

2. And democracy needs a Second Chamber. The United States of America expressly provided for a Second Chamber, the Senate which, in fact, exercises vastly wider powers than does the House of Lords. The French who are a very logical people, have included a Second Chamber in all their constitutions. So have the Scandinavian democracies. Even those countries which experimented with a single Chamber ultimately reverted to the double Chamber system because of the demands of democracy. Unless it is acceptably proved that democracy does not need a Second Chamber, it is not democratic to abolish one in Britain when the Parliament Act has destroyed the power of the Lords to interfere with Money Bills, and limited its power on other Bills to "delaying action" and, that too, just for a year. Life Peerages Act, 1958 and the Peerage Act, 1963 tend to democratize it, accepting the democratic utility of bicameralism. Even the Labour Party, except for some members, do not favour its abolition. Lord Morrison portrayed the attitude of the Labour Party when he said, "So the powers of the Lords have been much diminished over the years. I think rightly so. But it remains an assembly of considerable importance where good debates are held. There are men of great experience in the Lords' Chamber. The debates are of pretty good quality as a rule and in legislative revision, improving and polishing up parliamentary Bills, the House of Lords is useful and effective. Although its powers are more limited, its standing is still pretty high."<sup>47</sup>

3. An argument that the House of Lords ought not to have a permanent Conservative majority is not necessarily an argument that there ought not to be a House of Lords. Conservatism is needed to check the radicalism of the Lower House. It is just like the appeal from Philip drunk

46. *Government and Parliament, op. cit.*, p. 194.

47. Lord Morrison, *British Parliamentary Democracy*, pp. 7-8.

to Philip sober. A Second Chamber in a Unitary State is a means of checking what a nineteenth century Lord Chancellor called "the inconsiderate, rash, hasty, and undigested legislation of the other House." The House of Lords is a brake of considerable advantage on the decisions of a popularly elected House, sometimes reached under stress of great national emotion. When radicalism is injected with conservatism it is reason without passion and this is precisely what laws ought to be. Then the real question, which needs a straight answer, is whether the House of Lords should be hereditary or elective.

4. There are certain advantages about having a non-elective Second Chamber. If the Second Chamber is to be the replica of the Lower Chamber, then, there is no point or little point, in having the Second Chamber. The essence of the Second Chamber is that it should not be subject to the same impulses and the same pressures as the Lower Chamber. No member of the House of Commons can afford wholly to disregard the wishes of his constituents. "Some, indeed, are little more than the echoes of the popular emotions of their constituents, and trim their political sails to every wind of popular feeling. Even the most courageous and honest must keep a 'weather eye' on popular feeling." But a member of the House of Lords rarely speaks for the sake of speaking. He has no advantage to keep the debate going. He can speak freely, express unpopular views, advocate unconventional remedies. Nor has he any constituents to please. A Peer's constituency, it has been said, is under his hat. At the end of the debates, when all kinds of views have been expressed and opinions given, there is usually no division. Even if there is, it does not matter, for it does not involve the fate of the Government. The Lords also know that the Parliament Act sets a limit to their capacity of defying the will of the popular House, they resist but do not persist.

5. The result is that the House of Lords can afford to have full and free debates on non-legislative issues which the Commons "are too busy to discuss or which party leaders may consider too explosive to touch," because a Lords' vote does not of itself imperil the administration. The proceedings of the House of Lords receive wide publicity and the people at large find cue to their opinions in the utterances of these reverential statesmen. This is how the Lords prepare the public for the consideration of the important issues, educate public opinion, and make the Government susceptible to such reactions. The House of Lords, thus, performs a very useful function of influencing the people and the Government. Debates and votes on Motions in the Lords "can and at times do", writes Morrison, "stir public opinion, or they may ventilate true public grievances or have repercussions in the House of Commons so they make the Government conscious of some failure or shortcoming. No Government, therefore, whatever its political complexion, studiously and systematically ignores the opinion of the House of Lords. Indeed, it is the duty of the Leader of the House of Lords in the Cabinet to indicate to his colleagues the feelings of his House on subjects under considerations."<sup>48</sup>

6. Then, the House of Lords acts as a legislative chamber. Bills can be introduced there instead of in the House of Commons. The Bryce



Commons stated that partially non-controversial Bills when they originate in the House of Lords may find an easier passage in the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it. Moreover, a limited Act of Parliament would protect the Lords if mistakes are made: the Government would be criticised in administrative circles, but strict re-consideration of it may be made. Similarly, if grave criticism is a result of legal correctness but not of sound and lasting principle of the courts. The House of Lords is a valuable asset to keep the matter of spotting lack of clarity in legislation out of drafting, because it not only distinguishes between a number of members who have functioned on the bench of the Court of Justice and also on the Law Lords.

The House of Lords actually does the examination and revision of Bills after they have passed through all the stages in the House of Commons. This is now more needed since the House of Commons restricts on all Bills is obliged to be under several rules limiting debates, thereby curtailing the possibility of free and fuller discussion. The House of Lords functions under no such limitations. Moreover, the Lords is properly said to be a ventilating chamber consisting of men who have distinguished themselves in the field of public activity, and possessing varied and diverse experiences. Glancing down the list of those who have been created Peers during recent years one notices that in addition to persons who may be described as "politicians" there are to be found former Diplomats, Admirals, Generals, Labour Union Officials, Businessmen, Newspaper proprietors, University Professors, Doctors and civil servants. Such a galaxy of men with expert knowledge in the various fields of public life can with confidence engage themselves in practical and highly intelligent discussion and criticism. Nearly a century ago Walter Bagehot wrote: "The House of Lords has the greatest merit which such a Chamber can have: it is possible. It is incredibly difficult to get a revising assembly, because it is difficult to find a class of respected revisers. . . . The Lords are in several respects more independent than the Commons. . . . The House of Lords, besides independence to revise judicially and position to revise effectually, has leisure to revise intellectually. These are great merits, and considering how difficult it is to get a good Second Chamber, and how much with our present First Chamber we need a second, we may well be thankful for them."<sup>49</sup>

8. The House of Lords is still a forum of debate on the administrative activities of the Government. The Lords had and still have the power to ask questions and a full right to debate its policies. The House of Commons has not the time to discuss all issues and problems, national and international, whereas the House of Lords has sufficient time and opportunity to do so. This is a useful national service rendered by the distinguished men whose views matter with the people and government. Even the apathy of the Peers to attend the meetings of the House has been characterised as a virtue in disguise. It would be impossible to get through the business of the House under present conditions if all who were entitled to attend and participate did so: a staggering number of

more than 1,000. "The working of the House is made possible only," maintained Viscount Samuel, "by the absenteeism of a large number of members, and we should be grateful to those who grace the meetings of this House by their absence."

9. The Lords also relieve the Commons of the work of considering Private Bills. Most of these Bills are examined in the first instance by committees of the House of Lords. Such Bills undergo a "quasi-judicial" process which may take much time when they are opposed. "A Bill opposed in one House is usually not opposed in the other; and the result is that the Peers diminish by one-third the heavy and uninteresting labours which would have to be undertaken by members of the Commons if there were no House of Lords." Provisional Order Bills and Special Orders are much in the same position.

10. Interposition of delay is needed to crystallise public opinion on all Bills before they become Acts. In fact, it is of considerable advantage that the decisions of a popularly elected Chamber should be given a second thought and that, too, under conditions of calmer atmosphere in a Chamber which is less susceptible to immediate popular pressure. The problem of second thought is much needed on Bills which affect the fundamentals of the Constitution, or introduce new principles of legislation, or raise issues upon which opinion of the people may appear to be almost equally divided. George Washington illustrated the need for interposition of delay by pouring a cup of hot liquid into a saucer and allowing it to cool. "We pour legislation into the senatorial saucer to cool it," he said.

But the real point is how long the House of Lords should be allowed to interpose delay in the enactment of legislation? Churchill was of the opinion that all controversial legislation should be passed in the first two years of a Government's term of office, and thereafter the Lords should apply the brake to radical change until such time as "the engine of the popular will is refuelled by popular election". To this Attlee replied that it would mean that "the engine had to go to be repaired every five years for a Conservative Government and every two years when a Labour Government was in power." In the three-party conference, convened to consider the composition and powers of the House of Lords, when in 1947 the amending Bill to Parliament Act had passed in the Commons, the Conservatives suggested a delay of eighteen months after the second reading of the Bill. But the Labour's proposal was for nine months from third reading. No agreed compromise could be arrived at and the result was interposition of one year's delay after second reading was determined by the Act of 1949.

11. Perhaps, the greatest merit of the House of Lords, as Bryce emphatically maintained, is its moral authority. "A Second Chamber," he said, "ought to possess, if possible, the largest measure of moral authority. By moral authority I mean... the influence exerted on the mind of the nation which comes from the intellectual authority of the persons who compose the chamber, from their experience, from their record in public life and from the respect which their characters and their experience inspire... This House has a moral authority as well as the prestige, the unequalled prestige, of its long antiquity. There is no as-

sembly in the world which can look back over so long and glorious a career as the great Council of the Nation, the **Magnum Concilium** of early Norman times, the form of which remains in this House as its oldest member.... I cannot help hoping that, whatever new Chamber is constructed, every effort will be made to preserve for it both the prestige of antiquity and the moral authority which this House inherits."<sup>50</sup> The House contains Peers who are members of ancient families in whom a sense of public service is ingrained by long traditions. Then, there are ex-Cabinet Ministers who have earned their titles through their political work.<sup>51</sup> This argument, however, becomes untenable in the presence of reform proposals as embodied in the White Paper of November 1968.

12. Finally, it is argued that the House of Lords is also useful as a seat for Ministers, in that any figure who is called upon to serve in the Government, but who does not wish to enter the party political fray of the House of Commons can be raised to Peerage and thereby made eligible for Ministerial office. In 1957, Sir Percy Mill was created a Peer and he took up the post of Minister of Power in Macmillan's Government. Lords Bowden, Cadogan, Chalfont, and Gardiner were given Life Peerage in 1963 and 1964, and were, thus, made eligible for Ministerial office. But this argument does not cancel the case for abolition of hereditary Peerage.

### REFORM PROPOSALS

**Proposals for Reform: 1869-1917.** With the Act of 1949, the issue of the powers of the House of Lords has been decided and the Labour Party does no longer argue for its abolition. The next question is about reforming its composition. This question is as old as several generations. Lord Russel introduced in 1869, a Bill providing for the gradual infiltration of Life Peers, but it was rejected. In the same year a project of Earl Grey came to naught and the same fate awaited the proposals of Lord Rosebury in 1874 and Lord Salisbury in 1888. No more was heard of the House of Lords reform until 1907. In 1907 the House set up a Select Committee to consider the suggestions made from time to time to increase the efficiency of the House in legislation. The report of the Committee suggested of new Constitution of the House consisting of Peers of the royal blood: the Lords of Appeal ordinary: 200 representatives elected by the hereditary peers: hereditary peers possessing special qualification; Spiritual Lords of Parliament. and Life Peers.

But it was too late. In the meantime the struggle between the Lords and the Commons had commenced and that, too, with great momentum. The result of the struggle was the Parliament Act of 1911. The 1911 Act was declared to be only a stage towards a more fundamental reform and its preamble was indicative of it. The preamble said that it was "intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis." But the overwhelming occupation of the Asquith Ministry left the subject unpress-

50. Speech in the House of Commons, March 21, 1921. As quoted by Sydney D. Bailey, *British Parliamentary Democracy*.

51. Brasher, N.H., *Studies in British Government*, p. 108.

ed. Then, came the First World War and the issue remained untouched till 1917 when a Committee, consisting of 30 members equally chosen from both the Houses and representing all shades of opinion, presided over by Viscount Bryce, was appointed.

**Bryce Committee Report.** The Bryce Committee submitted its Report in the spring of 1918. It expressed the opinion that 'in so far as possible, continuity ought to be preserved between the historic House of Lords and future Second Chamber which obviously would mean that a certain portion of the existing peerage should be included in the new body.' At the same time, the Committee agreed that its membership should be open to all the people so that it might represent adequately their thoughts and sentiments and no one set of political opinion should exercise therein a marked and permanent dominance.

The Committee, accordingly, proposed that the reconstituted House of Lords should have 327 members: three-fourths (246) to be elected by an electoral college composed of the members of the House of Commons grouped into 13 regional divisions. The commoners from each region would elect the quota to which their area on the basis of population was entitled to. The remaining 81 members were to be chosen from the whole body of peers by a Standing Joint Committee of both the Houses. The tenure of office was fixed at 12 years, one-third members in each group retiring after four years.

With regard to the functions of the House of Lords, the Committee agreed that the reconstituted Chamber ought not to have equal powers with the House of Commons. Nor should it aim at becoming a rival of the Commons, particularly in making and overturning ministers or of voting Money Bills. The Committee considered the following functions appropriate to a Second Chamber in Britain:

- (1) The examination and revision of Bills brought from the House of Commons.
- (2) The initiation of Bills dealing with subject of a comparatively non-controversial character.
- (3) The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it.
- (4) Full and free discussion of large and important questions.

**Reforms Plan: 1918-34.** The Bryce Committee Report and the plan it recommended was too much of a compromise and it pleased neither the Conservatives nor the progressives. The Government of Lloyd George, however, in 1922 moved in Parliament a resolution embodying the essentials of the Bryce plan. The plan was coldly received and three months after when the Coalition Government resigned it was left without official sponsorship. The short-lived Conservative Government marked its own time, and the first Labour Government under Ramsay MacDonald dared not touch the problem because of its own precarious position.





House of Lords should be based on a modification of its existing constitution as opposed to the establishment of a Second Chamber of a completely new type based on one system of election.

(2) The revised constitution of the House of Lords should be such as to secure as far as practicable that a permanent majority is not assured for any political party.

(3) The present right to attend and vote based solely on heredity should not by itself constitute a qualification for admission.

(4) Members of the Second Chamber should be styled "Lords of Parliament", appointed on grounds of personal distinction or public service. They might be drawn either from Hereditary Peers, or from Commoners who would be created Life Peers.

(5) Women would be capable of being appointed Lords of Parliament in like manner as men.

(6) Provision should be made for the inclusion in the Second Chamber of certain descendants of the Sovereign, certain Lords Spiritual and the Law Lords.

(7) In order that person without private means should not be excluded, some remuneration would be payable to members of the Second Chamber.

(8) Peers who were not Lords of Parliament should be entitled to stand for election to the House of Commons, and also to vote at elections in the same manner as other citizens.

(9) Some provision should be made for the disqualification of a member of the Second Chamber who neglects, or becomes no longer able or fitted, to perform his duties as such."

**Future of the House of Lords.** In spite of general recognition of the fact that a hereditary legislative chamber is an anachronism in a modern democratic State, there has been no progress in reconstituting the House of Lords at least until 1967. In 1967, the Labour Government announced its proposals for a major reform of composition together with proposals for further reduction in the powers of the House of Lords. It is now planned to abolish the 600-year-old privilege of law-making and the proposal was passed by the House of Lords itself on November 21, 1968. It is a sweeping reform that would virtually make the hereditary Peers extinct as a political force. The House will retain its ancient right to function as a brake on legislative measures sent to it from the House of Commons. But in future it will not be composed of aristocrats whose seats are guaranteed by hereditary birth-right. The Labour Government has promised detailed legislation within a year. Two issues are, however, clear. Abolition of the House of Lords is not the scheme of reform. Secondly, privilege will no longer remain the basis of entrance ticket to the House of Lords. It will be left with an obstructive power that amounts to a nominal delay. The Labour Government now recognises the utility of the House as a revising and deliberative Chamber. Lord Morrison had correctly expressed the point of view of the Labour Party. He said, "whilst willing to respect the House of Lords for the value and standard of its debates, and for its capacity as a Chamber of legislative

revision, we should not tolerate, from such an institution any undue interference with the will of the House of Commons or of the people." What the Labour wants is a Second Chamber strong enough for revision and weak enough to be no rival to the Commons.

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## CHAPTER VIII

# PARLIAMENT (Continued)

### THE HOUSE OF COMMONS

**Composition and Organisation.** The House of Commons has always been a purely elective body, but both the electorate and constituencies have varied greatly in the course of centuries. The distribution of seats in the Commons resulting from the general elections in 1966 is: -Labour 363, Conservative and Associates 253, Liberal 12, Republican Labour 1, and the Speaker one. In 1964 the complexion of the House was: Labour 317, Conservative and Associates 303, Liberal 9, and the Speaker 1. Members are elected from single-member constituencies. Before the House of Commons (Re-distribution of Seats) Act of 1944 and the Representation of the People Act, 1949, there were several two-member districts in London. There was also the business-premises vote, and the university graduates could vote in special university constituencies in addition to their regular residence voting. But plural voting is now a matter of the past.

All British subjects, of either sex, provided they are 21 years old or over, and from whatever part of Her Majesty's Dominions they come, are eligible for election,<sup>1</sup> provided they are not lunatics, bankrupts, persons convicted of certain crimes including corrupt practices, clergymen of the established Churches of England and Scotland and the priests of the Roman Catholic Church, and Peers of England and Scotland and the United Kingdom, and the holders of certain offices under the Crown, as also those expressly precluded under the House of Commons Disqualification Act, 1957 (for instance, holders of judicial offices, civil servants, members of the regular armed forces and the police forces, members of the legislature of any country or territory outside the Commonwealth, and holders of other public offices listed in the Act).

The life of the House of Commons is for five years unless previously dissolved. But normally Parliament is dissolved by the Sovereign, acting on the advice of the Prime Minister, before the expiry of the full legal term and general elections held. Where a particular vacancy occurs in the period between general elections, for example, on the death or resignation of a member, a by-election is held to fill the vacant seat. According to the ancient theory, service in the House of Commons is like a jury service, not a right but duty. Technically, a member may not resign his office. But resignation is possible through a fiction. There is a sinecure office "the steward of the Chiltern Hundreds" and the "Steward of the Manor of the Northstead" and a member intending to resign

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1. The age of voting has been reduced from January 1, 1970 to 18. But adults of 18 getting the right to vote will not become members of Parliament or serve in the jury before 21.

applies to the Chancellor of the Exchequer, for appointment to one or other of these offices. Such a request is granted as a matter of course. The appointment automatically results in the vacating of a seat in the House of Commons, because it is a *panis pro cinere* under the Crown. Then, the office of the stewardship is promptly re-filled.

The House of Commons, according to the usual practice, must meet at least once a year because certain essential legislation, including taxation and expenditure of public money, is passed only for a year at a time and must be renewed annually. The session normally begins in October or November and continues for twelve months, except for brief adjournments. The session is brought to an end by prorogation and all business unfinished at the end of the session is terminated (with certain minor exceptions) until Parliament is again assembled. This means that a Bill not completed in one session must be reintroduced in the next, unless it is to be abandoned. The dispersal of the House through adjournment does not affect uncompleted business.

Since 1947, the normal times of meetings of the Commons have been the first five days of each week, except when Parliament is in recess. The hours of sitting for normal business are Mondays to Thursdays from 2.30 p.m. to 10.00 p.m. and Fridays 11.00 a.m. to 4.30 p.m. Certain business is exempt from normal closing time and other business may be exempted if the House so chooses, so that the Commons often sits later than 10.00 p.m. on the first four days of the week, and all night sittings are not uncommon. On all these occasions time has to be rationed. From 2.30 till not later than 2.45 on Mondays to Thursdays private business is taken, questions following until 3.30. Immediately after questions is the time at which members may seek leave to move a motion of adjournment in order to discuss a matter of urgent public importance. If leave for the motion has been granted it stands over till 7 o'clock. It is only after such like preliminaries that comes the order for the day for the transaction of public business. This continues until 7 p.m., when adjournment motion or opposed private business may be taken. After that the interrupted business is resumed and continues until 10 p.m.

Members of the House of Commons are paid for their parliamentary work in order to enable them efficiently discharge their duties without undue financial worry. A member receives £3,250 a year. The income is subject to income tax. Under the Ministerial Salaries and Members' Pensions Act 1965 a compulsory contributory scheme has been introduced to pay pensions to members, after ten years' service, on retirement from the House if they have reached the age of 65. Provision has also been made for widows' and orphans' benefits.

**Closure of debate.** As the time of the House of Commons is carefully rationed in order to provide for an orderly conduct of business, some measure for an enforced closure of debate is, therefore, necessary. Ordinarily, an agreement is made "behind the Speaker's Chair" between the Chief Whips of the Government and the Opposition with regard to allocation of time to debate on different measures and the Speaker will see to it that the agreement is carried out. If such an arrangement fails, then, there are several expedients to cut short debates. This system of shortening the debates is known as the closure.

"A time must come," remarks Dr. Finer, "when debate ceases and action is taken. This is, also, a law of life itself." But before 1880, the procedure in the House of Commons was designed to obstruct and prolong discussion rather than make laws or oversee administration. In 1881, the Irish Nationalists adopted tactics by obstructing the business of the House. They would speak for hours on any subject, relevant or irrelevant, and yet the Speaker had no authority to stop that confusion and end such obstruction. The sitting of the House, which began at 4 o'clock on Monday, January 24, 1881, ended only at 9-30 a.m. on the following Wednesday. Speaker Brand declared, "The dignity, the credit, and the authority of this House are seriously threatened, and it is necessary that they should be vindicated. Under the operation of the accustomed rules and methods of procedure the legislative powers of the House are paralysed. A new and exceptional course is imperatively demanded." He declined to call any more members to speak, put the question, asked the House to change its rules or give the Speaker more authority.

The House did both. It altered the rules of debate so that time wasting and obstruction could be checked, and increased the authority of the Speaker in controlling the debate. Deliberate obstruction is rare now, and to some extent the members can be relied upon to recognise an obligation to be reasonably brief in what they have to say. But occasion may arise when cutting short the debate may become expedient. Closure may, then, take one of the following forms:

(1) **Simple Closure.** After a debate has been going on for some time, a member may move that "the question be now put—that is, that the subject on which discussion is taking place may be put to the vote. It is the discretion of the Speaker to accept or refuse the motion. He will refuse it, if he thinks that such a motion is an abuse of the rules of the House, or an infringement of the rights of the minority. If the Speaker permits it, and the motion is carried by not fewer than a hundred votes, the debate is closed and the matter under discussion is voted upon.

The procedure of closing the debate in this way makes the Government, if it is despotically minded, the master of the debate. With a comfortable majority at its back, it can get the motion to put the question moved, get 100 members to support it, and carry the issue. It is only the impartiality of the Speaker which can stem such designs of the Government and see that the right of the Opposition to have sufficient say is not choked.

(2) **Guillotine or Closure by Compartment.** In addition to the simple closure device, which may be used on any kind of motion, there are other devices whose use in general practice is confined to legislation. This kind of closure involves allotting a certain amount of time to various parts of a measure or to its several stages, and at the appointed time taking a vote no matter any part of the measure or even its important aspects had been discussed or not.

The closure by compartment is introduced in a resolution before the House, planning the various stages, and provides that at the end of each, at a time fixed, the Speaker shall put the question without further debate.



This kind of closure has been developed in order to deal with long and obstinate Opposition, and in order to give the Opposition some measure of choice as to how the time allotted for discussing the various parts of the Bill is to be used. Since 1946 Standing Committees use the 'guillotine' also.

3) "**Kangaroo Closure.**" Another form of closure provided for in the Standing Orders is known as the "Kangaroo." It was first used in 1909, by which the Speaker is empowered to select those clauses and amendments to be proposed which he thinks most appropriate for discussion. That is to say the Speaker at the Report Stage is invested with power to decide which amendments may be debated when several have been submitted to the same clause. The practice of missing some amendments is called the Kangaroo since the Speaker "leaps over" some amendments either because they are not in order, or had been talked about before, or are merely time wasting. Kangaroo may be used either in conjunction with Guillotine or separately. The Chairmen of Committees, too, possess a similar power. The device of Kangaroo invests the Speaker with grave responsibility, but there is virtually no evidence of real abuse. The principle which the Speaker follows in the application of the Kangaroo is to select those amendments that 'raise the most important points of principle and concern the most important sections of opinion, and the most effectively worded in this sense.'

**Parliamentary privileges.** Each House of Parliament enjoys certain privileges and immunities designed to protect the House from unnecessary obstruction in carrying out its duties. These privileges apply collectively to each House and individually to each member.

In the House of Commons the Speaker formally claims from the Crown for the Commons "their ancient and undoubted rights and privileges" at the beginning of each Parliament. These include freedom from arrest in civil proceedings for a period from forty days before to forty days after a session of Parliament, freedom of speech, so that Members of Parliament cannot be prosecuted for sedition or sued for libel or slander for anything said in the House or reported in Parliamentary publications and the right of access to the Crown, which is a collective privilege of the House. Further privileges include the right of the House to control its own proceedings; the right to pronounce upon legal disqualifications or membership and to declare a seat vacant on such grounds; and the right to penalise those who commit a breach of its privileges. The House is, thus, protected from criticism that affronts its dignity. In 1947 Garry Allingham was expelled from the House on account of critical articles he had written about Parliament, and at times, outside offenders against privilege are summoned to the House and reprimanded.

## OFFICERS OF THE HOUSE

The chief officer of the House of Commons is the Speaker who is elected by the Members to preside over the House immediately after a new Parliament is formed. Other officers of the House are the Chairman of the Ways and Means, and the Deputy Chairman, both of whom may act as Deputy Speaker. These officers are elected by the House.

Permanent officers of the House, i.e., those who are not members of Parliament, include the Clerk of the House of Commons, who is charged with such matters as keeping the records, endorsing bills and signing orders, and the Serjeant-at-Arms, who attends the Speaker in the House.

**Mr. Speaker.** At the hour appointed for the House of Commons to meet, Mr. Speaker enters the Chamber with time-honoured ceremonial. The *Oxford English Dictionary* defines the Speaker as "the member of the House of the Commons who is chosen by the House itself to act as its representative and to preside over its debates." This is a fairly correct definition and it brings out three important points: that the Speaker is himself a member of the House of Commons and elected like all the others; that the House itself elects its own Speaker; and that he is the House's accredited Deputy and the Chairman of its deliberations. The dictionary definition, however, gives no idea of the Speaker's indispensability. Without the Speaker the House cannot meet. On the death of Speaker FitzRoy,<sup>3</sup> for instance, the House rose at once and could not function until the election of his successor, although the country was in midst of the Second World War.<sup>4</sup>

The Speaker is an office the origin of which is obscure, but it is an office of much dignity, honour and authority. The first Speaker officially recorded in the Rolls of Parliament was Sir Peter de la Mare in 1376. In old days the Speaker was the spokesman for the Commons when they wished to lay their petitions before the King and in a sense he is that still. Today, in all his work, both in and out of the Chair, the Speaker interprets the will of the House and speaks for it as well as to it. For nearly six hundred years the office has developed, but not essentially changed.

In the earlier days the King appointed the Speaker, but long after when the office became elective the usage was, as Coke testified in 1648, that the Sovereign would "name a discreet and learned man" whom the Commons would then proceed to "elect". It was not till the reign of George III that the Royal influence wholly ceased to be exercised in the choice of a Speaker. Even now the election of the Speaker is subject to the approval of the Crown. But the real choice is that of the House of Commons, and normally the practice is to have the unanimous election of the Speaker.<sup>5</sup> He is chosen by the Party in power from its own benches when there is a vacancy. The Opposition is always consulted before his name is proposed and if the Opposition objects, his name is withdrawn. As the Speaker is expected to be as impartial as any human being can

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3. FitzRoy died in 1943.

4. Briers, P.M., and Others, *Papers on Parliament, A Symposium*, p. 2.

5. A contest for the Speakership is possible. Shaw Lefevre was elected for the first time (in 1839) in a contest and so was Speaker Gully in 1895. Another contest over the election of a new Speaker took place in 1951, when the Conservatives were returned to Office. The Labour Party, in Opposition, did not object to the Conservative candidate for the office, but at the same time proposed that the former Deputy Speaker was most suitable a candidate because of his greater experience. Votes were, accordingly, taken, the Conservative candidate ex-Minister W.S. Morrison was elected defeating Major Milner of the Labour Party.

be, the candidate proposed for the Speakership is one who has not been an active partisan, or a member of a Government and has ordinarily served a long apprenticeship as Chairman or Deputy Chairman of the Ways and Means or of some other Committee. The purpose is to secure general respect, and "no violent animosity." In 1945, when Labour had a majority of over 200, it did not oppose to the re-election of Colonel Clifton Brown, who had been the Conservative nominee in 1933. In 1959 the Conservatives, thought that they might elect a Speaker from the Labour Party. It could not materialise as the Conservatives insisted that the choice of the candidate should be theirs. Sir Frank Sorkiss refused the appointment and the Conservatives refused to consider any other Labour candidate. Sir Harry Hylton Foster was accordingly elected.

The Speaker, thus, elected continues in office for the whole life of Parliament.<sup>6</sup> But once elected he continues in office for so long as he wishes no matter whether or not the party which first proposed him for the Speakership is returned in majority.<sup>7</sup> In fact, once elected, the Speaker retains office until death or voluntary retirement. It is a tribute to the impartiality of the presiding officer of the House. Onslow, who was Speaker for thirty-four years at the beginning of the eighteenth century, set a good example of impartiality by resigning his office as Treasurer of the Navy in order to show that he was independent of the government. But his successors for the next hundred years did not adhere to his conception of office. Not until the nineteenth century it became the generally accepted principle, never questioned since 1870, that a Speaker, once elected, takes no further part in party politics.

Since the time of Shaw Lefevre it has come to be understood that the Speakership is a strictly judicial office, wholly divorced from politics. As the Speaker abstains from any kind of political activity, its natural corollary is that a Speaker should not have to fight an election. Accordingly, for a long time there was a tradition to re-elect him unopposed. Since 1832 this had been the general rule. But in 1935 and again in 1945, the Labour Party contested the re-election of Conservative Speakers, FitzRoy and Clifton Brown, though without any success. In 1951, no official Labour candidate opposed the Speaker. But an independent Labour candidate who ran against him was overwhelmingly defeated. In 1955 elections the Speaker was opposed but re-elected by a large majority. It appears that the electorate feels alive to its duty of re-electing the Speaker unopposed and are determined to continue with a tradition which is now more than a century old, although since the end of the Second World War the Speaker has, almost always, been opposed. But when a candidate at the polls the Speaker remains aloof from party issues, standing as 'the Speaker seeking re-election.' The endeavour has been, as Herman Finer remarks "to make the Speaker the objective embodiment of the

6. The Speaker remains in office after dissolution until the next Speaker has been elected. He does not, however, after the dissolution execute duties such as issuing writs, etc., as he does during a parliamentary recess.

7. During the nineteenth century, for instance, only three Speakers were elected from the Conservative Party. The Party came to office in 1841, 1874, 1886 and 1895, but in each case the Speaker already in office was reappointed, although he was elected to Parliament as a Liberal and to the Chair under a Liberal Government.

rules and laws of the Commons, purgating from him the last milligram of partisanship.”<sup>8</sup>

**Duties and Functions of the Speaker.** As an impartial arbiter in the proceedings of the House, the duties of the Speaker are many and arduous. Some of these duties depend on age-old practice, some on statutory authority, and some on the Standing Orders of the House. We divide them, accordingly, into three main categories.

(1) On occasions he acts as spokesman of the House, e.g., when he claims the Commons' privileges, and executes its orders and decisions. Sometimes he bears their loyal address to the Throne. The Commons have access to the King only through the Speaker, or, in a body, with the Speaker at the head. In the name of the Commons the Speaker conveys thanks and censures. He presents Money Bills at the Bar of the House of Lords.

(2) In certain ways, the Speaker acts as the House's representative and executive. He is, indeed, its active and the only constitutionally recognised deputy. He issues a number of warrants in the name of the House for various purposes. For example, when a seat falls vacant during a session, the House directs Mr. Speaker to cause a writ to be issued for a new election. Similarly, he issues warrants for the commitment of offenders and for the attendance of witnesses in custody.

The Speaker is also in charge of the administrative department, specifically called the Speaker's Department of the House of Commons. To it belong the Clerk of the House, a Librarian and staff, an Examiner of Petitions for Private Bills, officers of the vote office, and various others.

Occasionally, the Speaker is required to preside over a constitutional conference like the Buckingham Palace conference in 1914, the Speakers' Conference in 1920.

(3) Gladstone once said that the Speaker's chief function was to defend the House against itself. He does this when he presides in the Chair of the House during the debate. In the Chair, his functions are three-fold. First, to keep order in the House. Second, to keep members in order. And third, to select the speakers in the debate.

(i) The Speaker presides over the sittings of the House of Commons, except when it sits as a Committee of the Whole, and decides who shall have the floor. All speeches and remarks are addressed to the Chair. In any political assembly feelings are apt, from time to time, to run high. When they do, there is always the possibility of disorder. It is the business of the Speaker to see that the proceedings of the House are conducted with decorum and, if possible, with effect. He has, accordingly, wide powers to check disorder, irrelevance, tedious repetition and unparliamentary language or behaviour. It is a rule that when the Speaker stands, no member must remain on his feet. When he finds signs of disorder, the Speaker will stand and with a few well-chosen words, of admonition or appeal, will try to cool down the passions of Members, and, thus, avoid disorder. Usually this is effective, but if any Member persists in disorder, the Speaker may ask him to resume his seat. If he still con-

8. *Governments of Greater European Powers*, p. 107.

tinues to be disorderly, the Speaker may order him to withdraw from the House. If he does not go, the Speaker will name the Member. This means expulsion of the Member from the House. If the Member refuses to leave the House he will be escorted out by force if necessary through the Serjeant at Arms. He adjourns the House if the disorder becomes serious. A Standing Order to this effect was brought in after certain Irish members had forced Speaker Gully into a very difficult position and it was applied in May 1905. But it must be emphasised that such occasions are really very rare in the Parliamentary life of England.

Here is a lengthy quotation from Herbert Morrison to illustrate the high traditions of the office and the great reverence with which the Members hold the incumbent. "The Speaker," says Morrison, "has no bell with which to restore order, not even a gavel. When he rises in his place and says 'Order, Order' it is rare for the House not to come to order at once. And if some Members should be noisy a large proportion of the House will aid the Speaker by crying 'Order, Order' until the noisy and disorderly ones are quietened, or a Member standing at the same time as the Speaker rises resumes his seat. One evening between the wars I was impressed by a comparison with the French Chamber of Deputies. The occasion was exciting and the Deputies were thoroughly enjoying themselves in one of their occasional outbursts of noisy and persistent disorder. The President sat in his place ringing the bell vigorously and at length, it almost seemed that the louder he rang the bell, and the longer he rang it, the worse the disorder became. I could not help thinking, with some British Parliamentary pride, of Mr Speaker in the House of Commons."<sup>19</sup>

(ii) His second function is to keep members in order and this relates to the judicious conduct of debates. The Speaker is, in fact, "Lord of Debate." He must see that the debate centres on the main issue before the House and Members do not wander, accidentally or deliberately, in the realm of irrelevance. Any Member can point out to Mr Speaker that the Member who is speaking is out of order. But generally, the Speaker himself calls such a Member to order. Then, there are constant direct appeals to him for his rulings on points of procedure. Here the Speaker acts as a judge interpreting the Law of Parliament. His ruling is final which need not be contested. Each decision of the Speaker ranks as a precedent, to be heeded like the judgment of a Court on the next occa-

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9. On the first occasion when the member is named he must stay away for five days. On the second, for twenty one days. On the third, until the end of that sitting of Parliament.

10. The Serjeant At-Arms attends the Speaker with the Mace (the symbol of Speaker's authority) and arranges the policing of the House. The Speaker can also order the arrest of a member and confinement to the Tower of Big Ben. In 1930, one member in a fit of anger seized the Mace and lifted it from the Table. There was talk of Mr. Speaker using this power for the offence, by Parliamentary standards, was very grave, but he did not use it and the offending member was merely expelled for a period.

11. For one whole hour the House refused a hearing to the Colonial Secretary. The Deputy Speaker was in the Chair and he adjourned the House.

12. *Government and Parliament, op. cit.*, pp. 204-205.



sion. Similarly, he advises the Members and the House on points not covered by Law. He puts questions and announces the results of votes.

(iii) Mr. Speaker's third duty in presiding over Commons' debates is to "call" the Members to participate. He decides who is to speak, for so little time is available now-a-days that only those who are fortunate enough "to catch the Speaker's eye" can hope to speak. The Speaker is guided in his choice by many considerations. He will usually give a Member a chance of making his first, or maiden speech, but generally he will choose those Members who, in his opinion, are likely to be in a position to make the best contribution to the debate: the Government and Opposition leader share a conventional priority. And since his object is to give opportunities for the expression of all the main shades of opinion, he exercises his judgment most discreetly. In fact, Members apply to the Speaker beforehand through their Whips, so that his choice is by no means haphazard, and, of course, the Leaders of the House and Opposition decide who shall be their principal speakers. But he preserves his freedom to depart from this list.

(iv) Another less obvious function of the Speaker is to protect the House against the encroachments of the Government. When Ministers tend to encroach upon the freedom of Members, or refuse to answer questions, or do not give sufficient information, it is to Mr. Speaker that the Member appeals to safeguard and enforce the rights of Members against the executive.

There are some other functions of the Speaker and they are of crucial importance. He can prevent the putting of the question to a vote, when moved by a Member of the majority and usually a Government Whip, until he is personally satisfied that the minority has been given due opportunity to debate its views. After all Closure is an "infringement of the rights of the minority and it is the duty of the Speaker to protect the liberties and rights of debate of the minority." He, also, decides whether to admit or rule out amendments. Then, he has the power of decision on the admissibility of questions. He may, on his own judgment, decide whether a matter is of definite public and urgent importance and so put it on the immediate agenda for debate. The Act of 1911 empowers the Speaker to certify that a Bill is a Money Bill and thereby eliminates the obstruction of the House of Lords. He decides how Bills are to be allocated between the various Standing Committees, and in this respect has a comparatively free hand. The Speaker also appoints the Chairmen of Standing Committees, whom he chooses from the Chairmen's panel, a list of not less than ten Members drawn up by the Committee of Selection. It is for the Speaker to decide who is the leader of the Opposition should this ever be in any doubt.

The umpire like quality of the Speaker is characteristic of the trust which the Commons repose in him. He does not vote, except in a case of a tie. But the Speaker usually endeavours to give his casting vote in such a way that it maintains the *status quo*, upholds established precedents and previous decisions of the House, and avoids making himself personally responsible for bringing about any change. What he really does, therefore, is to put a temporary stop to the debate on an issue that will probably be revived at a later date.

What precisely the office of the Speaker is, and his functions have been succinctly described by Dr. Brown in the following words: "Speaker from 1943 to 1951. On the question of the Speaker's function he said: 'I have to try to see that the House runs smoothly. The Speaker can help here in the House, and is part of the House. I have to see that the government business which I am not responsible for it is not unduly hampered by verbal obstruction. I have to see that members discuss their own business. Of course there will be verbal obstruction at times, on all sides of the House, and all these I have to try to control. I am not a controlling speaker. Free speech and fair play for all must be maintained.' As Speaker I am not the Government, nor am I the Opposition, nor am I the House of Commons, nor am I the 'back benchers' man. As Speaker I shall try to make the office very much. I wish to uphold it, and I shall."

The Speaker is, thus, the impartial defender of the rights of the members of the House. For him the House's back-bencher is no less than a Member, and the greater Member is no more than a Member. The essence of his impartiality lies in the way he creates an atmosphere of fair play by ensuring that the Opposition have an opportunity to express their views and criticisms, yet without the Speaker seeing that there is no parliamentary obstruction to hinder the Government in its task of governing the country. It is Mr. Speaker's function to regard the privileges and rights of the Members of the Commons not only against the Crown and Lords but as between each other to the end that the whole basis of Parliament as a forum in which the elected representatives of the people speak their minds and say what they think popular or unpopular should be reserved. The Speaker's conduct reflects the spirit, as Biers says, which is 'fundamentally more important than the forms of Government'. In some ways it is necessary, he writes, for the continued existence of the House of Commons, for it can survive only so long as its procedure and facilities are adequate for the functions it has to perform, and the acoustical or established procedure to novel conditions is the Speaker's task. The Speaker must accordingly possess high and varied qualities of character and intellect. He should be able, vigilant, imperturbable, tactful and sensitive for and interested in the institution of Parliament. Sir William Hoare said of the Office: "We expect dignity and authority, tempered by urbanity and kindness, firmness to control and persuasiveness to counsel; promptitude of decision and justness of judgment; tact, patience and firmness; a natural superiority combined with an inbred courtesy; so as to give by his own bearing an example and a model to those over whom he presides; an impartial mind, a tolerant temper, and a reconciling disposition accessible to all in public and private as a kind and prudent counsellor." The Speaker seldom speaks, but when he does, "he speaks for the House, not to it."

The varied qualities needed in an ideal Speaker are not commonly found. But the ideal is recognisably there and for all these burdens the Speakership carries compensation in social status and material well-being.

13. Brown, W.J., *Guide to Parliament*, p. 61.

14. Biers, P.M., *Papers on Parliament. A Symposium*, p. 27.

15. *Ibid.*

He receives a salary of £8,500 a year, borne on the Consolidated Fund (plus £1,250 as a Member of Parliament), tax free and a free residence within the Palace of Westminster. In the official precedence, he ranks after the Lord President of the Council, that is, the seventh subject in the land. He is the only subject who holds levees at which court dress must be worn, and to which invitations are in the nature of commands. On retirement, he gets a handsome pension of £4,000 a year and is created a Peer. Speaker Whitley (1921-28) was the first to refuse peerage. On his retirement Labour Members opposed the grant of his pension. They thought that the Speaker's pension was too much whereas his salary too little.

## FUNCTIONS OF THE HOUSE

The House of Commons has, broadly speaking, three functions: legislation, financial business, and deliberation and criticism or controlling the Government. Legislation developed from the practice of petitioning the King. Financial functions were the original and the procedure involved therein originated in the practice of granting "aids". The critical and deliberative functions are the earliest, rudimentary in the beginning but the most essential feature of the governmental system in Britain. It is, perhaps, not always realised that the prime task of the House of Commons is not to govern or legislate, but to criticise and control the executive government and it is the essence of parliamentary democracy. John Stuart Mill illustrated this point in his own characteristic way. "The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every Constitution, must reside somewhere... The proper duty of a representative Assembly in regard to matters of administration is not to decide them by its own vote, but to take care that the persons who have to decide" are subject to its constant control.

## LEGISLATION

**Process of Legislation.** The process of making laws is the business of Parliament as a whole, King, Lords and Commons. The House of Commons can by itself do nothing. But, in practical terms, the role of the Monarch in Parliament is just formal, and in a number of respects the legal power and political authority of the House of Lords is subservient to that of the Commons. Today, the Commons composed of the 630 elected representatives of the people, is the dominant element in Parliament, so that in almost all practical (though not legal) respects Parliament and the House of Commons are interchangeable terms. The House of Commons, thus, can initiate any measure, ordinary and financial, and most of the great contentious and important laws originate there and the verdict of the House of Commons finally determines their fate.

Every law begins as a **Bill** which is read three times in each House of Parliament and after receiving the King's assent becomes an **Act**. Why the Bill is read three times, it is difficult to say. It may only be assumed that if the House has given its assent to a measure three times there

can be no question of unpremeditated acquiescence to it. The practice of reading a Bill three times dates from mediæval times, when the number three was regarded with especial reverence, and by the end of the sixteenth century it appears to have become invariable. It is, indeed, a sensible practice, but it is only a practice and not a legal necessity.

**Kinds of Bills.** Bills, in Britain, are classified in accordance with two important distinctions. In the first place, Bills are divided on the basis of a difference of **substance**, into **Public Bills** and **Private Bills**. Public Bills are of general application and contain subject-matter applicable uniformly to the public as a whole or to large parts of it. On the other hand, Private Bills affect particular local or private interest and are concerned with establishing legal arrangements that will apply to a specific person, corporation, group, community or the like. They are not generally of public concern and are passed by a special procedure distinct from Public Bills. Most Private Bills come from local government authorities.

Public Bills are subdivided, according to a **formal** distinction, into **Government Bills** and **Private Members' Bills**. Both **Government Bills** and **Private Members' Bills** are, as far as subject-matter is concerned, **Public Bills**, but their origin is different. A Government Bill, as its name implies, is a Public Bill introduced by a Minister on behalf of the Government. A Private Member's Bill is a Public Bill promoted by a Member of Parliament, who is not a member of the Government. Public Bills run between 90 to 150 per year as finally enacted laws, of which a very small number originate from Private Members. Public Bills may originate in the Commons.

**Public Bills or Government Bills.** A Public Bill in becoming law, passes through **three readings** but **five stages** in the House of Commons. The five stages are: (1) First Reading; (2) Second Reading; (3) Committee Stage; (4) Report Stage; and (5) Third Reading. If there are financial clauses in a Bill, and most Bills have such clauses, there will be two extra stages, either before or after the Second Reading. A financial resolution is moved and debated in the Committee of the Whole House (the House without the Speaker) and report to the House itself.

Before a Public Bill begins its career in the House of Commons, the Cabinet discusses the proposal to introduce a Bill at the initiation of the Minister concerned. If the Cabinet accepts the proposal, a memorandum is sent to the Office of the Parliamentary Counsel, a subordinate department attached to the Treasury, set up in 1869 and staffed by non-practising lawyers, containing a general description of the scope of the Bill. The Parliamentary Counsels are the skilled lawyers who draw up the Bill on the lines suggested by the memorandum. Then, the draft Bill is laid before the Cabinet for approval, printed and discussed with the representatives of the various interests affected. No Government can afford to ignore or trample upon the various groupings of opinion. There is the next general election to be always remembered. It means that there are endless negotiations, deputations and interviews before even a final draft of the Bill is settled. The Bill may have to be redrafted many

times and this process may occupy a considerably long time. At the end of such consultations the Bill may have to receive Cabinet approval once again.

(1) **First Reading.** When the Bill has been finally approved by the Cabinet, it stands its turn for introduction. There are two ways of introducing a Bill. It may be introduced on a motion, or it can be introduced on written notice. The former procedure has now fallen into disuse as far as Government Bills are concerned. The normal method of introducing a Bill is on written notice and is prescribed in Standing Order No. 35 of the House of Commons. On the day appointed, of which notice has been given, the introducer merely comes forward and hands to the Clerk of the House a "Dummy Bill." The Clerk reads out the title of the Bill. The 'Dummy' does not contain the text of the Bill. It is just a special form of stationery officially furnished on which the title of the Bill is written down. There is no debate and discussion and that finishes the first reading of the Bill. The Bill is printed as soon as it is ready and members get its copies to study. The measure then waits its turn for the Second Reading. The First Reading is thus a formal stage.

(2) **Second Reading.** The crucial stage in the life of the Bill is the second reading and, *ipso facto*, the second stage in its career. On a day fixed in advance by an order of the House, the Minister-in-charge of the Bill will rise and move that "the Bill be now read a Second time." He will explain, elaborate and elucidate what the proposed measure will do, and how the necessity of such a measure is important and urgent. Some leading member of the Opposition will follow the Minister. He might move to amend the Minister's motion and say that "the Bill be read a second time this day six months hence." Or he might propose a substantive amendment to the policy embodied in the Bill. Then would ensue a general debate in which many Members on both sides of the House would participate, and it would end with the Minister winding up for the Government. Upon the conclusion of the debate there would be a division. If the Government were defeated it would have to resign. But it would never be defeated so long as it commands majority.

It should, however, be noted that the second reading is not the time for detailed discussion or amendments and vote upon the clauses. It is the Bill as a whole, its merits and principal policy issues involved, which is discussed and amendments are proposed not to the Bill, but to the motion that "the Bill be now read a second time." The object is to approve the Bill or throw it out entirely. The second reading in Britain, therefore, corresponds more exactly to the Continental practice of "discussion generale," which usually precedes passage to the specific articles.

Another point to be noted is that we described the second stage as crucial in the life of the Bill. Erskine May, the former Clerk of Parliament, said that "The second reading is the most important stage through which the Bill is required to pass; for its whole principle is then at issue, and is affirmed or denied by a vote of the House."<sup>17</sup> But the truth

17. As quoted in Herman Finer's *The Theory and Practice of Modern Government* (1954), p. 485.



is that one stage in the course of the Bill is as important as the other. In fact, decisions are made in the Committees and not in the second reading. The organs of opinion and interested groups, as Dr Finer maintains, are "extremely vocal from now onward and seek to exert influence upon the Minister-in-charge of the Bill. These obtain their opportunity for concrete amendments in the states of cogitation which immediately precede, and operate during consideration, in committee."

(3) **Committee Stage.** Upon being read a second time, ordinary Public Bills go automatically to one of the Standing Committees, unless some member rises immediately after second reading and moves that the Bill be committed to a Committee of the Whole House or to a Select Committee or to a Joint Committee of Lords and Commons. Public Bills to which Cabinet attaches great importance are often sent to the Committee of the Whole House.

The Committee stage provides the occasion for a detailed discussion of the Bill. Every clause must be put separately to the Committee and accepted, amended or rejected with or without debate. Discussion is generally of a very restrained persuasive character. The Minister is generally terse and quiet and the speeches of the critics have something of the same dry, businesslike flavour. The government, it must be noted, maintains with persistence its guiding hand throughout the Committee stage. It does not relinquish its leadership to a Reporter, as in France or to a "member-in-charge" as in the United States. A Minister, in Britain, sponsors the Bill in Parliament and pilots it through all stages. The fate of the Bill depends almost exclusively upon him. "He must guide the Bill through the Committee with tactful, and if necessary forthright, firmness in respect of principles, and with the appearance of amiable resignation and broad-mindedness in connection with unimportant detail."

A member of a Committee may speak any number of times to the same question without being exactly repetitive or demonstrably irrelevant. To avoid such obstructionists, the Government may be forced to apply a 'guillotine' motion, or by moving the Closure on every amendment. This is a salutary if not a drastic remedy and yet it cannot prevent obstruction. If the Opposition feels inclined they will force a division on every clause."

But once a Bill is passed through the second reading, its fundamental principles are supposed to have been accepted. It is, therefore, out of order to propose an amendment in a Committee intended to negative the effect of the Bill. Similarly, amendments which are not strictly relevant to the subject-matter of the Bill, and amendments which are not in

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18. *Ibid.*

19. The exceptions are Bills for imposing taxes, Consolidated Fund Bills and Provisional Order Bills.

20. "In Standing Committee on the Cinematograph Films Bill 1927, a minority of six Members divided the Committee no fewer than three hundred times, and prolonged the Committee stage from April to July: twenty-five sitting days. In 1948, the Opposition prolonged the debate on the Gas Bill for months in Committee, and even forced several all-night sittings on the Bill—the only case where a Standing Committee had sat all night." Taylor, E., *The House of Commons at Work*, p. 139.

conformity with the general intention of the Bill are out of order. Then, the amendments must not be inconsistent with whatever has already been agreed to in the Committee on the Bill, and "they must not be trifling, vague or jesting".

**Kinds of Committees.** The Committee stage has existed for centuries. The Commons had in the past, when the Speaker was the servant of the King and "an office-seeking spy," always wanted to discuss affairs without the presence of the Speaker. Now the Committees derive their importance and utility from the increased legislation and the inability of the House to spend time on its detailed discussion. The modern Committee system was established in 1882. "It was", as *Finer* says, "one answer (the other was Closure) to the congestion of the House with business, aggravated at that time by the ingenious obstructive tactics of the members from Ireland, who had made up their minds that if Ireland was not to be freed to govern herself, they would not let England govern herself." The main purpose of the Committee system was decongestion to save the time of the House of Commons by devolving its business on other bodies of the House which functioned at other times.

Now there are five types of Committees: (1) Committee of the Whole House; (2) Standing Committees; (3) Select Committees; (4) Joint Committees; and (5) Private Bills Committees. The Private Bills Committees are for the discussion of private and local legislation and have nothing to do with the Public Bills. The Joint Committees are Select Committees of the House of Commons and the House of Lords and consist of an equal number of members from each House to consider Bills or other matters in which both Houses are interested. We are primarily concerned with the first three types of Committees.

(1) **Committee of the Whole House.** The Committee of the Whole House is the first in importance. It consists of all the members of the House of Commons. But it is distinguished from the House itself that it is presided over not by the Speaker, but by a Chairman of the Committee or in his absence by the Deputy Chairman. The Mace which is the symbol of authority of the Speaker is placed, so long as the Committee is in session, under the Table. Then, the Rules of Procedure in the Committee are relaxed. The motion need not be seconded and the members are allowed to speak any number of times on the same question. There is no restriction on speech in the Committee of the Whole House and all devices which aim at cutting off debate cannot be moved.

Committee of the Whole House meets for four distinct purposes. There is, (1) the Ordinary Committee of the Whole House on a Bill; (2) the Committee of the Whole House on a Money Resolution; (3) the Committee of Supply; and (4) the Committee of Ways and Means. The first comes into being whenever the House resolves that any ordinary Bill shall go to the Committee of the Whole House rather than to a Standing or Select Committee. When the work of the Committee is done, it rises. The House of Commons again comes into session, and the Speaker occupies the Chair and the Mace is placed on the Table. The Chairman of the Committee, then, approaches the Chair and says, "I beg to report that the Committee have made progress in the matters referred to them,

and ask leave to sit again." The Speaker asks when the Committee is to sit again and one of the Government Whips answers him. The appointed day is announced from the Chair and becomes an order of the House. If a Committee has completed its appointed task, its Chairman says, "The Committee have come to a certain resolution." The Committee of the Whole House it should be noted, is not set up permanently. It is a temporary body appointed from day to day.

The Committee of the Whole House on a Bill is rare. If it is desired to send the Bill to a Committee of the Whole House, a motion to that effect must be moved immediately after the Bill is read a second time. Otherwise the Bill will go automatically to a Standing Committee. The Committees of Supply and of Ways and Means are Committees of the Whole House of Commons, which discharge the financial duties of the House concerning the grant of public money and the levying of taxation.

(2) **Standing Committees.** After the Second Reading automatically a Bill, other than a Money Bill, goes to one of the Standing Committees, unless the House resolves that the Bill would go either to the Committee of the Whole House or to a Select Committee. "Constitutionally important Bills" are referred to the Committee of the Whole House, because the House has always preferred to deal with them directly rather than in smaller Committees. A Bill is referred to a Select Committee when examination of expert evidence is necessary to carry the legislation with technical efficiency involved therein.

Most Bills, therefore, go to the Standing Committees. Originally, there were two Standing Committees. In 1907, their number was raised to four; in 1919, to six; and in 1947, to "as many as shall be necessary." Currently, there are seven such Committees appointed, though the number can be increased at need. The Committees are not named as in other legislatures by subject-matter, for example, Education, Home, Armed Services, etc. They are distinguished only by a letter of the alphabet, A, B, C, D. Only three Committees, the Scottish Standing Committee, the Scottish Grand Committee and the Welsh Grand Committee are distinctly named. The Standing Committees are appointed by the Committee on Selection; a body normally consisting of eleven Members drawn from the main parties in the House at the beginning of each session. The members of a Standing Committee are constantly changing, from session to session. Each Committee consists from twenty to fifty members, who are specialists and experts in the subject which is the substance of the Bill. The parties are represented in proportion to their numbers in the House. Chairmen of Standing Committees are appointed by the Speaker from a Chairmen's panel consisting of not less than ten persons nominated by the Selection Committee. Now the Committees meet in the mornings from 10-30 a.m. to 3-30 p.m., with the recess, and may continue even afterwards. The House has now admitted that Committee might sit while it is in session. The "guillotine" form of closure has more recently become applicable to Standing Committees. The Government may also use its power to move the Closure on each amendment.

Bills come to the Standing Committees quite arbitrarily, according to their order on a calendar and according to which Committee finishes

its work first. There is no specialisation on different topics. The Standing Committees are composed of members of Parliament and have no vestige of executive power. They cannot summon persons and papers before them. They cannot debate or discuss matters irrelevant to the actual text of the Bill before them. They are, in brief, legislative Committees and not investigative Committees. All information that is needed is supplied by the Minister-in-charge of the Bill. The Opposition supplies the contrary information. The public are admitted to meetings of a Standing Committee, unless the Committee decides to exclude them.

In addition to the normal Standing Committee, there are three others, the Scottish Standing Committee, the Scottish Grand Committee and the Welsh Grand Committee. The Scottish Standing Committee consists of thirty members nominated from Scottish constituencies with up to twenty other nominated members. In its plenary form, as the Scottish Grand Committee, it comprises all the members for the Scottish constituencies and not less than ten nor more than fifteen others. These Committees have three functions: to discuss for two days of each session matters of exclusively Scottish concern; to consider for six days such estimates as refer exclusively to Scotland; and also to consider the principles of any Bill which the Speaker certifies as relating exclusively to Scotland. Such a Bill can then, on the motion of a Minister, be referred to its Committee stage to a Scottish Standing Committee. The Welsh Grand Committee consists of 36 members for constituencies in Wales and Monmouthshire, with up to 25 other nominated members. The Committee considers the Annual Report for Wales and certain selected subjects for debate.

(3) **Select Committees.** Select Committees are appointed 'to inquire into and report to the House on special matters of great importance or to give special consideration to Bills that are controversial and propose radical changes. They are employed on specialised tasks which the House itself is unsuited to perform. They chiefly carry out inquiries rather than to discuss legislative details. Since Select Committees are specialised Committees they seldom have more than fifteen members, who are more or less technical experts adequately familiar with matters referred to them for investigation. They hold hearings, collect evidence, examine witnesses, sift evidence, and draw up reasoned conclusions to report to the Commons. As soon as the investigation conducted by a Select Committee is completed and its report submitted to the House, the Committee passes out of existence. The findings of a Select Committee are not binding. It simply makes recommendations to the House.

Apart from temporary Select Committees of this kind, a number of perennial Select Committees on various topics are appointed every year and they remain in existence throughout the session of Parliament. Hence these are called Sessional Select Committees. Examples of Sessional Select Committees are: the Selection Committee, the Committee of Privileges, the Committee on Public Petitions and Committees on Public Accounts, on Estimates, on Statutory Instruments and on Nationalised Industries. In addition three 'specialist' Committees have been set up: The Committee on Agriculture, the Committee on Science and Technology, and the Committee on Education and Science. These Committees have

the power to ask Ministers to give evidence and their meetings are held in public.

(4) **Joint Committees.** Joint Committees are Committees composed, usually of an equal number of Members of each House appointed to consider either a particular subject or a particular Bill or Bills, or to consider all Bills of a particular description, for instance Bills dealing with statute law revision and consolidating Bills. A Joint Committee to consider a particular subject may be appointed at the instance of either House, but the proposal that a particular Bill should be committed to a Joint Committee must come from the House in which the Bill originated.

The members of a Joint Committee are usually chosen in equal numbers by the respective Houses. The Committee has only such authority as both Houses agree to give it. The time and place of its meetings are also fixed by agreement between the two Houses. The Chairman is elected by the Committee itself from amongst its members. Decisions are taken by vote and the Chairman votes like any other member of the Committee.

The Report of a Joint Committee is presented to both Houses—by the Chairman to the House of which he is a Member, and by a member selected by the Committee for the purpose to the other House. A Bill is reported to the House in which it is pending, and a member directed to report accordingly to the other House.

(5) **Private Bills Committees.** Finally, are the Private Bills Committees. A Private Bill Committee consists of four members chosen by the Committee of Selection of the House and the members selected on the Committee are required to sign a declaration that they are not interested personally in the Bill and that their constituents are not locally affected by it. We shall refer to such Committees while dealing with Private Bills.

**Committee System evaluated.** In Britain as early as the reign of Queen Elizabeth, it was not unusual to refer a Bill after a Second Reading to a Committee which can be compared to a Select Committee of our times. The Committee system in its present form was established to relieve the congestion of business in the House of Commons, caused partly by the obstructive tactics of the Irish Nationalists, as mentioned above. They have, consequently, no resemblance whatever between the Committees of the American or Continental type. The Committees in the United States and Continental countries are bodies of relatively stable membership specialising in particular aspects of public policy. In the United States there are Committees of Congress which formulate policy, and intervene in the actions of the Government. In the Third Republic of France a system of eleven Commissions, chosen by lot from the Chamber of Deputies, performed the same functions to an even greater extent. The Fourth Republic constitutionalised the Commissions. Article 15 of the Constitution provided that "the National Assembly should study in its Committees the Bills laid before it..." They were nineteen in number and were powerful enough to find themselves often in conflict with the Government.

But such a conception of Committee system is entirely foreign to the spirit of the British Constitution. The Committees of the House



of Commons are not small expert bodies undertaking special studies of the merits of the Bills and possessing the power of life and death over them. They are rather miniature editions of the House headed by a Chairman whose powers and functions are very much like those of the Speaker including the Closure rules. They have no permanence or individuality. Their members are constantly changing. The Standing Committees of the House are distinguished only by a letter of the alphabet, and they have no special subjects to deal with.<sup>21</sup> The Speaker assigns Bills to them more or less at will. The purpose of the Committees is to put the Bill into final shape for adoption after its general character has already been approved at second reading and before it has to be reported out. Public hearings are not conducted by Standing Committees and they take no evidence.<sup>22</sup> The House of Commons still jealously guards its responsibility of making laws and criticising policy in full session. Its Committees are only auxiliaries, "the mere accessories of the legislative and critical machine."

The Committee system, as it obtains in Britain, has engaged the attention of parliamentarians and public men and they advocate for the creation of specialized Committees of the House of Commons, each concentrating on the affairs of a Department or group of Departments. The advocates of Specialized Committees included Lloyd George, L.S. Amery, Sir Stafford Cripps, Sir Ivor Jennings, Harold Laski and D.W. Brogan. The many reforms that have been suggested along these lines vary in detail. But all are agreed that Specialized Committees would enable Members to acquire the detailed information about the work and problems concerning the Department; would enable the members to acquire information about and to criticize those aspects of defence policy "which are now shrouded in secrecy"; the Members would discuss administrative problems in a non-partisan way; would help Members of the Opposition not only to criticize the Government in an informed way, but also to prepare themselves to take over responsibility for the Departments if they should win an election.

The suggestions for reform of the Committee system have been widely discussed in the press, platform, books, in debates in the House of Commons, and before the Select Committees on Procedure of 1930-31, 1945-46, 1958-59, and 1964-65. But "they have met unyielding opposition from the spokesmen of whatever government to be in power."<sup>23</sup> The government point of view is that Britain should not try to copy the institutions of foreign countries and if American or French pattern was adopted, "we would be doing something absolutely opposite to British constitutional development."<sup>24</sup> It has further been maintained that specialized Committees would constitute a radical constitutional innovation" which would be a challenge to the responsibility of the Minister that he is individually accountable to the House as a whole for the work of his Department.

21. The Public Accounts Committee and the Estimate Committee have special functions in connection with the expenditure of public funds.

22. The Public Accounts and Estimate Committees have the power to send for persons and papers. In some ways they have functions like Congressional investigating committees, though they act in a non-partisan manner and within the policy limits laid down by the House.

23. Birch, A.H., *Representative and Responsible Government*, p. 161.

24. R.A. Butler in a debate in the House of Commons in 1958 and as cited in Birch's *Representative and Responsible Government*, p. 162.

But Birch, a strong advocate of specialized Committees, even suggests that "it may be appropriate to reconsider the nature of responsible Government in Britain"<sup>25</sup> if ministerial responsibility blurs by the creation of the Specialized Committees. Whatever be the merits or otherwise of Specialised Committees, it cannot be denied that the British Committee system is defective and under the existing arrangement Parliament cannot control administration because M.Ps. lack knowledge about administrative affairs and the House lacks time for detailed discussion. To remedy the position partially three Specialized Committees have recently been set up: the Committee on Agriculture, the Committee on Science and Technology, and the Committee on Education and Science. They are in addition to the Public Accounts Committee, the Select Committee on Estimates and the Select Committee on Statutory Instruments. All these Committees are set up at beginning of each session in Parliament, but are in effect permanent features of the House of Commons' Committee system. R.H.S. Crossman, Leader of the House of Commons, while pleading for reform in the Parliamentary procedure gave a note of warning. He said, "...we must take care to see them up in the right way. We cannot make the American-style Committees. They must be in our tradition. We must take trouble and care on this. We are on the edge of getting it right, but do not let us set up too many Committees."<sup>26</sup>

(4) **Report Stage.** The next stage in the career of a Bill is called the Report Stage, when the Bill is reported back to the House by the Committee. If the Bill has been dealt within the Committee of the Whole House, the report stage is formal. Where it has been dealt with "in Committee upstairs"<sup>27</sup> debate may arise and amendments may be moved on Report. The Government sometimes avails itself of the opportunity to make amendments which were promised at an earlier stage, but could not be drafted or could not be moved or amendments which it is felt are so important that they ought not to be in a Committee. There is always a tendency for the Report stage to lengthen out, "the tendency of a parent body", as Finer puts it, "to reconsider the discretion it gave its offspring." To save the time of the House, the Government resorts to motions for Closure and "the Speaker assists by keeping the debate to the clauses rather than generalities."

(5) **Third Reading.** The final stage in the House is that of the Third Reading. The rules governing Third Reading are substantially those which apply to Second Reading. There is a debate again on principle. The idea of the debate at this stage is that the Bill "having been approved in principle on the Second Reading, having been licked into shape in detail on the Committee stage, the House should take one more look at the Bill as amended before it finally gives its approval." Only amendments involving verbal alterations are accepted. When the motion that the Bill be read for the third time is carried, its career in the House of Commons comes to an end. "The Third Reading", remarks Dr. Finer, "is a political mustering: the Government expresses its thank-

25. Birch, A.N., *Representative and Responsible Government*, p. 164.

26. Extract from Parliamentary Speeches on Reform given in Bernard Crick's *The Reform of Parliament*, Appendix D, p. 308.

27. 'Upstairs' signifies that the Standing Committee meets in a Committee Room on the floor above the Chamber, so the phrase commonly used.

fulness that it has been able to do the country some good, in spite of the opposition; and the Opposition replies by claiming that it has made a bad Bill better than the Government first presented it, and that, even so, it has doubts for the future of the country's prosperity."<sup>28</sup>

**A Bill becomes an Act of Parliament.** The Bill passes through much the same stages in the House of Lords. If the House of Lords has no amendments to offer, then it becomes an Act of Parliament after receiving the formal assent of the King. The House of Lords may amend the Bill or even throw it out altogether. But overthrowing the Bill by the Lords makes operative the Parliament Act of 1911, as amended in 1949. In case of amendments, they have to be approved by the Commons. On the day appointed for the consideration of amendments, the Speaker puts the question: "That the Lords' amendments be now considered." As each amendment is read by the Clerk, the Minister-in-charge of the Bill rises and moves: "That the House doth not agree with the Lords in the said amendment" or "That this House doth disagree with the Lords in the said amendment." In case of disagreement, a Committee is appointed to "draw-up reasons" for not agreeing to amendment. Then, an exchange of messages takes place between the two Houses. If there is no agreement and both the Houses insist on their own plea, the Bill is lost unless the Commons invoke the Parliament Act of 1911, as amended in 1949.

The ceremony by which Bills receive the Royal assent represents one of the many examples of ancient parliamentary pageantry. It is sometimes given by the King in person, but more often by a Royal Commission. It takes place in the House of Lords. The King is represented by Lords' Commissioners, who sit in front of the Throne. At the bar of the House stands the Speaker of the House of Commons who has been summoned from that House. The Clerk of the Crown reads out the title of each Bill and the Clerk of Parliament pronounces the Royal assent—*Le Roy le veult*. With the Royal assent the Bill has become a law.

**Private Members' Bills.** The procedure for the Public Bills introduced by Private Members is slightly different. What actually happens is that before the beginning of session the Private Members send their Bills to be introduced in Parliament. Then, ballots for precedence are drawn. Private Members' Bills must be introduced on a Friday, for the Government monopolises the time of the House on the earlier days of the week. The Members who are successful in the ballot for precedence on Fridays present their Bills upon written notice. There is another method to introduce the Bills under the "Ten Minutes Rule." This method gives to the sponsor of the Bill an opportunity to make a short speech, for ten minutes, in favour of the Bill. This will usually be followed by an equally brief speech from a Member or Members who oppose the Bill. After that the Speaker will put the question that leave be given to bring in the Bill. If the motion is carried the Bill is presented and has its first reading.

The Private Members' Bill suffers from certain tangible disabilities. In the first place, the time allotted is absolutely insufficient. The time

allotted for all stages of all Private Members' Bills is ten days in the session. Secondly, the Private Members, in comparison with Members of Government, lie under a heavy disadvantage in the drafting of the Bill. Finally, even if it is well drafted, its passage depends on a combination of various circumstances. If the Government is opposed to the Bill, it will have no chance. If the Government is indifferent, various procedural difficulties stand in the way. If the Government definitely approves it, as to make its own, the Bill would, of course, become a Government Bill. "However, it would appear that if the Private Member is popular or at least not unpopular, if the Bill is popular or at least not unpopular, and if the member possesses some skill in respect of parliamentary procedure, the Bill will have a fair chance of being passed into law."

Apart from these rather restricting circumstances, Private Members' Bills follow exactly the same course of Public Bills promoted by the Government.

**Private Bills.** Private Bills are quite different from Private Members' Bills. A Private Bill is a Bill which is designed to further, and which only affects, specific private interests, as opposed to the general classes of the community which are affected by most Public Bills. They deal with a special situation or a limited locality, and the great majority of such Bills concern the rights and powers of local authorities. Private Bills resemble Public Bills in that most of the work is done before the Bill reaches Parliament. There are lengthy negotiations, conferences on disputes between the interested parties and every effort is made to 'settle' opposition before the Bill is presented in order to reduce the expenses to which parties are liable and in case of contested Bills they are enormous.

A Private Bill is presented in the form of a petition by the promoters and it is deposited in the Private Bill Office of the House of Commons. The promoters are not the members of Parliament, but outside persons or bodies acting through a firm of parliamentary agents. Thereafter the agents must appear before the Examiners<sup>29</sup> of Petitions for Private Bills and prove that they have observed the provisions of all the Standing Orders relative to giving notice to interested persons and the general public. The Examiners report to both the Houses simultaneously and if their report is favourable the Bills are presented in one or the other House within the dates prescribed by Standing Order, and read a first time.

The presentation and first reading of Private Bills are mere 'book entries', and the Members of Parliament will normally have nothing to do with them until they come up for Second Reading. The Second Reading is also likely to be entirely a formality, except in the rare cases where an important new principle is contained in the measure. The real hearing takes place at the Committee stages. Opposed Private Bills go to an ordinary Private Bill Committee—a Committee known as a "Private Bill" group, i.e., a Committee on a group of Private Bills. It consists of four members, chosen in the Lords by the House and in the House of Com-

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29. The Examiners are permanent officials appointed jointly by the two Houses.



mons by the Committee of Selection. Members selected on the Committee must sign a declaration that they are not personally interested in the Bill before the Committee, and that their constituents are not locally affected by it.

In Committee the semi-judicial nature of private legislation is seen at its plainest. A Committee on a Private Bill is to decide whether the Bill is justified at all; whether the promoters really need it; whether it is the only way of furthering their ends. The Committee must decide whether it is to the public advantage that the Bill should pass into law. Above all, it must also assess the claims of the opponents of the Bill who appear before them. Persons who are interested in the passage of a Private Bill support it before the Committee. Those who oppose it, marshal their objections. Both sides are represented by expensive legal lawyers, expert in this kind of work.

The Committee, then, makes a report which for practical purposes is its decision. This is normally accepted as a matter of course by the House. The Report and Third Reading stages are, therefore, with few exceptions, formalities. After Third Reading the Bill passes to the other House, and in due course, if no mishap occurs, becomes an Act.

Private Bills which are unopposed go to an unopposed Bill Committee consisting of five members plus the Counsel to Mr. Speaker. The proceedings of this Committee are brief and usually formal. The senior partner of the firm of parliamentary agents appears before the Committee, explains the general purpose of the Bill, produces the formal evidence, and accounts for any clauses of an unusual nature. In fact, most of the work is done in private conferences between the Speaker's Counsel and the parliamentary agents.

**Provisional Order Bills.** Instead of promoting a Private Bill, the Company or Local Authority may in some cases obtain an order from a Government Department allowing them to proceed. In all such cases the Department concerned holds a local inquiry, and if it is satisfied that the application is justified, issues the order and presents a Bill in Parliament to confirm the Provisional Order. Most of the work has, thus, been done before the Bill, which is called a Provisional Order Bill, reaches Parliament. Almost all Provisional Order Bills are unopposed as the Department is not likely to make an order to which Parliament would object. If there is opposition, the Bill goes to a Select Committee, but the chances of its being defeated are negligible.

**Delegated Legislation.** Delegated legislation is a term employed to describe the Statutory Instruments—Rules, Orders, and Regulations—issued by Government Departments to supplement, amplify and apply statutes passed by Parliament. We have seen how slow and complicated is the process of law making. This is in order that every detail of the Bill may be carefully examined by the representatives of the people, and British legislation is always lengthy and detailed.<sup>30</sup> Although the draftsmen of the Bill try to provide for all contingencies, but there is a limit to the details which the Bill can contain. And, then, the conditions vary and circumstances change. To meet those varying conditions and

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30. Jennings, I., *The Queen's Government*, p. 92.



circumstances Parliament delegates through its statutes power to Ministers and their administrative assistants to make Orders and Regulations in their discretion, that is, to apply the provisions of the statutes to the situations they are intended to regulate. "Much of our social and economic legislation", L.S. Amery said, "covers so vast and detailed a field that no statute, however cumbrous—and many of them are already cumbrous and unintelligible enough—could possibly provide for all contingencies. Some power of ministerial variations or interpretations is obviously necessary, subject to the attention of Parliament being drawn to what is being done."<sup>31</sup>

The main purpose for which powers are delegated by Parliament to the Executive are thus: (1) to allow the amendment of existing legislation in order to bring it up to date; (2) to create machinery to administer the Act; (3) or, most generally, to allow the Departments to decide details within the framework of legislation that consists only of broad principles. This often also involves, sub-delegation, whereby the Minister is empowered by the Act to delegate these powers to his Departmental officials, subject to his confirmation. In this way, two or three tiers of delegation can be involved in the granting of delegated power.

Delegated legislation, accordingly, means the function of sub-legislation by the Executive. It is legislation not by direct functioning of Parliament, but by powers conferred on the Executive by an Act of Parliament (or, more rarely, by Royal Prerogative). The Committee on Ministers' Power defined it "as the exercise of minor legislative power by subordinate authorities and bodies in pursuance of statutory authority given by the Parliament itself." It is not an original power of the Executive itself, but delegation of authority by Parliament and strictly subordinate to the terms of the Statute authorising delegation. It is, as such, termed **delegated Legislation** and sometimes **subordinate Legislation**. If it is inconsistent to the parent law, or is in excess of the power granted, it is void. Otherwise, it has the force of law and the law courts cannot interfere therein. What a supreme body delegates no other agency of Government can abrogate. Parliament, being sovereign, may delegate powers to whomever it wills and may similarly withdraw the powers that it has delegated. This is unlike the powers of the American Congress. Congress there is itself a delegated agency and the Constitution forbids a delegated agency to delegate any further on.

The power to legislate, when delegated, is normally confined to matters of detail bordering upon administration, but in case of sudden emergency power may be delegated to legislate on major matters. In 1931, the Gold Standard (Amendment) Act empowered the Treasury to legislate for the control of the Exchange. The National Economy Act empowered the King-in-Council to effect reductions, including cuts in salaries, in certain public services. The Foodstuffs (Prevention of Exploitation) Act authorised the Board of Trade, subject to annual resolution by either House of Parliament, to control supply price of certain foodstuffs.

**Delegated Legislation is Inescapable.** Professor Laski points out

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31. Amery, L.S., *Thoughts on the Constitution*, p. 50

that "the habit of delegated legislation is not new."<sup>32</sup> The Report of the **Committee on Ministers' Powers** gives examples of delegation of legislative powers in the sixteenth, seventeenth and eighteenth centuries. It existed even in the fourteenth century: a Statute ordered that "no wool should be exported until the King and his Council do otherwise provide." It delegated to the King-in-Council the specified power of deciding when to end the ban on exporting wool. But it is only during the last century and a half that the bulk of delegated legislation has enormously increased to meet the ever increasing needs of a modern State. For example, in 1890, 168 of such Instruments (till 1946 called Rules and Orders) were issued; in 1913, 444; in 1937, 1,500; and never less until in 1945, it rose to 1,706; it then fell from 1,166 in 1951 to 706 in 1952,<sup>33</sup> and now again it runs into four figures. The factors which are responsible for this over accelerated pace may be summarised as follows:

1. So long as the functions of the State were limited and it existed mainly for maintaining internal order and external security, Parliament had few laws to make and, accordingly, it could provide conveniently the necessary legislation. Nowadays the province of the State has increased considerably and so have the activities of government. Schemes of social welfare and economic problems of a national and international character form the primary functions of the State. The provision of social services, like national health insurance, unemployment insurance, town and county planning, involve the making of detailed regulations to provide for individual benefits. The exercise of economic control involves the imposition of a variety of restrictions and positive duties. It is obvious that when we are using duties, quotas, bounties, licences and various other expedients as instruments of policy, some accurate, flexible and speedy means must be found to give effect to the policy of Parliament. And whenever it seemed clear to the House of Commons that it was a convenient way of operating a statute, it has never hesitated to grant such a power through the means of delegated legislation.

2. Moreover, Parliament no longer has the time, nor, indeed, the necessary data to enable it to produce the mass of detailed regulations which the present functions of government required. Delegated legislation relieves the pressure on Parliamentary time by removing details of administration from Acts of Parliament. Then, it enables Parliament to settle broad principles without entering into highly technical details. The Committee on Minister's Powers says, "Apart from the broad principles involved, technical matters are difficult to include in a Bill, since they cannot be effectively discussed in Parliament..." The National Insurance Act, 1946, contained 79 clauses and schedules, "but if it had not provided for ninety-nine sets of regulations, it would have contained at least three hundred clauses."<sup>34</sup> Delegated legislation has, thus, the merit of shortening Bills and consequently the time in considering them. "The province of Parliament", wrote Lord Thring,

32. *Reflections on the Constitution*, p. 43.

33. The Committee was appointed in 1929 under the Chairmanship of Lord Donoughmore. The Committee submitted its Report in 1932.

34. Finer, H., *Governments of Greater European Powers*, p. 133.

35. Molson, Hugh, *Papers on Parliament, A Symposium*, p. 97.

Parliamentary Counsel to the Treasury in 1877 "is to decide in hard questions affecting the public interest and the more procedural and subordinate matters can be withdrawn from their consideration, the greater will be the time afforded for the consideration of more serious question involved in legislation." This is probably the only note in which Parliamentary government can with respect to its legislative functions be satisfactorily carried on."

3. Delegated legislation enables the Executive to provide for all unforeseen contingencies without having to return to Parliament for amending Acts or additional powers. The details can be regulated after a Bill passes into an Act with greater care and minuteness and to better adaptation to local or other special circumstances. Besides, Statutory Instruments mitigate the inflexibility which would often otherwise make an Act unworkable. Even the smallest and most uncontroversial amendment of an Act requires the passage of another Act through all the parliamentary stages in both the Houses. It may also happen that no parliamentary time may be available to push the amending Bill through. This would frustrate the object of the original legislation. Delegated legislation, on the other hand, can rapidly be revised by the issue of another Statutory Instrument. Parliament has the same rights over such a changed Instrument as over the original.

4. Next, Delegated legislation is ideal in an emergency. It is the means by which the Executive can be armed with power to take immediate action and, indeed, without public discussion. The Economy Act of 1931, enabled the Government to effect economies they deemed necessary by Orders-in-Council. The Defence of the Realm Act, 1914, and the Emergency Powers (Defence) Act, 1939 and 1940 empowered the Government to do whatever it deemed necessary to meet the wartime emergencies. The Committee on Ministers' Powers while dealing with this aspect reported, "In a modern State there are many occasions when there is a sudden need for legislative action. For many such needs delegated legislation is the only convenient or even possible remedy."

5. Sir William Graham Harrison, First Parliamentary Counsel to the Treasury, assigned another reason in favour of delegated legislation. He says, "I should like also to emphasise a side of the question which appeals to me particularly as one who has drafted, not only a large number of statutes, but also a very large number of Statutory Rules and Orders, viz. the superiority in form which, as a result of the different circumstances and conditions under which they are respectively prepared and completed, delegated legislation has over statutes. In most cases the time available for drafting Bills is inadequate, and their final form when they have passed both Houses is generally unsatisfactory. On the other hand, statutory Rules can be prepared in comparative leisure and their subject matter can be arranged in a logical and intelligible shape uncontrolled by the exigencies of Parliamentary procedure and the necessity for that compression which every Minister (however much in debate he may use the draftsman as a whipping-boy) invariably requires in the case of a Bill."<sup>36</sup> Delegated legislation, thus, provides a speedy, convenient and

36. Cited by Jennings in *Parliament*, pp. 457-58.

accurate means of giving effect to the policy of Parliament and also to meet the ever-increasing need for speed in the governmental process.

**Dangers of delegated legislation.** Delegated legislation is thus quite inescapable. But delegated legislation, its critics point out, is a clear threat to Parliamentary system of government as it offends the principle that legislation should be made in Parliament. If Parliament uses its unlimited legislative powers to delegate the power to another body, Parliamentary government itself is suspended. In Germany, this was, in fact, the method used by Hitler. Long before the collapse of France in 1940, the Government had been authorised to issue decrees by French Parliament which thereafter scarcely ever met. It means that Parliament abdicates its own proper functions to the Executive. Then, the ever-expanding scope of Government action has resulted into an inconceivable regulation of the citizens' life. "Bureaucrats tend to exalt administrative convenience and the national advantage at the expense of the individual and his freedom. The official in his zeal to achieve a desirable result may impose an unreasonable burden upon the subject. The power under a statute to make rules gives him just the opportunity that he wants." The Committee on the Ministers' Powers pointed out that delegated powers might be so wide as to deprive the citizens of protection by courts against action by the executive which is harsh or unreasonable. The courts can declare delegated legislation *ultra vires* only when the rule is against the delegation of power or when proper procedures have not been used. They cannot ensure that powers are exercised reasonably in the wide sense.

Some public anxiety at the practice of delegating legislative power was occasioned on the publication in 1928 of a vigorously written book, *The New Despotism*, by Lord Chief Justice Hewart. Lord Hewart claimed that the Old Despotism of Royal domination had been replaced by the New Despotism of Executive domination of Parliament, which was proving to be just as big a threat to Parliament's authority and to public liberties, with Parliament being used as a cloak for Executive Despotism. Similarly, W.A. Robson in his book, *Justice and Administrative Law*, emphasised the constitutional problems involved in these developments. Much of the concern of the critics was not over the delegation of powers to the Ministers, but was over the sub-delegation of powers to civil servants. The disquiet that was, thus, aroused led the Government in 1929 to set up a Committee under the Chairmanship of the Earl of Donoughmore to consider the powers exercised by or under the direction of (or by persons or bodies appointed by) Ministers of the Crown, and to report what safeguards were considered necessary. It was a distinguished Committee (The Committee on the Ministers' Powers) and its recommendations were of great importance. The Committee reported in 1932 and came to the conclusion that whether good or bad the development of the practice of delegated legislation was inevitable. The system of delegated legislation, the Committee concluded was "legitimate...for certain purposes, within certain limits, and under certain safeguards." Nothing was done to implement the recommendations of the Donoughmore Committee until the War, when the Select Committee on Statutory Instruments was set up in 1944.

In 1946, the Select Committee on Procedure criticised the existing



machinery for Parliamentary scrutiny and in 1952 the Select Committee on Delegated Legislation made a more detailed analysis of the problem. The main criticisms that emerged from these post-war enquiries were that the Executive was assuming the legislative role of Parliament to an extent that endangered liberty, and that many of the powers that were delegated to Ministers were too loosely defined. It was pointed out that prior consultation with those affected by delegated legislation was not always possible, and that the protection of the courts was denied by many of the regulations.

The post-war period also witnessed a further spate of literature, for example, Christopher Hollis's *Can Parliament Survive?* and G.W. Keeton's *The Passing of Parliament*, which criticised the effect of delegated legislation in increasing Parliament's subservience to the Executive. In recent years, however, concern over the question of delegated legislation has been less marked.

**Safeguards against abuse of power.** Dangers of delegated legislation are not inherent in it. With proper safeguards they can be avoided. The first safeguard is provided by the process of consultation that takes place with affected parties before a Bill is introduced in Parliament. Thus, some of those parties who are to be affected by legislative powers that are to be delegated to the Executive are able to comment upon, and perhaps influence the contents of the parent statute. But the real safeguard against the abuse of power to legislate must be sought in Parliamentary control. Herbert Morrison has said, "The principle of delegated legislation is, I think, right, but I must emphasize that it is well for Parliament to keep a watchful and even jealous eye on it at all stages."

Thus, Parliamentary scrutiny of the actual granting of delegated powers remains the most important safeguard. The existing methods of scrutiny are based primarily on the Statutory Instrument Act, 1946. The Act clarified and modified the existing method of control. The term 'Statutory Instrument' was used to describe the documents that grant delegated powers (replacing the multiplicity of Rules and Orders that had existed before), and the Select Committee that had been set up in 1944 to scrutinize the process of delegated legislation, was put on a permanent basis as the Statutory Instruments Committee. Now the methods of Parliamentary control rest partly on the activities of the Statutory Instrument Committee and partly on the initiative of individual Members of Parliament.

All Statutory Instruments are published by Her Majesty's Stationery Office and are placed on general sale for the information and use of the public. They are formally presented to Parliament, with copies being sent to the Speaker and the Lord Chancellor, and to all Members of Parliament who ask for them. A Member of Parliament can take action according to the prescribed procedure. There are three distinct procedures which can be used for the presentation of Statutory Instrument, the parent Act defining the procedure to be adopted. The first is, simply to present the Statutory Instruments to both Houses of Parliament. They be-



come operative immediately after presentation to Parliament. Neither of the Houses has the power to annul them. Nor any positive acceptance of the Instrument is necessary. It is only a method of publicity and generally it is used for minor matters. This method, accordingly, affords little chance of Parliamentary control.<sup>28</sup>

The second procedure is for the Statutory Instrument to be laid before both Houses for a period of forty days. Under this procedure no Statutory Instrument can come into operation until it has been approved by the affirmative resolution of both Houses. The third and the most used procedure is for the Statutory Instrument to be laid before both Houses for a period of forty days and the Instrument is operative until, or unless, it is annulled by a prayer for Annulment in either House in this period. It may, however, be noted that an Instrument can be annulled, but it cannot be amended. The difference between the second and third procedure is obvious. According to the second procedure the Instrument does not become operative unless the Government takes the initiative and secures by a resolution of both Houses its positive approval. According to the third procedure, the Instrument becomes automatically operative unless there is successful move to stop it.

The second safeguard is the process of scrutiny. The Committee on Ministers' Powers recommended "the appointment of a small Standing Committee of each House to consider and report on Bills conferring law-making powers and on regulations and rules made in pursuance of such powers and laid before Parliament." In 1944, a Select Committee on Statutory Instruments—known as the Scrutiny Committee—was established and its existence is renewed each session. The Committee consists of eleven members based on party composition in the Commons, with the Chairman coming from the Opposition. The function of the Select Committee is to consider every Statutory Instrument or draft of an Instrument laid before the House and draw the attention of the House to provisions (1) that it imposes a charge on the public revenues; (2) that it is made under an enactment which excludes challenge in the law courts; (3) that it appears to make some unusual or unexpected use of the powers conferred by statute; (4) that it has been withheld from publication by unjustifiable delay; (5) that it calls for elucidation of their form or substance.

In the House of Lords the Special Orders Committee examines orders which require an affirmative Resolution of the House or an Address to the Queen before becoming effective or continuing in force. The Committee does not report on the expediency of an order but reports its opinion as to whether the order raises important questions of policy or principle and how far the order is founded on precedent; it also advises the House whether the order can be passed without special attention, or whether there ought to be a further enquiry before the House proceeds to a decision.

The Select Committee on Statutory Instruments is reputed to spend much time on sifting in the Instruments which need be brought before the House; Counsel of the Speaker of the Commons assists it with advice,

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28. Punnett, R.M., *British Government and Politics*, p. 322.

summons civil servants for explanation what it cannot understand, and finally reports to the House within the time limit for action. From 1944 to the end of 1954, 19,400 instruments were made and out of these 10,250 had to come before Parliament. The Select Committee scrutinised 7,000 and drew the attention of the House to 93 of them. In other words, as Dr. Timet says, "over eight years, about 1,380 public instruments per year were made, about 900 a year were scrutinised, and an average of 11 per year were brought to the attention of the House."

It follows from the supremacy of Parliament that no Court of Law can question the validity of a statute. But the same does not apply to Statutory Instruments. They are only valid if they comply in substance and in form with the provisions of the parent Acts. It must, however, be emphasised that the courts cannot consider the wisdom or otherwise of a Statutory Instrument. "If it is bureaucratic, vexatious, embarrassing and harassing to the subject it is for Parliament to take a decision and object in whatever way is appropriate."<sup>39</sup>

Moreover, powers are delegated to the Queen in Council or to authorities directly responsible to Parliament, i.e., to Ministers of the Crown, to Government Departments for which Ministers are responsible, or to organisations whose legislation is subject to confirmation or approval by Ministers who thereby become responsible to Parliament for it. Certain Acts also require direct consultation with organisations which will be effected by delegated legislation before such legislation is made.

Laski maintained that "the protest against the growth of delegated legislation collapses as soon as it is submitted to serious scrutiny." The existing safeguards offer Parliament, the Courts, and the public the chance to keep delegated legislation in its proper place. No administration, much like the one in Britain can remain oblivious of the reactions of Parliament and pressure groups when it is formulating regulations. In fact, there is always some form of prior consultation between a Department exercising legislative powers and the interests most likely to be affected, although it is not a formal obligation. Nonetheless, here, too, as it is in so many other activities of Government, the price of liberty is eternal vigilance. It is wise to delegate power of legislation but "Parliament must ensure that the powers given to Ministers are not abused and the law courts must retain their power to see that they are not exceeded." There is, however, one missing element in the whole scheme of parliamentary control. When a proposed Instrument is debated in the House it has no power to amend it. It can only pass or reject it as a whole. The House, accordingly, has to accept the part, that is objected to, in order that the rest, which it approves, may be passed.

## FINANCIAL FUNCTIONS

**Money Bills.** "Who holds the purse holds the power", wrote Madison in the *Federalist*. It was through the control of the nation's purse

39. *Governments of Greater European Powers*, p. 134.

40. *Papers on Parliament, A Symposium*, op. cit., p. 107.

41. *Parliamentary Government in England*, p. 350.

that the House of Commons rose to supremacy. Hence it is no matter of surprise that Money Bills should occupy a large portion of time that the House devotes to its work. The enactment of Money Bills is somewhat different from that of others. In the first place, they must originate in the House of Commons and in the Committee of the Whole. The House of Commons cannot vote money for any purpose nor impose a tax except at the demand and responsibility of the Crown, which in effect means the Cabinet. The Government, thus, has complete and undivided power of initiative in financial matters. Likewise, the power of the House of Commons is complete and decisive. The Parliament Act of 1911 prescribes that a Money Bill passed by the House of Commons and sent to the House of Lords one month before the ending of session, may be submitted to the Royal Assent and become law after one month whether passed by the House of Lords or not. The role of the House of Lords in matters of Money Bills is, accordingly, formal.

**The Budget.** The principal financial function performed from year to year is the preparation, consideration, and authorization of the Budget. "Budget" is an old word meaning a bag containing pages or accounts. The use of the word in public finance originated in the expression "The Chancellor of the Exchequer opened his Budget," which was applied in Parliament to the annual speech of the Chancellor of the Exchequer explaining his proposals for balancing revenue and expenditure.

The Budget speech is the main occasion of the year for reviewing the Exchequer finances and the economic state of the nation, and its formal basis is the Chancellor's proposals for raising money by taxation. Viewed in simple outline, it involves, on the one hand, estimates of annual financial expenditure and, on the other, a calculation of anticipated revenue. The formal action by Parliament that renders legal the expenditure of public money takes the form of an Act of Parliament. Such an Act authorises the payment of money out of the Consolidated Fund. Consolidated Fund is a great reservoir into which all the revenues of the Kingdom are poured and out of which all the money required for public expenditure is drawn. Consolidated Fund has no physical existence. It is just an account lodged with the Bank of England and money is paid out from it when authorised by Acts of Parliament. The principal Act of this kind is the Annual Appropriation Act.

The Consolidated Fund is replenished through moneys paid into it by authority of Act of Parliament which gives legal validity to the raising of revenues. The principal Act in this respect is the Annual Finance Act. Annual Budget prepares a way for the passage of Appropriation Act and Finance Act.

The financial year begins on April first. The estimates for the coming financial year are presented to the House of Commons somewhere in the second or third week of February. A little later the Chancellor of the Exchequer makes his Budget Speech reviewing the finances of the past year and detailing the financial programme of the current year, particularly as regards new taxes, or increased taxes, or reduced taxes. The estimates are discussed in the Committee of the Whole on Supply. This Committee, like the Committee of Ways and Means, meets under the Chairman of Ways and Means, or his Deputy, in place of the Speaker.

The procedure is more informal than in a sitting of the House. Motions do not have to be seconded, debate cannot be cut off by Closure rules and members may speak any number of times.

The estimates are presented in sections and each section is taken up in "votes" or groups of items. The number of days allotted to consideration of the annual estimates are fixed at twenty-six, all of which must be taken before August 5. The debates in Supply on the Estimates are very seldom devoted to properly financial matters. They are almost invariably general debates on the policy of the Government to the services provided for. This gives an opportunity to the Ministers to explain and defend their proposals and to the Opposition an opportunity to air their grievances or to criticise the general policy of the Government. The Members may propose to strike out or reduce any item of expenditure, but they have no right to add or increase any amount. The debates must be concluded within the allotted time. When the estimates have all been debated, the whole is then embodied in an Appropriation Bill and put through the usual stages and passed by the House.

But the Appropriation Bill is not passed until July or August. It follows that money must be provided for the Government between April 1, and the passing of the annual Appropriation Act. So the Departments draw up provisional estimates of the money they are likely to require during those four months. These estimates are presented to Parliament as a **Vote on Account** and considered as expeditiously as possible. In the case of Service Departments—Army, Navy and Air Force—no Vote on Account is usually necessary. The item 'Pay, etc., of officers and Men' is brought up, and debated which is invariably passed before the beginning of the financial year. Unlike the Civil Departments, Service Departments may use for one purpose money voted for another. It must, however, be remembered that the Committee of Supply sanctions all expenditure of public money which is not (a) otherwise sanctioned by an Act of the same session, or (b) paid directly out of the Consolidated Fund.<sup>42</sup>

The Committee of Ways and Means has two functions to perform. In the first place, before any money voted in the Committee of Supply can be withdrawn from the Consolidated Fund, it must be authorised by a resolution of the Committee of Ways and Means. But the second and more important function of the Committee of Ways and Means is the raising of revenues. Revenue, like expenditure, is partly raised under statutes that continue until repealed, partly under the authority of annual statutes. The bulk of the revenue is raised by the former method. Proposals are taken up in groups or sections and approved by the Committee in the form of resolutions. The rules prevent private members from moving any increase in the taxes or imposition of any new tax. Their action is only restricted to approving, striking out, or lowering the taxes proposed

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42. Certain high officials are paid out of the Consolidated Fund, e.g., Judges, the Speaker, the Comptroller and Auditor-General. This means that their salary has not to be voted annually. They are supposed to be above political considerations. Interest on the National Debt is also paid directly out of the Consolidated Fund, and it is by far the largest of the amounts so paid.

by the Government. After the Committee of Ways and Means has voted all the revenue proposals, its resolutions are embodied in annual Finance Bill, just as the resolutions of the Committee of Supply are embodied in the Appropriation Bill. The Finance Bill is, then, introduced and put through the different stages prescribed for an ordinary public Bill. After passing through the Commons, the Finance Bill goes to the House of Lords where it is subject to the provisions of the Parliament Act, 1911.<sup>43</sup>

### CONTROLLING THE EXECUTIVE

A third great function of the House of Commons is that of controlling the executive. The responsibility of the Ministry to the House of Commons, a primary characteristic of the British system of Government, involves a constant control of the House over the Government. Indeed, control and responsibility go naturally hand in hand. Since responsibility of Government means its resignation from office whenever the policy of Government proves fundamentally unacceptable to the House of Commons, "an obligation rests upon the House of Commons to exercise a day-to-day control over the Ministry in such a way that fundamental disagreement between the executive and the representatives of the people will be clear and manifest." If the actual and possible mistakes of government were not apparent, the Government might become irresponsible. Control by the House of Commons prevents this. It tends to keep the Ministers constantly conscious of the fact that they will be called upon to give an account of what they do. "A Government," says Laski, "that is compelled to explain itself under cross-examination will do its best to avoid the grounds of complaint. Nothing makes responsible government so sure."<sup>44</sup>

The House of Commons maintains its control in two ways. The first is the constant demand in the House for **information** about the actions of Government; the second is the **criticism** that is constantly aimed at the Government in the House. These two methods are closely related to each other and take various forms.

The most effective instrument by which the House of Commons seeks information from the executive is the oral or written question. "Parliamentary Government," asserts Laski, "lives and dies by the publicity it can secure not only on governmental operations, but on all the knowledge it can obtain on the working of social processes."<sup>45</sup> Any member of the House of Commons may, by following prescribed regulations, direct questions at Ministers and for four days in a week, at the beginning of the sitting of the House, Ministers devote almost an hour to answering questions which have been put to them. An average of 15,000 questions are asked every year. Except for "Private Notice" questions, which are questions of an urgent character of which the normal advance notice is not given, two days' notice of a question is normally required. Questions may be answered orally or in writing. A member cannot put down more than three questions for oral answer

43. See *ante*.

44. Laski, H.J., *Parliamentary Government in England*, p. 149.

45. *Ibid.*, p. 159.



on any one day. Supplementary questions arising out of the original answer may be allowed at the discretion of the Speaker. Questions either seek for information or press for action. The person to whom they are addressed must be officially responsible for the subject-matter of the question. They may deal with the grievances of individual citizens or with great issues of public policy.

The device of asking questions has important results. In the first place, it brings the work of the various Departments of Government under the public scrutiny. This fact makes all concerned with the working of the machinery of Government realise that their efficiency and honesty are being regularly tested. Secondly, it mitigates the danger of bureaucratic habits, because "men who have to answer day by day for their decisions will tend so to act that they can give account of themselves." Finally, it is the most effective check on the day-to-day administration. Questions, in brief, bring to light the activities of Government and subject Government to the public scrutiny, and this is according to Limer, "the fundamentally characteristic British way of keeping the Cabinet painfully sensitive to public opinion."<sup>46</sup>

The House of Commons is also a debating assembly. "A society that is able to discuss," writes Laski, "does not need to fight, and the greater the capacity to maintain interest in discussion, the less danger there is of an inability to effect the compromises that maintain social peace."<sup>47</sup> If the original meaning of the word Parliament is not used opprobriously, it is really a place where people talk about the affairs of the nation. This is done when laws are made and policy of the Government is under review. The most important function of His Majesty's Opposition is to criticise matters of administration and policy making and, thereby, make the Government to defend its intentions and its practices. The best opportunity for the Opposition to criticise governmental policy as a whole is when it debates the reply to the King's "Gracious Speech". At the beginning of each Session of Parliament, the Government's legislative programme is announced in the King's or Queen's Speech—known as Speech from the Throne. An address in reply to the Speech from the Throne is moved and seconded and followed by a debate, usually lasting six days, on the policy of the Government as outlined in the Speech and on amendments from the Opposition regretting that the Speech contained no reference to some matter, or was in some other way unsatisfactory. Then, discussion of public finance, more especially of proposals for expenditure, offers a very real opportunity for discussion and criticism. If the Opposition disapproves the Government's foreign policy, it uses the debate on appropriations for the Foreign Office as an occasion for criticism. Indeed, the House of Commons devotes to criticism of the Government the whole time allotted to the examination of the estimates.

The normal occasion for criticism of the Executive is, of course, a debate on a motion for adjournment. A Member may, during a sitting, between the time when all questions have been answered and the time for the beginning of the public business, move the adjournment of the

46. *Governments of Greater European Powers*, p. 162.

47. *Parliamentary Government in England*, p. 149.

House for discussing a definite matter of urgent public importance. If the motion is supported by forty members and the Speaker has agreed that the matter is definite and urgent, the sitting is suspended until evening when a full debate on the issue is held. What is important to note is that even a Government which commands an overwhelming majority in the House of Commons cannot prevent the ventilation of an important grievance. Even the weakest Opposition can conveniently command the support of at least forty votes and once the Speaker, who is an impartial and non-party man, recognises the urgency of the matter, the debate is assured. "Such motions are accepted," says Finer, "roughly only twice a year. Yet the possibility of instantaneous arraignment keeps the Government alive to opinion in the House of Commons and efficient and lawful relationships with the millions who are under its democratic power."<sup>48</sup> What has been called the "Half-hour" adjournment debate takes place at the end of each day's regular business. A Member may raise a matter of which he has given informal notice, but which does not involve new legislation. A short reply from the Government follows. This enables a grievance to be ventilated without a formal motion and without a vote. Immediately before Parliament adjourns for recess there are a series of general debates similar in character to the regular "Half-hour adjournment debates." In addition to these, the most extreme form of Opposition attack on Government policy is the vote of censure which is tantamount to expressing lack of confidence in the Ministry. Such a motion is really a crucial occasion in the life of a Government, because it decides its fate. So long as a Government can command a comfortable majority, it is not possible for such a motion to get through. But still it creates embarrassments in the ranks of the Ministry and shakes its prestige.

The Commons, therefore, spearheaded by the Opposition, possess adequate and effective opportunities for controlling the Government. And such a control is more urgent today than before for the functions of the Government are so extensive now that they touch the very bones of individual lives. "The Government departments", aptly remarks Finer, "are virtually forty great monopolies; they need a strong force outside them to shake them up,"<sup>49</sup> and this the Opposition does on so many counts. It is Her Majesty's Opposition, now statutorily recognised. It has its own leader, who is "the obverse of the leader of the House,"<sup>50</sup> with its own 'shadow Cabinet'. Her Majesty's Opposition is prospective government. According to Tierney, the duty of Her Majesty's Opposition is "to propose nothing, to oppose everything and to turn out the Government."

## DECLINE OF PARLIAMENT

**Work of Parliament Evaluated.** According to Ramsay Muir the growth of Cabinet dictatorship "has, to a remarkable extent, diminished the power and prestige of Parliament, robbed its proceedings of significance, made it appear that Parliament exists mainly for the purpose of

48. *Governments of the Greater European Powers*, p. 162.

49. *Ibid.*, p. 132.

50. Jennings, I., *Parliament*, p. 74.

maintaining or of somewhat ineffectually criticising an all good but omnipotent Cabinet and transferred the main discussion of political issues from Parliament to platform and the members." Parliament, in brief, its critics maintain, has merely become an instrument in the hands of the Government and it simply endorses its decisions so long as it can command its majority. It has no will or initiative of its own. Members are lost in oblivion. Many reasons are advanced for a decline in the power and prestige of Parliament.

For the last fifty years or so, the critics maintain, there had been an inconceivable growth of the power of the Party Whips and the Party machines over the individual Members of Parliament. The result is that there is neither freedom nor spontaneity in speech and vote to the Back-Benchers who belong to a party. Take, for example, the Labour Party. The Parliamentary Labour Party works under a set of rules which regulate the conduct of its members. A Labour Party candidate is required to pledge in writing that he would scrupulously observe the rules of the Party and one of which lays down that a Labour Member of Parliament may not vote in a sense different from that determined by the Party. This is not objectionable, it is contended, if the whole Party were to meet to determine the course of voting. But the Party meets only once a week for an hour or so, "and plainly cannot deal with more than a fraction of the business which will come before Parliament in the following week." It, therefore, in practice means that a Labour Member of Parliament must vote according to the behest of the Party Leaders who decide the issues and whose orders the Party Whips obey. There is all the difference in the world between voluntary general co-operation in pursuit of agreed political ends and a dull mechanical discipline which reduces Members of Parliament to the level of robots. This is, in fact, "robotizing" of politics.

A hundred years or so ago, the number of electors in any constituency was very small. It did not require a highly organised political machine to establish contact between the candidate and his electors. The candidate could keep and, in fact, he did keep personal contacts. But a typical constituency today possesses sixty or seventy thousand electors, and it is, for all practical purposes, impossible for a candidate to keep the old bonds of personal contact. He must, accordingly, if he is to fight with any prospect of success, need the support of a powerful local and national political machine. And the machine gives its support on its own terms. The terms are that the member should, if elected, do as he is told and he is told to religiously follow the Party Whip. Almost every vote taken in both the Houses of Parliament is governed by a strict system of Party discipline. Any one recalcitrant in duty towards the Party to which he belongs is to pay a heavy price of expulsion and that is the end of his political career. This is not, the critics say, the way of democracy and more so Parliamentary democracy.

The Party discipline has certain obvious advantages. But its results are too obvious. It helps to determine the Party policy in the "back room of the party caucuses, imposed by this disciplinary set-up on the House of Commons, and by the House on the country. In prin-

ciple, policy should spring from popular need, be freely ventilated in Parliament, and then express itself in Government action." Secondly, it makes for irresponsibility in Government; "if a government knows that sane or silly, right or wrong, drunk or sober, it can force its proposal through the House by virtue of this disciplinary set-up, it is under a lessened necessity to exercise its powers with the maximum of care and responsibility. This makes for slack, careless, and bad government." Finally, rigid Party discipline makes Members of Parliament cowards and subservients as they lose honesty, courage and independence. It is practically unheard for a Member to vote against his Party. On a small number of questions of no political significance, when government "takes off the whips" that the Members vote according to their personal convictions.

Next, the reforms in the procedure of the House of Commons, too, have considerably diminished the importance of the Private Member and the authority of the Government has correspondingly increased. The timetable for Bills, the guillotine, the selection of amendments and other devices which aim to cut short debate are, undoubtedly, a requirement of efficient legislative procedure. But they reduce to the minimum the influence of Members. The legislative initiative has gone from the Private Member and it belongs to the Departments under the direction of the Cabinet "which together have become in practice the first Chamber in our law-making mechanism."<sup>52</sup> This is partly due to the technicality of modern legislation which ordinary Members of Parliament are quite incompetent to understand. It is reported that only two Members understood the Local Government Bill of 1928, and one of them was the Minister who presented the Bill and who had been very minutely instructed by the civil servants who drew it up.<sup>53</sup> The result is that the Parliamentary process becomes a dull, meaningless and routine affair. The actual work is done by the permanent civil servants and legislation, the general feeling is, becomes their concern.

Another result of the technicality of modern legislation is that legislative powers are freely delegated by Parliament without the Members of the two Houses fully realizing what is being done. Orders made in pursuance of these powers have, it is true, generally to be submitted to Parliamentary scrutiny, but "their quantity and complexity are such that it is no longer possible to rely for such scrutiny on the vigilance of private members acting as individuals." It was argued before the Donoughmore Committee, and the critics of delegated legislation still argue, that the real danger lies in the volume and character of delegated legislation; that the delegation of legislative power has passed all reasonable limits and assumed the character of a serious invasion on the sphere of Parliament by the Executive; and that no standardization of practice or use of procedural devices can alter the fact that delegated legislation essentially threatens the Sovereignty of Parliament and the Rule of Law.

The control of public finance, the critics further maintain, is the prerogative of the House of Commons. But of all the functions of the

52. Greaves, H.R.G., *The British Constitution*, p. 31.

53. One was Neville Chamberlain, the Minister of Health, and the other was Sidney Web, who had made a detailed academic study of grants-in-aid. Refer to W.I. Jennings, *Parliament Must be Reformed*, p. 43.



House of Commons this is the least efficiently performed. "When it deals with legislation, if it does not initiate, it does at least substantially after the Bill submitted to it, and often makes a mess of them. When it deals with the general policy of the Cabinet... its debates even if not leading up to any definite resolution or decision, exercise a very important influence. But when it deals with the all-important subject its own special subject, or finance, it seems to be almost impotent."<sup>54</sup> The initiative in financial matters, as in other fields of policy, is taken by the Cabinet, and Parliament may only criticise and attempt to alter what is proposed by the Government. The Ministerial majority in the House of Commons ensures to sustain the Cabinet's financial programme and to vote down threat of any kind from the Opposition. Then, Parliament has little time to delve deep into the Government's financial proposals. The twenty-six days of debate allotted to the estimates allow only a superficial examination of most of them. The result is that the debate is centred on policy issues rather than on financial aspect involved in the Budget.

The Select Committee on Estimates was set up in order to have a more searching examination of the estimates, and to suggest, if any, economies consistent with the policy implied in those Estimates. But the Committee has so far only had a limited success. Although the Committee is even working through Sub-Committees, yet it cannot consider all the Departmental Estimates every year: it therefore chooses for examination those Estimates which, for one reason or another, have aroused some special interest or concern. The work of the Public Accounts Committee is restricted. All that the nation can be sure of is that money which has been voted for a particular item has been spent on that item. But it cannot be sure that it has been spent properly on that item. There is another direction in which the finance of the country has escaped almost entirely from the control of Parliament and that is with regard to the National Debt. A very large part of the revenues of the State goes to pay interest on the National Debt and it is paid directly out of the Consolidated Fund under permanent legislation and needs no annual sanction from Parliament. It is true that since it is paid under legislation, and Parliament being the legislature, it must have determined that it should be so. "But it must be remembered that huge loans raised in time of national emergency and coming eventually to swell the National Debt to fantastic figures are rushed through Parliament on the strength of that national emergency, which results in a general mitigation of scrutiny: and also that the cumulative effect of several Acts of Parliament, and of many transactions performed under Acts of Parliament, may be very different from what a Parliament would be justified in sanctioning if it had to vote the money annually."<sup>55</sup> Inevitably, as expenditure increases and borrowing too increases, the opportunities for real financial scrutiny diminish and the control of the House of Commons becomes less effective.

**Criticism Met.** But the "Years during which procedure was being worked out," says Lord Kennet, "were the years of struggle between the

54. Muir, R., *How Britain is Governed*, p. 221.

55. Taylor, E., *The House of Commons at Work*, pp 222-23.



legislature on one hand and the Crown on the other. The chief care of the Commons was at first to prevent the Crown from getting money except through Parliament, and in later years to prevent it from spending money on purposes other than those for which Parliament had provided it. Their procedure was planned to act as a check on the Crown in the interests of themselves, the economizers. But times have changed. The rule of Parliament is established, and the power of the Crown is gone. A check upon the Executive's power over the purse is still needed by the Commons as much as ever, but the Executive upon whose power the check has to be exercised is now not the Crown but its Ministers responsible to Parliament. Procedure planned to check the Crown is out of date."<sup>56</sup> For that purpose it is certainly out of date. And yet it is essentially desirable if the financial procedure could be made an effective control of national finance. The procedure, as it stands, is still extremely useful. "It provides the cue on the soundest constitutional basis—that redress of grievances should precede supply of money—for debates which must take place, and which need a motion of sufficient gravity to register the feeling of the House, without tying the hands of the Executive."<sup>57</sup> Instead of trying to pit its judgment against the experts responsible for working out the details of estimates and expenditure, the House of Commons very wisely concentrates on the political aspects of the government proposals, which are singled out by the Opposition. The functions of the Commons are, in fact, one aspect of their control over the general policy of the Government. The Government cannot behave in a completely arbitrary fashion. It must take account of the political situation and public opinion.

There are various devices which help Parliament to keep proper scrutiny of expenditure. There is the Treasury to control expenditure and it derives its power from the responsibility to Parliament of the Chancellor of the Exchequer for the financial policy of the Government. Control over issues of money to Departments and the audit of accounts is exercised by the Comptroller and Auditor-General, who holds a permanent appointment with the status of an officer of the House of Commons. As Comptroller of the Exchequer, he controls receipts and issues of public money to and from the Exchequer Account, and as Auditor-General he audits Departmental accounts and submits his report on the Appropriation Accounts and other accounts, as required by law, to Parliament. His statutory function is to ensure that all expenditure is properly incurred. In addition, he has been encouraged by successive Committees of Public Accounts to examine Departmental expenditure with a view to drawing attention to any cases of apparent waste or extravagance.

The accounts of each Department and the reports on the accounts made by the Comptroller and Auditor-General are considered by a Select Committee called the Public Accounts Committee. The business of the Committee is to ensure that expenditure is properly incurred in accordance with the purpose for which it was voted and within relevant Act of Parliament. It is a powerful instrument for the exposure of waste and inefficiency. The Estimates Committee is another Select Com-

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56. Young, E.H., *The Finance of Government* (1936), p. 42.

57. Taylor, E., *The House of Commons at Work*, p. 225.

mittee and its functions are to examine the Estimates, to report, how if at all, the policy applied in the Estimates can be carried out more economically and to consider the principal variations between the Estimates of the current year and those of the previous year and the form in which estimates should be presented.

It is true that the Public Accounts Committee and the Estimates Committee can only partially remedy the present incomplete supervision of national finance, but it must be conceded that the Government Departments are really nervous of these Committees. Lord Morrison illustrates it from a personal experience. He had an argument with his Permanent Secretary of the Home Office, Sir Alexander Maxwell, when he was keen on spending a little money for a public purpose. Sir Alexander Maxwell told Lord Morrison that it would be *ultra vires* of law as he had no power to spend money on that particular subject. Morrison argued that he had the power and did not agree with his Permanent Secretary. Therefore, Sir Alexander Maxwell replied, "Secretary of State, the matter could become serious. I may be called before the Public Accounts Committee", and the Committee might ask me why did I allow it when it was *ultra vires*? Am I then to say that I advised the Secretary of State that he could not, but he insisted on spending it. Whereupon Home Secretary you will be in an awful trouble in the House." Morrison had to yield. Summing up, Morrison says, "This is one of those devices whereby a Minister who is trying to do something that in strict law he is not entitled to, even the Civil Service can pull him up, which is a good thing."

"It is fashionable now-a-days," writes Prof. Laski, "for critics of the present position to lament almost with tears over the decline of his (Private Member) status." But, "the lament," he says, "is wholly misconceived. It mistakes the functions the modern House of Commons has to perform; it mistakes the purposes of parties in the modern State; it is an anachronistic legacy of a dead period in our history when politics was a gentleman's amusement, and the sphere of governmental activity was so small that an atomistic House of Commons was possible. The only way to restore to the Private Member the kind of position he occupied eighty or even fifty years ago, is to go back to the historic conditions which made that position possible. History does not permit us to indulge in such luxuries."<sup>58</sup> The old days of *laissez-faire* do not exist any longer. Every Government introduces proposals for legislation which Gladstone and Disraeli alike would have described as "socialistic" and which would have shocked Cobden or Peel.<sup>60</sup> The immensely greater area of functions with which the modern Government has to deal, and the growing centralization of economic power necessitate that the legislation, if it can be real, co-ordinated and integrated legislation, must become Government legislation. It cannot be left to the uncoordinated action and vagaries of Private Members. This is not all. The problem of modern Government is a problem of time and this is, according to Laski, the basic reason why the initiative in legislation has passed from the Private Member.

58. Morrison, Lord, *British Parliamentary Democracy*, pp. 88-89.

59. Laski, H.J., *Parliamentary Government in England*, pp. 165-66.

60. Jennings, I., *Parliament Must be Reformed*, p. 40.

Saving of time, as it is generally demanded, to consider the increased volume of legislation is much more difficult to effect. The frequent attempts made by the Select Committee on Procedure, consisting of experienced Parliamentarians, to find a solution suggest that there is likelihood now of anything except slight changes. The Select Committee on Procedure of 1958 approved in general only those suggestions which involved fuller use of Committees, reduction in the volume of oral questions, and greater opportunities for Backbenchers to speak in debates. These suggestions were debated in the House of Commons in July 1959, and February 1960, but for variety of reasons few changes were made. "The House of Commons generally speaking shows a strong determination to keep most stages of its business in the hands of the House as a whole", and it is due to the innate conservatism of the parties over parliamentary procedure.<sup>61</sup>

But the Private Member, in spite of his loss in the legislative function, has still many important functions to perform. The ventilation of grievances, the extraction of information, the criticism of administration, and initiation of debate still remain with him and he can make a great contribution in representing the direction of public opinion. He can also serve on Committees of enquiry. If Parliament needs to be reformed<sup>62</sup> and Private Member to get a due place, then, as Laski suggests, let it be done "without treading upon the essential right of Government to initiate legislation." The function of legislation is not the only function of Parliament. Its real function is to watch the process of administration to safeguard the liberties of private citizens. "In the proper scrutiny of delegated legislation, in the improvement by analysis, by criticism, by suggestion, of departmental work in the enlargement of the place of the Select Committee of enquiry, in our system, there is a wide range of service awaiting the private member of which we do not, in the present organisation of the House, take anything like full advantage."<sup>63</sup>

It does not, however, mean that such an enlargement of Private Member's functions should in any way interfere with the Cabinet's control of Parliamentary activity. If it is to amount to an interference of the Cabinet's control, "coherence of policy would at once be lost and with it the ability to place responsibility." The real success of the British system of Government, in the opinion of Prof. Laski "lies precisely in the exact allocation of responsibility that it makes possible."<sup>64</sup>

Nor does it amount to the dictatorship of the Cabinet or domination by the permanent Civil Servants. The chief task of the House of Commons is to maintain a Government. For this there must be a coherent majority in agreement with the general policy of the Cabinet, "willing to entrust it with vital decisions, looking to it for leadership, and broadly having confidence in the persons who compose it."<sup>65</sup> It is

61. Brasher, N.H., *Studies in British Government*, pp. 81-82.

62. Jennings, I., *Parliament Must be Reformed*, p. 40.

63. Laski, H.J., *Parliamentary Government in England*, p. 167.

64. *Ibid.*

65. Greaves, H.R.G., *The British Constitution*, p. 44.

now admitted on all sides that administration is at the centre of the modern State. A vast sphere of the activities of government are beyond the control of Parliament. Administrative discretion must, accordingly, exist and decisions rest with the Minister. At the same time, the Cabinet is a Government by consent. It has to conduct its operations in full publicity. It is subject to constant criticism both within and without Parliament, and sometimes the criticism is devastating. Its main problem, therefore, is to maintain the loyalty of its supporters despite the impact of this criticism upon them. It means that the Cabinet must diligently follow the flow of public opinion and always remember the next General Elections.

The Government is, accordingly, at all times alive to the fact that in the making of every policy there are limits beyond which it must not go. "Maintaining a majority is never a simple and straightforward matter; the discipline of followers is not the obedience of private soldiers to their commanders. There enter into its making a host of subtle psychological considerations the accurate measurement of which is vital to the Cabinet's life." MacDonald had to give way on the Unemployment Assistance Regulations in 1934. Baldwin had a thumping majority, but he had to sacrifice Sir Samuel Hoare in the Abyssinian crisis of 1935. Similarly, Chamberlain had to yield on his National Defence Contribution of 1937. An unpopular policy always creates the fear that it may lead to defeat at the next General Elections, and Members are unwilling to serve under a Government which does not recognise that it is leading them to a defeat. Had Baldwin refused to withdraw the Cabinet's proposals on Abyssinia, it is evident that a large majority of his followers in Parliament would have voted against him with the obvious result that either he would have resigned or would have asked the King for dissolution. Let us, then, conclude with Laski that it is "dangerous to run the House on too tight a reign. Excessive secrecy, grave discourtesy, continuous threat of resignation or dissolution, inability to quell an angry public opinion outside, always breed revolt. A Cabinet maintains control in the degree that it is successful in not going too far beyond what the House approves. It must know when to yield; and it is important to yield gracefully. A Cabinet that tries to carry off its policy with too high a hand is almost always riding for a fall."

There is, as Lord Morrison says, "balance of power" between the Government and the House and that is the essence of British Parliamentary democracy. The Government in introducing its legislation or administering its policy always tries to be reasonable, rational, polite and considerate. If it conducts itself as if it is the master of the House, which really it is so long as it has a majority, it is asking for trouble. "Ministers must take into account the forces that are against them; the possible criticism—public opinion, the press, and above all, the House of Commons; at times the House of Lords. Therefore, the Cabinet tries not to ride for a fall. It tries to develop a sense of what it can get the House to accept and what it cannot get the House to accept."<sup>66</sup> If the Government is defeated, it means some of its own supporters have gone

66. Laski, H.J., *Parliamentary Government in England*, p. 172.

67. Morrison, Lord, *British Parliamentary Democracy*, pp. 72-74.

against it. It also leads to a General Election and the party goes to the country divided and the people know all about it. It damages the prestige of the Party and injures the prospects of the Government at the election. "So the Cabinet has to be careful. Ministers have to look ahead. . . . They may get to know that the House won't stand for it", and will make a concession.<sup>68</sup>

Parliament, thus, stands unique and by no means deprived of its political significance. Parliament now works harder than it did before, and there has been no formal decree depriving it of its ancient rights. If the governmental control has widened, Parliamentary control too has been lightened by new Committees, such as those on Statutory Instruments and Nationalised Industries. Wherever are loopholes, as it has already been indicated, efforts are made to plug them, as far as possible. But one thing is certain that in a Parliamentary democracy as in Britain, there is no question of Cabinet dictatorship. Jennings has very aptly said that dictators who have to appeal to the country at frequent intervals are the servants of the people and not their masters. There is the periodic and daily assessment of their actions. The House of Commons compels the Government to be responsive to the public opinion at all times. The Opposition is there to remind it of the vulnerability of its position and the weakness of its policies. There are, therefore, very strong and exceedingly democratic forces within Parliament to restrain the Government from acting arbitrarily. That is its responsiveness and responsibility as the constitutional system, according to L.S. Amery, "is one of democracy by consent and not by delegation."<sup>69</sup> There is, therefore, not much justification in Richard Crossman's statement that Parliament "has declined, is declining and should not decline any further."<sup>70</sup>

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68. *Ibid.*

69. Amery, L.S., *Thoughts on the Constitution*, p. 12

70. Refer to Ronald Butt's *The Power of Parliament*, p. 412.

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## CHAPTER IX

# LAW AND THE COURTS

The previous part ended with the process of democratization of the British system of government and the working of the political institutions which emerged therefrom. But the maintenance of democracy must depend in a large measure on the just and efficient working of the courts of law. Judiciary, indeed, is the never-failing custodian of the liberties of the people in Britain and British justice—honest, impartial, intelligent, and available alike to rich and poor—has been the pride of Englishmen for centuries together.

### KINDS OF LAW

**Common Law.** There are in Britain three kinds of law, Common Law, Equity, and Statute Law. Common Law, arising from ancient customs, finds its origin in about eight hundred years back. Before the Norman Conquest there was no uniform legal system. The courts were local bodies and the laws had varied a great deal in different places. The Norman and the Angevin Kings were determined to unite the nation and to make the strength of Monarchy felt, or, in the legal phrase, "to make the King's writ run," throughout the length and breadth of the land. They found that their judicial power was the most effective instrument for this purpose, and their practice was to send their judges to tour the country and to see that it was being properly governed. In the beginning, the travelling judges listened to cases in the local courts and applied the customs which they found in different places. Gradually, they began to iron out the differences and applied the same principles everywhere without much regard for particular local customs. By the process of unification the judges, thus, built a system of rules which was the same or "common" for the whole of the realm. This was the origin of what we still call the Common Law. It was the origin, too, of the "Assizes," the courts which the judges still hold under the King's commission when they tour the country "on circuit."

This early unification of the law in Britain has been an event of abiding importance. It gave the country a strong law, and perhaps it is partly the strength of law that has made Englishmen one of the most law abiding nations in the world. Another result of the unification of the law or at least the method by which it came about was to give to the office of the judge a prestige and influence far above that which it holds in any other system. The Common Law was in origin a judge-made law. The decision of one judge was followed by others, because that was the easiest thing to do. In this way precedents and the doctrine of **stare decisis** ("let the rule stand") were evolved. The doctrine embraces even the Statute Law and it is an invariable rule of British

jurisprudence that a decision given by a judge as to what the Common Law is or what the statutes mean, shall be accepted as a rule to be applied in all similar cases, until it is set aside by a judge of a higher court or until a new Act of Parliament settles the matter beyond doubt.

The Common Law is, therefore, a body of rules which had never been ordained by any Monarch, or enacted by any legislative body. It grew by decision and record. It is still the most fundamental element in the British system. In particular, it covers the general principles of the law of contracts and the civil wrongs. The criminal law, too, was the Common Law, though most of it has now been put into statutory form.

**Equity.** With the lapse of time, however, the Common Law became sufficiently inflexible as to give rise to serious complaints. Judges ceased to adapt it to the changing needs of British society. There were many cases in which the Common Law provided no remedy and sometimes there were manifest injustices because of rigid adherence to precedence. Feudalism was disappearing and money economy was taking its place about the fifteenth century. The country at that time was passing through a period of social, economic and political instability in which justice often required a procedure less technical and dilatory and method of enforcement more summary, than those that the Common Law was providing. The development of Equity, the second strand in English Law, provided remedies for deficiencies in the Common Law and saved the situation.

The law had always regarded the King as the 'fountain of justice', and the courts were his courts. If his courts failed to give justice an aggrieved subject was entitled to appeal to the King and to pray him to grant a remedy out of his grace. In the beginning, the King tried to deal with each petition on its merits, giving the matter his personal attention and sometimes discussing it with his Council. But he soon found that if he kept on dealing with all the petitions himself, he would have time for nothing else. The King, therefore, passed on such petitions for consideration by his Chancellor, who was not then a judge as he is today. The Chancellor was the legal member of the King's Council and "Keeper", as it was said, of the King's conscience. Thus arose the Court of Chancery, which at first was not so much of a court as an administrative department of the State, charged with reconciling law and justice. In effect, an aggrieved subject who could not get justice from the law in a civil suit, appealed to the Chancellor for the redress of his grievance in accordance with the accepted ideas and common sense.

Equity was rooted not in custom but in conscience. "It was based on the belief that law should correspond to the moral standard of the community." Since Equity provided remedies where the Common Law could only impose penalties, and as it recognised the existence of new problems to which the law had not been adapted, much business came to the Chancery. From the decisions of the successive Lord Chancellors was framed a body of rules known as Equity, not in opposition to the law, but as an addition to it. Equity included such principles as the following:

"Equity will not suffer a wrong to be without a remedy.

He who seeks equity must do equity.

Delay defeats equity.

Equality is equity.

Equity looks to the intent, rather than to the form."

It was not until the beginning of the eighteenth century that the principles of Equity became well settled and the method of their development from case to case had been the same. It meant that the Chancellor had become a judge and his Chancery had become a court of justice. It also meant that there emerged two independent systems of courts applying two separate kinds of law. This extraordinary state of things actually lasted until 1873. The Judicature Act established for the first time a single system of courts and the rules of both Law and Equity were administered both in the King's Bench and Chancery. It must, however, be noted that the Judicature Act of 1873 did not amalgamate Common Law and Equity, but it settled the relation between them by enacting that where they conflicted, Equity was to prevail.

To sum up, Equity consists of a miscellaneous collection of principles, "not systematically related to one another, but each tending to make this or that rule of the Common Law more equitable than it would otherwise be." It has many things in common with the Common Law. Both the Common Law and Equity were shaped by judges to fit the needs of the period in which they were formed, though the needs were different in each case. Common Law provided a basic system of law based upon ancient customs, but moulding them in conformity to the centralized royal authority. Equity simply added to the rules of the Common Law in order to make it more equitable and thereby to remove the rigidity or inadequacy of law. Equity was, thus, complementary to the Common Law. But gradually, like the Common Law, it, too, became a system bound by precedents and in the eighteenth century, a Chancellor declared that the doctrines of Equity "ought to be as well settled and made as uniform almost as those of the Common Law."

**Statute Law.** The Statute Law is composed of Acts passed by Parliament and this is by far the largest source of law in modern times. Until the nineteenth century almost all civil and criminal law was Common Law or Equity. Even when the civil and criminal law had been embodied in the Acts of Parliament their basis still remained Common Law. It must, however, be noted that Statute Law overrides the Common Law. This is unlike Equity, because it does not contradict Common Law. It simply mitigates Common Law or meets its deficiencies. In case of a conflict between Statute and Common Law, the former is always upheld, for the Statute Law has the final voice; whatever the Common Law, or past statutes, or decisions based on them may have prescribed, that can be altered by a new Statute. In fact, the need for Statutory law was felt to remove the anomalies by the precedents which did not fulfil the changing needs of society and were in conflict with the new standards.

**Civil and Criminal Law.** When we turn from the sources to the contents of law, the most important distinction is the one between civil and criminal law. The object of civil proceedings, which is called "actions," is to give redress, usually in the form of pecuniary damages, to some private party whose rights another has infringed. On the other hand, in criminal proceedings or "prosecutions" the law does not regard the wrong act as directed to a particular person only. It considers that there is a public interest at stake and its aim is to protect society against such acts punishing the offender.

## THE COURTS

**The Civil Courts.** The Courts that apply the law in the United Kingdom are broadly speaking divided into civil and criminal courts, although no rigid line can be drawn since the distinction is a comparatively modern one. Quite a number of civil cases are, in fact, heard in criminal courts while occasionally a criminal case may be heard in what is primarily a civil court. For civil cases the lowest courts are the county courts, which decide cases in which the amount involved does not exceed £500, or where, in actions for the recovery of land, the rateable value of the land is not more than £100 a year. The growth of social and economic legislation has added to the jurisdiction of the County Courts. Workmen who consider they have not received due compensation for injury suffered in their employment, and tenants and landlords disputing about their rights under the Rent Restriction Act, bring their cases to the County Courts.

County Courts (of which there are nearly 400) are so located that no part of a county is more than a reasonable distance from one of them. They are presided over by a paid judge, who almost always sits alone, although he may sit with a jury consisting of eight persons if either party wishes it and the court makes an order to that effect. There are 92 County Court Judges now in office, each having a circuit, which is either one court, or a group of courts, depending upon the amount of work to be done.

In addition to the County Courts there are still a few local courts with somewhat similar jurisdiction. Most of these are survivals from the medieval borough courts and have little or no work to do at the present time, but the Liverpool Court of Passage, the Salford Hundred Court and the Mayor's and City of London Court are still well used.

Above the County Courts, there is one Supreme Court of Judicature consisting of two parts: the Court of Appeal, in which sit the Master of Rolls and Eight Lord Justices of Appeal, and the High Court of Justice, in which the judges are the Lord Chief Justice and about thirty Justices.

The High Court is organised into three divisions: the Chancery to which most of the cases which formerly belonging to Courts of Equity are assigned; the Queen's Bench for the Common Law cases; and Probate, Divorce and Admiralty. The Court of Appeal and the High Court sit in London, but the Judges of the Queen's Bench Division also hear criminal cases in the country at the Assizes. Petitions for divorce are also now heard at the Assizes. Appeals from the County Courts rest with



the High Court. On its original side it has jurisdiction in cases in which the amount involved is sufficiently large. Then, there is the Court of Appeal which receives appeals both from the County Courts and the High Court of Justice. The Court of Appeal sits on two or three divisions or occasionally all Lord Justices sit together in cases of great importance. Above the Court of Appeal stands the House of Lords, the highest Court of Appeal in the realm both in civil and criminal cases. The whole House of Lords never sits as a court. In 1876 seven Peers for life were created to hear appeals and they are known as Lords of Appeal in Ordinary or more popularly as Law Lords. The Appellate Jurisdiction Act 1947, changed the number to nine. All appeals are now heard by ten Law Lords namely, the Lord Chancellor and nine Lords of Appeal in Ordinary. The Lord Chancellor is the presiding officer and is a member of the Cabinet. The nine Law Lords are invariably men of high judicial distinction, eminent judges or lawyers who are made life Peers.

**Judicial Committee of the Privy Council.** The Judicial Committee of the Privy Council is an exalted appeal body which, strictly speaking, does not belong to the English judicial hierarchy. Technically, it is not a court which renders decisions, but a body which gives advice to the King or Queen on cases referred to it, although its recommendations are always accepted.

When the Long Parliament abolished the Star Chamber in 1641, it took away the right of the Privy Council to hear appeals from the English Courts, but it does not touch the right of appealing to the Council from the overseas possessions of the Crown. The Privy Council is, therefore, still the highest Court of Appeal from courts overseas, except in so far as its jurisdiction has been curtailed by legislation, as it has been in some of the Dominions.<sup>2</sup> It acts now in virtue of an Act of 1833 through the Judicial Committee, the members of which are Privy Councillors aided by their overseas colleagues on matters affecting their particular territories. The members of the Judicial Committee number about twenty jurists, but most of the work is done by the same judges as sit in the House of Lords, acting here, however, not as Peers, but as Privy Councillors. The Law Lords are salaried life peers and when this category of peers was created, it was decided that they could carry the bulk of work both in the House of Lords and in the Judicial Committee.

The Judicial Committee of the Privy Council has one special jurisdiction which associates it with the English Courts. In time of war it is the highest court for the whole of the Empire in naval prize cases.

**Criminal Courts.** In England when a person stands charged with a crime he is brought before one or more Justices of the Peace (J.P.) or, in the larger towns, before a Stipendiary Magistrate. The former serves without pay, whereas the latter receives regular salaries or stipends from their respective boroughs or urban districts; hence their title. The stipendiary Magistrates are appointed by the Secretary of State for Home Affairs and are barristers of seven years' standing. Justices of the Peace

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2. All the Dominions except New Zealand have restricted the right to appeal to the Judicial Committee of the Privy Council.

are appointed by the Lord Chancellor<sup>3</sup> on the recommendations of the Lord-Lieutenants of the counties. The Magistrates have jurisdiction over the same classes of cases as Justices of the Peace and also some additional powers.

Acting singly, Justices of Peace and Magistrates have jurisdiction over petty cases which are punishable by a fine of not more than twenty shillings or by imprisonment for not more than fourteen days. More serious cases are tried by a Bench of two or more Justices or a Magistrate. When two Justices sit as a Bench, it is called a Court of Petty Session. The courts have summary jurisdiction and may impose maximum fines ranging from £50 to £100 or even £500 in certain specified cases, or, they may impose a sentence of imprisonment up to six months or in a very few cases, a year. If the offence is punishable by imprisonment for more than three months, the accused may be tried by a Jury.

Then, there is the Court of Quarter Sessions, composed of two or more of the Justices from the whole of a county. In the larger towns it is presided over by a single paid Magistrate, the Recorder, appointed by the Home Secretary. All indictable offences, save the most serious, can be tried here, and appeals from the Courts of Summary Jurisdiction are heard. In fact, it is the Court in which majority of grave crimes are tried.

Courts of Assizes are branches of the High Court of Justice. They are held in the county towns and in certain big cities three times a year. A Queen's Bench judge is the presiding officer of the court assisted by a jury. The Assizes Judges work on circuits covering England and Wales, and travel from one county to another in the course of their duties. They can try any indictable offence committed in the county. The judge at a criminal trial, according to English practice, is much in the position of an umpire. In English law it is not the function of a judge to discover the truth. He is there to see that the rules are observed and both sides to the case have fair play. The truth will be known when the jury give their verdict. If the jury returns the verdict of not guilty, the accused is forthwith discharged. If, on the other hand, it finds him guilty, the judge pronounces judgment. If the jury cannot agree, there may be a new trial with a different set of jurors.

From Quarter Sessions or the Assizes the accused may appeal to the Court of Criminal Appeal. The prosecution cannot appeal if once the accused is found not guilty as no one can be again tried on the same accusation. The Court of Criminal Appeal consists of Lord Chief Justice and not fewer than three Judges of the Queen's Bench. The Court sits in London and without a jury. Under the Administration of Justice Act, 1960, a further appeal from the Court of Criminal Appeal to the House of Lords can be brought, if the Court certifies that a point of law of general public importance is involved and it appears to the Court or the House of Lords that the point is one that ought to be considered by the House. The House of Lords is the highest Court, as stated previously, both in civil and criminal cases. But its criminal business is quite exceptional. Since 1948, the House of Lords

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3. Or by the Chancellor of the Duchy of Lancaster.

has voted away the historic rights of its members to be tried for treason or felony by a jury of peers of their own or higher rank. The House no longer exercises any original jurisdiction.

### FEATURES OF THE JUDICIAL SYSTEM

1. There is no single form of judicial organization that prevails throughout the country. The system of courts described in the preceding pages is one obtainable in England and Wales. The law of Scotland differs both in principle and procedure and the organization of Courts there is, accordingly, different. Northern Ireland has still another system, although it is more like the English.

2. There is now integration of the Courts in England and Wales, Two generations before the country was "cluttered up with unrelated, over-lapping and sometimes useless tribunals." Cases multiplied and it was difficult to determine which Court had the jurisdiction and each type of court had its own peculiar forms of practices and procedure. As a result of the reforms brought about by the Judicature Acts extending between 1873-76 the judicial system has been thoroughly reorganised. Practically all the courts<sup>4</sup> have been brought together in a single centralised system removing the old anomalies and conflicts of jurisdiction.

3. There are no separate administrative courts in Britain just as there are in France and other Continental countries. In France and other Continental courts there are two distinct types of law, ordinary and administrative, and two separate courts, ordinary and administrative. The officers of the Government are amenable to the administrative courts for certain acts done in their official capacity and the law applicable therein is the administrative law. The English Common Law recognises no distinction between the acts of Government officials and ordinary citizens. All are amenable to the same ordinary courts and to the same law, though the system of administrative adjudication is inevitably developing.

4. But the great virtue of the English system is the independence, promptness and impartiality with which justice is administered. The judges are not influenced by any consideration except that of justice and fair play. This is primarily due to their absolute position of independence. They are appointed by the Crown and hold office for life or during good behaviour. They can be removed only by joint address of both Houses of Parliament to the Crown and their salaries are fixed so that no pressure can be brought to bear upon them. When in 1931, a special law was passed to enable the salaries of all government servants, from the Prime Minister downwards, to be reduced as an economy measure, the judges protested against their inclusion as involving an encroachment upon their absolute independence.

5. There is no system of judicial review in Britain. Parliament is supreme and it is beyond the competence of the courts to declare a law *ultra vires*. The courts have to accept the law as it emerges out of Parliament no matter even if it is repugnant to the provisions of *Magna Carta*, the Petition of Rights, or any previous Act of Parliament itself

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4. Except those of the Justices of the Peace.

such as the Habeas Corpus Act, the Parliament Act 1911, the Statute of Westminster, or "any other so-termed constitutional land-mark." Nor do the courts concern themselves with what Parliament meant to say; they simply look at the words of the statute.

6. The Judges and Courts in England are the custodians of the liberties of the citizens. The Englishmen have no constitutional rights in the sense we have them in India. There is liberty in England because there is Rule of Law. Bluntly put, it means that it is the law of England that rules the country and not the arbitrary will of any individual. The judges are the jealous guardians of the Rule of Law. Prof. MacIlwain has said that England needs no written constitutional guarantees because her traditions of government are so old and so firm, and these are the traditions of the Rule of Law; the common heritage of the British.

7. English procedure, especially in Criminal Courts, is accusatorial rather than inquisitorial. The complainant must prove his case. Before trial and at trial, an accused person is stringently protected against any kind of inquisitorial procedure. It is not for the judge to probe into the matter. He acts with complete impartiality as an umpire between the contestants and decides according to the evidence as presented to him. And the evidence itself is strictly limited. Only the sworn testimony of witnesses, subject to cross-examination, can be heard. There must be no hearsay, no evidence on previous offences or bad character. The trial must take place in open court, in the full limelight of press publicity.

8. The jury system in England is the first expression of the Rule of Law. The verdict of a jury in favour of the accused cannot be reviewed at the instance of the prosecution. It means that juries are able to temper justice with mercy and to refuse to convict wherever the law is seriously out of touch with public opinion. The power of adjusting the law of the land to difficult cases, which is indispensable to every human and enlightened system of justice, is vested not in the officers appointed and under the control of government, but in "chance groups of citizens," who are selected at random on each occasion from the general mass of the people and retire after doing their duty into the obscurity from which they came. On several occasions the juries "have struck vigorous and effectual blows for the liberty of the subject when the law has, for the time at least, been illiberal."

9. The independence of judges came rather later than that of juries. Besides the statutory security of judges in their office, the method by which they are appointed has provided another safeguard for their independence. In most other countries judges start their judicial career at an early age in subordinate positions and gradually work their way up the ladder by promotion. Naturally, therefore, they must look to Government or possibly to popular election, and a weak man may sacrifice his judicial independence in a temptation to win over the favour of those who can help him to improve his prospects. In England, on the other hand, a judgeship is the crown and not the starting point of a career. Judges are appointed generally in later middle life from among the leading members of the Bar. Once appointed, a judge has no favours to look for either from government or from anyone else. A



County Judge has no chance of promotion to the High Court. A promotion from the High Court to the Court of Appeal or the House of Lords does not add much, although it does add something to the dignity or the income of the judge. The obvious result is that "judges on the whole, so far from being subservient to government, tend to be critical of it, and regard themselves as the watchdogs of the ordinary man against anything savouring of bureaucratic tyranny."

10. Finally, there is the acceleration of judicial business, and the cases move rapidly. This is due to two reasons. In the first place, English judges possess greater discretion in dealing with legal technicalities. Secondly, the judicial Rules of Procedure are made by a special "rule committee" consisting of the Lord Chancellor and ten other persons who are eminently familiar with law. They know the technicalities and frame rules so as to ensure speedy justice. This is not possible when Rules of Procedure are made by legislatures, as in the United States, composed of laymen. Courts in England, therefore, "do not tolerate the pettifoggery, dilatory, hair-splitting tactics which lawyers are so freely permitted to use in American halls of justice. The Judge rules his courtroom, pushes the business along, and declines to permit appeals from his rulings unless he sees good reason for doing so." Moreover, the higher courts do not upset in appeal the judgments of lower courts for merely technical errors.

## RULE OF LAW

**What does it mean?** One of the very important features of the British Constitution is the Rule of Law. It is based on the Common Law of the land and is the product of centuries of struggles of the people for the recognition of their inherent rights and privileges. It means three things. First, that what is supreme in Britain is law. There is no such thing as arbitrary power and every rule by which the Government governs must be authorised by law, either Statute Law, passed by Parliament or by the ancient principles of Common Law, which have been recognised for many hundreds of years now. In other words, the Latin tag *Salus populi supreme lex*—the welfare of the people is the supreme law—cannot be used by the Government as an excuse for pursuing its own idea of the public interest without regard for legality. Second, that everyone is subject to the law and no one can plead that he acted under orders. His business like everyone else is to obey the law. The Government and its officials derive such power as they possess from the ordinary law. Third, the Rule of Law makes the government subject to Parliament, and through Parliament to the people. To put it another way, Parliamentary supremacy is, in part, only tolerable because the Rule of Law is recognised.

The meaning of the term Rule of Law can best be understood by considering what Government can be like without it. In France before the Revolution the nobility enjoyed special privileges and immunities and they could disregard the ordinary law. They could imprison and



punish their inferiors without putting them through any form of trial. In Britain the law gives no such privileges and everyone is subject to the same law. The Crown and Government, the Executive and its officials, are subject to exactly the same laws administered exactly in the same courts as the most humble citizen. This is the meaning of the phrase "equality before the law." In Germany, Hitler's expressed wishes were law and his Government had power to imprison people without trial, or even people who had been tried and acquitted by a duly constituted court by law. Where the Rule of Law prevails no one can suffer any penalty or loss of liberty unless he has been tried and sentenced by a court. At one time it was the practice in periods of emergency in Britain to pass Acts of Parliament suspending the issue of the writ of Habeas Corpus. In the two World Wars, it was thought desirable not to take this course. The Government was, however, empowered to intern suspected persons without trial though special committees were appointed by the Home Secretary to consider cases of persons so detained and advised him whether or not he ought to release them. But these emergency provisions were among the first to be abolished as soon as the emergency had ceased.

The other side to the Rule of Law is the possibility which it affords the ordinary citizen of reaching against interferences with his rights by any other person even though he is a government servant. The law in this respect was formerly imperfect. But it has now been considerably improved by the Crown Proceedings Act, 1947 which makes the Crown liable to action like any other ordinary person, and reduces to a minimum its privileges in litigation.

**Dicey's exposition of the Rule of Law.** The conception of the Rule of Law was given classical formulation by A.V. Dicey. Dicey gave to the Rule of Law three meanings.<sup>6</sup> It means in the first place, "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority, of wider arbitrary or discretionary powers of constraint." This principle implies that no person may be arbitrarily deprived of life, liberty or property; no one may be arrested and detained except for a definite breach of law which must be proved in a duly constituted court by law. Cases are not tried behind closed doors but in open courts to which public has free access. The accused has the right of being represented and defended by a counsel and in all serious criminal cases he must be tried by a jury. Judgment is rendered in open court and the accused has the right to appeal to higher courts. All this reduces to the minimum the possibility of executive arbitrariness and, thus, oppression.

The Rule of Law, in the second place, means: "Not only with us is no man above the law, but (what is a different thing) here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." It

6. *Law of the Constitution*, 8th ed. (1930), p. 179 ff. Also refer to Jennings, *The Law and the Constitution*, 3rd ed., Chap. II.

implies, in the first place, the equality of every citizen, irrespective of his official or social status, before law. Secondly there is only one kind of law in Britain to which all Englishmen are amenable. All public officials, high or low, are under the same responsibility for every act done by them. If public officials do any wrong to an individual or exceed the power vested in them by law, they can be sued in the ordinary courts and tried in the ordinary manner subject to the provisions of the ordinary law. The equality of all in the eyes of law minimises tyranny and irresponsibility of the executive. Dicey in elaborating the principle of equality before law says: "With us every official, from the Prime Minister to constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."

Finally, the Rule of Law means that with Englishmen "the general principles of the Constitution are...the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts." In Britain rights of the citizens do not flow from the Constitution, but from judicial decisions in particular cases, as in the famous *Wilkes*' case, and not from statements of general constitutional principles.

**How for Dicey's exposition is true?** Dicey was a great admirer of the Rule of Law. He maintained that there was liberty in Britain because there was the Rule of Law. But in reality there are some significant departures from the meanings given by Dicey to the concept of the Rule of Law. Dicey himself admitted these exceptions, although his admission "did little to modify the widespread influence of the mistaken views which he had propagated so effectively."

In considering Dicey's first meaning of the Rule of Law, a distinction must be made between arbitrary power and discretionary authority. It is still an essential principle of the constitutional government in Britain that there should be no exercise of arbitrary authority. When Dicey referred to "ordinary law", he had in his mind the Common Law or the Statute Law. Today, criminal law includes innumerable offences which are created by statutory regulations.<sup>7</sup> The power to create offences by regulations made by government Departments or subordinate bodies has become an inevitable task of the modern State. The growth of delegated legislation touches upon the principle of the Rule of Law.

Wherever there is delegated legislation there is discretionary authority. If discretionary authority is contrary to the Rule of Law, then, the Rule of Law is inapplicable to any modern Constitution. When Dicey in 1885, wrote the first edition of the **Law of the Constitution**, the primary functions of the State were preservation of law and order, defence and foreign relations. Today, the functions of the State are more positive and they regulate the national life in multifarious ways. Discretionary authority in every sphere is, thus, inevitable and administrative authorities have to be left a reasonable amount of discretion to

7. *Campion and Others, British Government Since 1918; Administrative Law in England* by W.A. Robson, p. 86.

8. See ante Chap. VIII.

meet the exigencies of time and peculiarities of a situation or a problem. Discretion does not mean absolute or arbitrary power and it must not be exercised unreasonably, wantonly and maliciously. It is "a science of understanding to discern between falsity and truth, between right and wrong... (and) not to do according to will and private affection." According to Lord Halsbury discretion should be exercised according to "the rules of reason and justice, not according to private opinion according to law, and not humour." Robson has aptly said that "Discretion in public affairs is seldom absolute, it is usually qualified. It must be used judiciously...." Arbitrary power, on the other hand, is the power exercised by an agent responsible to none and subject to no control.

Dicey's second meaning of the Rule of Law is also subject to certain qualifications. In the first place, there remain, even after the operation of the Crown Proceedings Act, 1947, certain privileges and immunities which are open to public authorities and their officers. The Public Authorities Protection Act, 1893, as amended by Section 21 of the Limitation Act, 1939, makes it necessary that all proceedings against public officials for the excess, neglect, or default of the public authority must be started within six months of the act. If it is not done, the proceedings lapse. Heavy penalty by way of costs is to be paid, if a citizen's law suit against a public authority fails. Judges are not liable for anything done or said in the exercise of their judicial functions, even if they exceed their jurisdiction, unless the judge ought to have known the facts ousting his jurisdiction.

Secondly, common with all civilised States, Britain too affords immunities to the persons and property of other States, their rulers and diplomatic agents, in the forms of process in courts, though not from legal liability as such." The significance of these immunities has been widely applied in favour of recognised international agencies and their officers particularly after 1944. In the third place, there are one or two instances where internal political expediency has required the conferment of special immunities. The Trade Disputes Act, 1906, prohibits the bringing of any action against a trade union in respect of a tort. Similarly, it is impossible to bring an action against an unincorporated body, e.g., social clubs and many other charitable institutions, though individual members or officers are liable for wrongful acts in which they take part.

It is true that the officials are amenable to the jurisdiction of ordinary courts, and the law of England knows nothing of exceptional offences punished by extraordinary tribunals. But during the last fifty years Government Departments, which are not courts in Dicey's sense, have been made final courts of judgment in regard to many matters which fall within the scope of their work. For example, the Home Secretary has the discretion to grant or refuse the certificates of natura-

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9. *Justice and Administrative Law*, p. 401.

10. Immunity does not attach to a ministerial, as opposed to a judicial, act. Thus an action lies for a wrongful refusal to hear a case, but not for a wrongful decision. Refer to *Wade and Phillips, op. cit.*, p. 236.

11. *Dickinson v. Delsolar* (1930), I.K.B. 376.

lisation to aliens. He has also the full power of deporting an alien and his actions cannot be challenged in any court of law. The Crown alone has the power to issue passports and the exercise of this power cannot be questioned in a court of law. Similarly, the Minister of Health, the National Health Insurance Commissioner, the Ministry of Education, the Board of Trade, the Minister of Transport, the Railway Rates Tribunal, and other authorities, not being ordinary courts of the country or constituted as such, finally decide questions affecting the person and property of the citizens. There is, thus, a considerable distribution of administrative power and, therefore, Dicey's Rule of Law is, in practice, considerably modified.

Finally, in his third meaning to the Rule of Law, Dicey only refers to the fundamental political rights and maintains that the citizen whose fundamental rights are infringed may seek remedy in the courts and he will rely, not upon a constitutional guarantee, but on the ordinary law of the land. He does not refer to the mass of rights derived from Statutes, e.g., pensions, insurance or free education. Even the rights at Common Law, like the right to personal freedom, the right of self-defence, the right to bring an action for wrongful arrest, assault or false imprisonment, the right to speech, etc., really find their effectiveness from various Statutes. The writ of Habeas Corpus existed at the Common Law, but was made effective by the Habeas Corpus Acts of 1679 and 1816. The right to arrest is governed partly by Common Law and partly by Statutes, e.g., the Criminal Justice Act 1925. The Law of Libel is primarily Common Law, but various Statutes, as the Law of Libel (Amendment) Act, 1888, give special privileges to the Press. The Public Order Act of 1936 is an important part of the Law of public meetings.

**Conclusion.** The conception of the Rule of Law as explained by Dicey, therefore, needs modifications in the context of the modern conditions. The Rule of Law still remains a principle of the British Constitution, but it needs restating in the light of present conditions. According to a recent statement, the Rule of Law "involves the absence of arbitrary power, effective control of and proper publicity for delegated legislation, particularly when it imposes penalties; that when discretionary power is granted the manner in which it is to be exercised should as far as practicable be defined: that every man should be responsible to the ordinary law whether he be private citizen or public officer, that private rights should be determined by impartial and independent tribunals; and that fundamental private rights are safeguarded by the ordinary law of the land."<sup>12</sup> Such a statement takes account of developments with respect to administrative law and justice which have important bearings on the rights of citizens. Since the principle of the Rule of Law is connected with the supremacy of Parliament, in ultimate resort the principle must guide the conduct of a political party which is in majority in Parliament and, thus, is in a position to influence the course of legislation.

**Administrative Law and Justice.** A feature of the Continental jurisprudence is the existence and use of a body of law known as adminis-

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12. Wade and Philips, *Constitutional Law*, *op. cit.*, p. 58.



trative law. It regulates the conduct of official business and pertains to the relations of private citizens and the governmental authorities. In France and other countries, which have modelled their judicial system upon those of Continental Europe, Administrative Law is dispensed in a separate system of courts called Administrative Courts. A French citizen, for example, who is involved in a dispute with a Department of the Government would seek redress in an Administrative rather than ordinary Court of law, and if some injury or loss is sustained by a citizen by the action of an officer of the government and the court holds it to be an abuse or excess or wrongful exercise of authority, he would collect damages or compensation from the Government.

Anglo-Saxon jurisprudence has never favoured the establishment of a separate body of law and separate courts for this kind of justice. Dicey had held that there was no system of administrative law in Britain,<sup>13</sup> and it was antithetic to the Rule of Law as it conferred a privileged status on officials and, thus, protected them from acting arbitrarily and irresponsibly. He accordingly, argued to keep officials, in both their private and public capacities, answerable to the same law as are private citizens, and to maintain the ordinary courts as the usual places for hearing and deciding cases arising out of the performance of administrative functions. Administrative Law, according to Dicey, is nothing more than the generalisation from the judgments rendered in the special courts, the *tribunaux administratifs*, for officials in their relations with the public.

But Dicey's is not a correct appreciation of the Administrative Law. Nor are his conclusions acceptable. Herman Finer states the truth that "wherever there is administration and law, there is administrative law"<sup>14</sup> In Britain, there is such a body of law and its sources, as Professor Robson writes, "include not only the law controlling public administration (i.e., statutes, Common Law and equity), but also the law emanating from the executive organs in the exercise of their duly authorised powers. Thus, Statutory Instruments, administrative orders, and the determinations of administrative tribunals can be as authentic sources of administrative law as legislation and decisions of courts. Moreover, just as the usages and conventions of the Constitution form an important part of constitutional law, so the uses and conventions form an essential part of administrative law."<sup>15</sup>

Moreover, there are many administrative 'Courts' functioning in Britain. They have developed on an *ad hoc* basis, though they form no system of judicial organisation as in France and other Continental countries. The modern tendency towards conferring judicial functions on departments of the government or on tribunals controlled, directly or indirectly, and appointed by the Ministers of the Crown, began about eight years ago, and during the lifetime of Prof. Dicey. It originated

13. Refer to W.A. Robson's *Administrative Law in England, 1919-1948*; and *British Government since 1918*, *op. cit.*, p. 86.

14. Dicey, A.V., *Law of the Constitution*, p. 329.

15. Finer, H., *Theory and Practice of Modern Government*, p. 924.

16. Robson, W.A., *Administrative Law in England 1919-1948*, *op. cit.*, p. 89.



mainly in social legislation, such as the Public Health Act of 1875, but "one powerful stream of tendency," Robson writes, "flowed through the successive Railway and Canal Commissions which were set up to regulate the railways in 1873 and 1888."<sup>17</sup> With the beginning of the present century the activities of the Government widely expanded embracing various phases of the social and economic life of the people. Parliament could not legislate for everything in a detailed manner. The result was a vast volume of delegated legislation that was passed and that continued to be passed by Parliament. And the factors that made it desirable to delegate legislative authority from Parliament (the need for speed, and the technical nature of the issue) also made it necessary to create administrative adjudication machinery to consider aspects of the administration or maladministration of the matter concerned. By 1920, judicial functions had been conferred on a wide variety of administrative tribunals such as the Minister of Health, the Board of Trade, the Ministry (then the Board) of Education, the District Auditor, the Home Secretary, the Electricity Commission, the London Building Tribunal, the pension appeal bodies and several others. Their jurisdiction covered an extensive range of subjects, including public health, housing, education, unemployment insurance, health insurance, pensions of all kinds, trade unions, public utilities and other matters. The most conspicuous development of the following years is the adoption of the three-man tribunal as the typical type. This type was adopted for the discharge of judicial functions in connection with the new national insurance scheme, the postponement of call up for military service, reinstatement of ex-servicemen in civil employment, unemployment assistance, the control of rents for furnished buildings, the regulation of road and rail transport. But, at the same time, there is still a tendency of conferring judicial powers specifically on a Minister and this has occurred in town and county planning, education, the national medical service, police appeals and the superannuation of local government officers.

The continuing expansion of governmental activity and responsibility for the general well-being of the community has, thus, greatly multiplied the occasions on which the individual may find himself at issue with the administration or with another body of persons or an individual. Consequently there has been a substantial growth in the number of tribunals—there are over 2,000 in existence now—and in the range of their activities during the past twenty years. Their constitution follows a fairly general pattern; all consist of an even number of persons so that a majority decision can be reached.

Administrative tribunals may be broadly classified as follows:

(i) those which have permanent members appointed for their special knowledge and a Chairman who may be a lawyer of experience as the Transport Tribunal, and the Lands Tribunal;

(ii) those which are purely administrative, for instance, the special Commissioners of Income Tax, who hear appeals on matters relating to Income Tax from the rulings of the Inland Revenue officials;

(iii) those which deal exclusively with matters of interest to one Gov-

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17. *Ibid.*, p. 125.

ernment Department or public authority, for instance, the Pensions Appeal Tribunals, which hear appeals against the rejection by Minister of Social Security of war service pension claims; and

(iv) those which consist of ordinary people appointed by a Minister to arbitrate between individuals, for instance, the Rent Tribunals, which have jurisdiction in the determination of rents of certain properties.

Although there is not general provision respecting appeals from statutory tribunals, the Tribunals and Inquiries Act, 1958, and other Acts provide for an appeal, at least on a point of law, from all the more important tribunals to the High Court or, in Scotland, to the Court of Session. An appeal may also lie to a specially constituted appeal tribunal, to a Minister of the Crown or to an independent referee. An Advisory body known as the Council on Tribunals exercises general supervision over the tribunals and reports on particular matters, those peculiar to Scotland being dealt with by the Scottish Committee of the Council.

Britain has, therefore, a large body of Administrative Law and most of this law originates in Statutes and Statutory Instruments. The great majority of Acts of Parliament passed and Ministerial regulations made in recent years relate to matters of public administration. And, we have said, that wherever there is administration and law, there is administrative law. There are also many administrative 'Courts'—Ministers, other administrative officials and special tribunals hearing and deciding cases.

**Reform of Administrative Justice.** It is now generally believed in Britain that it is unrealistic under modern conditions to try to give to the Rule of Law the strict interpretation placed upon it in the nineteenth century. Delegated legislation and administrative jurisdiction are both inescapable. One justification of administrative tribunals is that in their absence the Law Courts would be extremely overworked. But it may be added that tribunals have advantages over the courts for citizens and the State alike. Tribunals are cheap, speedy, less legal formalities to be observed, easily accessible to the public, and are composed of experts in the matter to be dealt with. There is, therefore, greater possibility of a right judgment and expert decision. The objections in principle to the system of administrative tribunals, however, are based partly on opposition to the increase in the executive authority and the extent of executive influence, and partly on the argument that justice cannot be expected in administrative tribunals because the administration is both the offender and the Judge of the offence. It offends against the principle that no party should judge a case in which it is itself involved.

Whatever be the reasons and merits of administrative adjudication there is need in the reform of administrative justice. In hearing and deciding cases administrative officers and administrative tribunals do not follow a judicial-like procedure, the Rules of Procedure followed by regular courts. The decisions rendered are not published and the authorities deciding cases are not required to give the reasons—or at least the grounds—for their decisions. And then the right of appeal from the decisions of administrative tribunals is often limited or even non-existent. This may mean miscarriage of justice. These are some of the defects which require to be eliminated.

Lord Hewart's *The New Despotism*, published in 1929, reflected the attitude of a considerable body of alarmed jurists and he called to the attention of the public the dangers that he believed to be attendant on this new development—delegated legislation and administrative adjudication. Two other books, F.J. Port's *Administrative Law* and Dr. C.K. Allen's *Bureaucracy Triumphant* pertinently brought the issue before the public eye. This was followed by the appointment of the Committee on Ministers' Powers in 1929 to deal with these two hotly debated questions. Its terms of reference were to consider the powers exercised by or under the direction of Ministers of the Crown by way of (a) delegated legislation, and (b) judicial or quasi-judicial decision, and to report what safeguards were desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law.

The Committee's findings about administrative adjudication were the same as with regard to delegated legislation that both are essential and desirable under the modern conditions, but subject to certain safeguards. Purely judicial functions, the Committee recommended, should not be entrusted, as a rule, to the Ministers, but quasi-judicial functions may and even must. The safeguards suggested were: that the High Court should have a right to prevent a Minister or Ministerial tribunal from exceeding their statutory power; that the aggrieved party should have a right to appeal to the High Court on a question of law; that the adjudicatory procedure should conform to the principles of natural justice which require that a man may not be a judge in his own case; that no party should be condemned, that the parties affected must know in good time the case they have to meet; that the parties are entitled to know the reasons of the decision; and that the inspector's enquiry report should be published along with the decision given on its basis. The Committee rejected Professor Robson's proposal, who was also a member of the Committee, for establishing Administrative Courts. It made no recommendations about the reform of the constitution of the existing tribunals or for co-ordinating them into a systematic pattern.

Since the Committee submitted its report in 1932 there has been a substantial further development of administrative justice and the three-man tribunal as the typical body for dispensing it. In 1955, a Committee under the Chairmanship of Sir Oliver Franks was appointed to report on the functioning of the administrative tribunals and it submitted its report early in August 1957.

The Report of the Franks Committee is a document of great importance. It rejected the Treasury view put before the Committee that the administrative tribunals were part and parcel of the machinery of Government and consequently were not judicial institutions. The conclusion of the Committee was that administrative tribunals were independent organisations of adjudication for the impartial assessment of the individual's claim. The three points on which the Report was based were: (1) all decisions of administrative tribunal should be subject to review by the ordinary courts in points of law; (2) the decision should be entrusted to a court rather than to a tribunal in the absence of special

considerations that make a tribunal more suitable and if possible to a tribunal rather than to a Minister and (3) the determination that the citizen should not suffer in the protection of his legal rights from the substitution of a tribunal or a Ministerial inquiry or hearing for a court of law. "We regard both tribunals and administrative procedures," the Report maintained, "as essential powers to society. But the administration should not use these methods of adjudication as convenient alternatives to the courts of law." The emphasis of the Report is that whoever be the arbiter of the rights of the individual, he must be an independent arbiter and the scope for decision must be confined to points of law; neither to policy, nor to administrative expediency or efficiency. The procedure that has been recommended by the Committee is: openness in inquiry or hearings, fairness and impartiality. "The intention of Parliament," adds the Report, "to provide for independence is clear and unmistakable."

As regards the composition of the administrative tribunals, the Committee recommended that the Chairman should be appointed by the Lord Chancellor and not by the Minister. The proceedings of the tribunal should be open and the citizen who is a party has a right to be told in good time the case he is to meet. The reason for the proposals and the background of Minister's policy must also be stated. There must be a full statement of the case together with relevant evidence and the parties concerned should know the reasons for the decision. The Minister's final orders must contain his reasons in full.

**Conclusion.** It seems unlikely that Britain will ever acquire a separate and unified system of administrative Courts as it exists in France. The British are more apt to proceed by way of gradual change and adaptation. What it is necessary to emphasize is the improvement in the quality of administrative justice. This can be brought about if "throughout the executive establishment there can be developed procedures for hearing cases that are fair and that accord the citizen his elementary rights, and if judicial-mindedness can be instilled into officials exercising judicial duties, then the dangers in the present situation will be removed to a large extent." The recommendations of the Franks Committee, acceptable to the Government, were embodied in the Tribunals and Inquiries Act of 1958, and the Town and County Planning Act of 1959. By the former Act a Council for Tribunals in England, Wales and Scotland was set up. Chairman appointed jointly by the Lord Chancellor and by the Secretary of State for Scotland and other members by the Department concerned. Its purpose is to exercise general oversight over the composition and procedure of tribunals. The detailed application of openness, fairness and impartiality could obviously not be defined by statute alone. But Ministers have brought these principles specifically to the notice of officials concerned in tribunal work. The Act also effected an improvement in that members of public concerned now receive much fuller information than before.

**The Parliamentary Commissioner.** But the dissatisfaction with the system of administrative tribunals continued. It was argued that the existing tribunal system was an inadequate means of dealing with public grievances, and there were many complaints that were not covered by the



Tribunal system. Since redress through Parliament was becoming increasingly difficult as Government activities continued to expand, it was suggested that there was a need for some supplementary means of dealing with grievances and a similar official as the Ombudsman, which had worked satisfactorily in Scandinavia, New Zealand and other countries, could usefully be introduced in Britain. Accordingly, a Parliamentary Commissioner was created in 1967, to examine complaints of mal-administration.

The Parliamentary Commissioner is an officer of the House of Commons, independent of the Executive. His function, under the Parliamentary Commissioner Act, 1967, is to investigate complaints of maladministration brought to his notice by Members of Parliament on behalf of their constituents. His powers of investigation extend to any action by a government Department in the exercise of its administrative function, but not to policy decisions (which are the concern of the Government) nor to matters affecting relations with other countries or the activities of British officials outside the United Kingdom. Certain other matters are also excluded from the scope of his investigations, but may be brought within the scope by Order in Council. The Commissioner does not normally intervene in cases where a complainant has an alternative remedy, whether to an administrative tribunal or to a Court of Law, but he has discretion in such cases whether or not to investigate. Decisions taken by a Government Department or other authority in the exercise of a discretion vested in that Department or authority are not reviewed by the Commissioner by way of appeal.

In the performance of his duties the Parliamentary Commissioner has access to all departmental papers and generally, speaking, reports his findings to the Members of Parliament who presented the case. A Select Committee has been appointed to which the Commissioner submits his annual report and any other report raising important general principles.

The creation of the post of the Parliamentary Commissioner was hailed no doubt, but the limitations imposed on his powers by the 1967 Act caused disappointment to many. The Parliamentary Commissioner is an officer of Parliament and he can act only on complaints he receives through a Member of Parliament. He has no executive authority of his own, and can only enquire into, and report to Parliament, on any complaint referred to him, while Ministers retain the right to veto the disclosure of any official document. Then, the investigations of the Commissioner are confined to the Departments of the Government alone and do not extend to Local Government or the nationalized industries. The innovation of an Ombudsman, therefore, left untouched many of the general criticisms of the existing machinery dealing with questions of alleged mal-administration.

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## CHAPTER X

# POLITICAL PARTIES

**The reasons for a Party System.** Today, political parties are accepted as a natural and inevitable piece of machinery of democracy. Democracy needs them for two reasons. First, political parties are the means by which the citizens get an opportunity to choose their rulers, and, secondly, they explain to them and educate them in the merits and dangers of alternative policies. MacIver defines a political party, "as an association organised in support of some principle or policy which by constitutional means it endeavours to make the determinant of government." A party is, thus, a voluntary association, which in a system of parliamentary government, as obtainable in Britain, formulates a programme, presents to the electorate the candidates who represent that programme, and return to Parliament a majority of members who will carry the programme into effect through the agency of their leaders organised in a Cabinet. A party is, accordingly, a link, a bridge, between society and the State; it affects the electorate, Parliament, and the Cabinet.

Yet political parties in Britain are not organs or institutions of the State specifically regulated by its laws, as is the case in some countries. The law does not even mention them. Their only nearer approach to official recognition is in the rules for the formation of Committees of the House of Commons.<sup>1</sup> But without political parties the whole nature of the British Constitution would be changed, and many of its conventions would become unworkable. Her Majesty's Government is a party Government and the Prime Minister is the leader of the majority party in the House of Commons. The party in Opposition is Her Majesty's Opposition and it is recognised as a necessary and vital element in the working of the British Constitution. The functions of the Opposition are to criticise and vote against the policy of the Government, the party in office, with a view to overthrowing it and taking its place. Ivor Jennings has, therefore, aptly said that "a realistic survey of the British Constitution today must begin and end with parties and discuss them at length in the middle."<sup>2</sup>

**The two party system.** In 1882, W.S. Gilbert wrote:

"How nature always does contrive  
That every boy and every gail  
That's born into this world alive  
Is either a little Liberal  
Or else a little Conservative."

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1. *The Modern State*, p. 396.

2. Stewart, M., *The British Approach to Politics*, p. 158.

3. Jennings, I., *The British Constitution*, p. 31.

Gilbert, of course, ignored the Irish Nationalist Party at that time and many other smaller parties and groups. During the last hundred years, Governments without a party majority have been in office for twenty-eight years and Coalition Governments for twenty-nine years.<sup>4</sup> Yet in substance Gilbert was right and there is a "national" tendency for Britain to follow the two party system. Taking recent examples, in the general election of 1950 there were 1,868 candidates who contested the 625 seats and stood under as many as thirty-three different labels. It is true that every label did not indicate a separate organised party, but even then, by grouping together parties which supported each other's candidates and omitting those whose organisation was too rudimentary, there were eleven organised parties or groups of parties. In the elections held in October 1959, there were again eleven organised parties or groups of parties. In all there were 1,536 candidates standing for elections for 630 seats. "The list of eleven parties," observes Ivon Thomas, "...looks like the analysis of a cricket eleven's innings with a long string of 'ducks' following a big stand by the opening pair and a slight contribution by the first wicket down; one player has retired hurt and there is a little wag in the tail." Two main features of the election of 1950 were that there was a complete rout of all Independents and all the candidates of minor parties. Even the Liberal Party was not able to get more than nine seats, though it put 475 candidates and two of them were elected with Conservative support. The Communists put 100 candidates and got none elected. Labour secured 315 seats and the Conservatives 298. In 1951 elections, a closely fought general election, the Conservatives won 322 seats, Labour 294, Liberals and others 9. In 1955 elections the Conservatives won 345, Labour 277, Liberal 6 and Sein Finn 2. In the elections held in October, 1959, the representation was: Conservatives and supporters 365, Labour and Co-operatives 258, Liberals 6 and Independent one.<sup>5</sup> In 1964 elections the Labour won 317, Conservatives 303, Liberals 9, others, which included Communists, Scotch and Welsh Nationalists, Republicans, Independents, and 23 members of individual parties, 0 seats. In the 1966 elections Labour secured 363 seats, Conservative and Associates 253, Liberal 12, Republican Labour 1, and The Speaker 1. Communists, Scottish and Welsh Nationalists, Independents and members of individual parties could secure no seat.

Elections of 1950, October 1951, May 1955, October 1959, 1964, and 1966 were between two gigantic machines and two-party system is the essence of governance in Britain. The British political parties started in the seventeenth century had two important and conflicting views on the constitutional questions, and consequently two parties.<sup>6</sup> For many years

4. *Ibid.*, p. 54.

5. Thomas, I., *The Organisation of Different Parties*, *Parliament, A Survey*, *op. cit.*, p. 169.

6. *Ibid.*

7. The relative strength of parties as on July 31, 1962, was: Conservatives 365; Labour 249; Liberals 7; Independents 8; excluding Speaker, Chairman and Deputy Chairman, Ways and Means; Vacant 3

8. The formation of two parties in Parliament dates back to the struggle over the Exclusion Bill in 1679. To check the passage of the Exclusion Bill, which was designed to prevent the succession of James, Charles II dissolved

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to follow there continued to be two parties. There is indeed, a certain logic in the system. The policies which a Government can adopt are necessarily conditioned by the circumstances of the time and for the most part in Britain the real question has not been "what policy shall be followed, but the speed at which the nation shall move towards predestined end. Some wish to move rapidly and others more slowly."<sup>9</sup> The cautious conservative found his place in the Conservative Party and the more adventurous in the Liberal or the Labour Party.

Since 1846, the two main parties have tended to represent different class interests. If there has not been further split of an ostensible character, it is because of the striking homogeneity of the British economic life. And none of the class divisions have been so distinct as to entail sub-divisions. "As land decreased in importance, the "Country Party" claimed the support of other kinds of capital. As the workers gained the franchise, the employer and the salaried employee moved over with the **rentiers**. We have no peasants' party because we have no peasants. We have no agrarian party because the owners of land are also shareholders and company Directors. We have no farmers' party because, in the main, the interests of land owners and farmers have been the same and, indeed, it would be impossible to distinguish the two classes."<sup>10</sup>

Again, it is assumed that British Ministries must be homogeneous. "England does not love coalitions" is an old but still a widely accepted maxim, although in national emergencies Britain had always formed National Governments. In fact, party leaders had always strived for the two-party system whenever the possibility of the split had been in evidence. Disraeli, more than anyone, recognised that, "he must build his party and keep it under one roof." Lord Salisbury went to the extent of compromising with Randolph Churchill until he could be sure that if he went he would go alone. "Campbell Bennerman performed Herculean feats to keep the two wings of the Liberal Party together during the Boer War; and Balfour wrote strange economics and played even stranger politics to prevent Chamberlain from splitting another party." Even the Constitution itself was developed under the two-party system and "does its best to compel it." The single member system of election does not contemplate the existence of more than two parties. The electors, too, have become so accustomed to the two-party system that an election is really a choice of the government. The great majority of the people are not interested "in political principles, but they are concerned with what party obtains a majority."

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Parliament. The supporters of the Bill began immediately to petition for a new Parliament, and came to be known as "Petitioners," while their opponents expressed their abhorrence of the attempt to force the King to summon Parliament and were consequently nicknamed "Abhorrrers." Soon afterwards the Petitioners became known as "Whig" and the Abhorrrers as "Tories." The two parties remained opposed in principle, though their views underwent a good deal of change in the course of time. The Whigs aimed at the restriction of the power of the Crown in favour of that of Parliament. The Tories, on the other hand, upheld Royal Power and opposed Dissent.

9. Jennings, I., *The British Constitution*, p. 57.

10. *Ibid.*, p. 58.

In the House of Commons arrangements rest on an assumption that there shall be two parties and two only. There most of the benches are divided into two ranks, facing each other across an intervening space. On the front Government or Treasury bench sit Ministers, and on the front bench opposite sit the Leader of the Opposition and his associates. The procedure of the House of Commons provides for a definite part to be played by the Opposition and the Opposition is assumed to be united. The Opposition has its own "Shadow Cabinet," and its Leader is paid a salary from public funds.<sup>11</sup> "The third party is thus constantly butting into what it appears to be a private figure." It should either support the Government or vote with the Opposition, or keep aloof and abstain from voting. If it constantly supports one party and opposes the other, it loses its separate identity. If it supports sometimes the one and sometimes the other, the elector regards it inconsistent and without any conviction for a programme. The decline of the Liberal Party is primarily due to its support to the Labour Government in 1924. In the election of 1950, the Liberal Party contested 475 seats and secured only 9 seats, polling 9.11 per cent of the total votes. Now it is on the verge of total extinction. In 1955 elections they secured 6 seats polling 2.08 per cent of the total votes. In 1959 elections the six seats were retained polling 16,40,761 votes. But in 1964 elections they polled 3,093,316 or 11.2% of the votes and won 9 seats. In 1966 they polled 2,327,533 or 8.6 per cent of the votes and secured 12 seats.

These are some of the reasons which have helped the emergence and maintenance of the two-party system in Britain. It has, no doubt, some tangible defects. But it does not mean overthrowing it. "The British Constitution," aptly says Jennings, "is a nicely balanced instrument, and a change anywhere produces a change everywhere." Its greatest merit is that two-party system ensures permanent and stable government. The political homogeneity of the Government produces a well organised and a responsible team of workers who play the game of politics with singleness of purpose under the captaincy of their accredited leader, the Prime Minister. They rise and fall in unison and are individually and collectively responsible for the policy which the Cabinet initiates. Minority Governments are weak because they cannot govern. Coalition Government is uncertain of its existence from day to day because it is the result of compromise. They continue to work together so long as they can be made to agree. "In a world where strong and rapid government is necessary," concludes Jennings, "only the two-party system works well."

## THE PARTIES

**Origin of Parties.** In the beginning when Parliament was an advisory body of the Crown, the question of parties did not arise. Parliament was asked for advice and it gave it. When given, the Crown might, or might not, take any notice of it. Two conditions were necessary for the emergence of the party system. The first was that Parliament should become a legislative body in all its essentials and its rights fully establish-

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<sup>11</sup> The Leader of the Opposition is paid an annual salary of £4,500 in addition to his parliamentary salary.



ed. This stage was not reached until the late seventeenth century. And the second was that there should be political issues of a broad and deep character about which and on which men could combine in parties. This stage was also reached in the latter part of the seventeenth century. If any date as such can be chosen for the origin of political parties, it is, as said before, 1679.

The original line of cleavage was between the Tories and the Whigs. The Tories represented the country interests, those interests surviving from feudalism and which were in danger of being eaten into by the rising mercantile interests of the towns. The Whigs represented the new interests which later transformed the economic and social structure of Britain. By the same token, the Tories were associated with the Church of England, while the Whigs were associated with the Dissenters. The aristocracy, for the most part, sided with the Tories, but elements of it favoured with the Whigs. By the nineteenth century these two parties had become the Conservative and Liberal and in spite of many changes and contradictions something of the old differences between them survived. They competed with each other for power throughout the latter part of the nineteenth century and well into the twentieth century till Labour Party replaced the Liberal Party in the political arena.

Barker cites an old story which once upon a time was widely current in Britain. The story went that when Liberty, Equality and Fraternity had to be distributed between France, England, and the United States, the English came first and took away Liberty, the French came next and took Equality, and the Americans coming last, took the residuary gift of Fraternity. If these gifts, continues Barker, were to be distributed among the three political parties in Britain, it would be just to say that the Liberals took Liberty, the Conservatives took the gift of Fraternity and the Labour Party adopted the residuary gift of Equality." The Liberals were the party of progress, reform, improvement and liberty. The Conservatives were the party of authority, tradition, conservatism and fraternity. The Labour Party views man as a man on the equal basis and stands for removing the hindrances and obstacles which divide men into conflicting classes because of the uneven distribution of wealth.

**The Conservative Party.** The Conservative Party, as stated above, has passed through many names. The name Conservative, which has now been for more than a century its general name, hardly denotes its essential nature. It values, according to Herbert Morrison, traditions and precedents.<sup>12</sup> "The essence of conservatism," says Dr. Finer, "is to be discovered in the social institutions of which it approves and its attitude to the idea of progress. The social institutions favoured by Conservatives are Crown and national unity, church, a powerful governing class, and the freedom of private property from State interference."<sup>13</sup> It would,

12. The Conservative Party is sometimes referred to as the Tory Party and the Labour Party as the Socialist Party. But the official titles are Conservative Party and Labour Party.

13. Barker, E., *Britain and the British People*, p. 43.

14. *Ibid.*

15. *Government and Parliament*, p. 131.

16. *Theory and Practice of Modern Government*, p. 312.

thus, appear that Conservatives steadfastly adhere to old traditional forms and solemn ceremonies. They dislike criticism to old institutions such as Monarchy and emphasise the duty of loyalty to the King and the State which he personifies. The Conservative sense of nationality is intense "and its most frequent judgment is that such and such a foreign country or sect is untrustworthy." It has faith in the superiority of the race to all other races. It believes in the mission of the race, popularly called the white man's burden to civilise other peoples even against their will and "even with violence to the point of brutality." Its attitude, as revealed in her history for a century or more was neither conservative nor cautious. It has been rather a fanatical clinging to the notion of fraternity or unity. Empire is its very breath and Churchill's famous remark, that he had not become His Majesty's first Minister to preside over the dissolution of the British Empire, was no accident. The Conservative Party clung down to 1922 to the unity of the United Kingdom in face of the pressing demand, which eventually took a revolutionary form, for Irish Home Rule. It again clung, under the inspiration of Disraeli and later of Joseph Chamberlain, to the unity of the British Empire by economic ties. Today it clings, in the face of the idea of the class division, to the idea of the social unity and homogeneity of the nation.

Since one of the chief things to be conserved today is the structure of capitalism, the Conservative Party is accordingly vested to the cause of private property and private enterprise. The great industrialists are, thus, joined to the old aristocracy in the conservative ranks. This union, encouraged by Peel in the second quarter of the nineteenth century, was, indeed, the making of the Conservative Party as distinct from the old Tory Party of the landed classes. The Tory element still remains, forming the Right wing of the party, a few of these called "Diehards" are inclined to regard all change with distavour. Majority of the Conservatives, however, urge that capitalism must be justified not only to the rich but to all classes, democracy should be preserved and social services extended. Nor, in their view, must support of capitalism mean complete abandonment of industry to private enterprise; the Government should keep watch and, where necessary, give assistance in such forms as tariffs, subsidies and marketing organisations. Nationalist feelings and the interests of industrialists combine to make the party favour the protection of home industries as a remedy against unemployment. In the twentieth century it took the form of Imperial preference and extension of inter-Imperial trade.

Among the younger members of the party a sharp swing towards a vigorous and progressive programme competing with the Labour Party has recently been in prominent evidence. The publication in 1947 of the **Industrial Charter**, which accepted the need for central planning, and the emphatic endorsement of this Charter by the Conservative Conference of 1947 is not only indicative of the victory of this group, but also a vital change in the attitudes of the Conservatives. **The Right Road for Britain**, the Conservative statement of policy in 1949, pledged the

'maintenance of full employment' and endorsed the importance and utility of social services. The Conservative Party manifesto of 1951 emphasised the need for housing and pledged to it a priority second only to national defence. In 1955 elections, the Conservatives pledged to "prosperity through free enterprise." In October 1959, the election manifesto read, 'the main issues at this election are simple: (1) Do you want to go ahead on the lines which have brought prosperity at home? (2) Do you want your present leaders to represent you abroad?' In a personal preface, Harold Macmillan observed, "I do not remember any period in my lifetime when the economy has been so sound and the prosperity of our people at home so widely spread." In 1964 elections the Conservative slogan was "Prosperity with a Purpose." Labour appealed on "New Britain" programme. The only difference between the two programmes is on emphasis, otherwise distinction between the two is none.

The Party derives its support from the possessing and patriotic and traditional governing class, of the wealthy, the aristocratic and the sub-aristocratic, the gentry, the upper and middle class, as well as working-class patriots, disgruntled workers, and high-skilled workers whose pride aligns them with the party that preaches the rewards and opportunities of free enterprise.

The Conservative Party is built around the party leader. The leader is not appointed on a sessional basis; once elected he remains leader until he dies or resigns, as it happened in the case of Churchill. When he retires his successor is usually designated by him. Even if the leader dies without having made a clear choice his successor is usually obvious. A Conservative Prime Minister is always party leader even if he is not very palatable to other important luminaries of the party. When Churchill was appointed Prime Minister in succession to Neville Chamberlain, his leadership to party came as a matter of course despite his unpopularity with the diehards.

The leader of the Conservative Party possesses powers much beyond those of the leader of the Labour Party. He appoints the Chairman of the party organisation at central office and is responsible for the elaboration of and statements of party policy. While in Opposition he selects the members of the House of Commons and Lords to act with him in the 'Shadow Cabinet.' The authority of the party's leader was succinctly stated by the party's Chairman in 1947. He said, "His authority is based on free election, and the confidence of his supporters. Resolutions passed by the National Union are sent to him for his information and guidance, but no resolution, however emphatic, binds him on questions of policy. This method suits us, and has suited the succession of great men we have been proud to have as our leaders." Thus, in 1945 the Party's manifesto was entitled "Mr. Churchill's Declaration of Policy to the Electors." In 1950, the manifesto was prefaced with an introduction by Mr. Churchill and that of 1951 began with "I" and was signed personally by him.

The Conservative Party has now broken with a hoary tradition regarding the election of its leader. They have decided that their next leader should be chosen by free ballot among the Party's members of the House of Commons.

**The Liberal Party.** The Liberal Party is now not a major party, though for many generations it had been one of the two large parties. "and even today the Liberals are not a minor party in their intellectual capacity or the quality of their leadership." It has become an army of generals without any adequate body of troops. So long as its principle lives, a Liberal Party will continue to live. In 1945, it secured about two and a quarter million votes and of 306 candidates it put only twelve were elected, and seven out of this total represented districts in Wales. In 1950, the number of votes cast in favour of the Liberal Party was over two and a half million, but only 9 candidates were elected, and 319 lost their deposits. In 1951 there was a sharp decrease in the number of votes and it could get in only six Liberal members. In 1955 and again in 1959 elections they retained the old number, though as a result of by-elections the number increased to 7 by July 31, 1962. In 1964 general elections the number of votes cast in favour of Liberals was 3,093,316 and they won 9 seats. In 1966, their number rose to 12, although the percentage of votes cast fell from 11.2 to 8.6.

The party has stood, at all times, for liberty in all its aspects. It has championed the cause of religious liberty and particularly the right of the Nonconformists to worship freely and to gain emancipation from the civic disabilities under which they suffered. It has championed the cause of political liberty, the right of every citizen to an equal share of the suffrage, and the right of the House of Commons, elected popularly, to a final and sovereign voice. The Parliament Act of 1911 was the triumph of the Liberals and a vindication of their creed of liberty.

The Liberals were opponents of government restraint and championed **Laissez-faire**. In the mid-nineteenth century they represented the trading and manufacturing classes as against the landed class. The popular element in Liberalism, however, caused the party to advocate social reforms which conflicted with the individualism of the nineteenth century. Today, the Liberals have recognised that there is a liberty of the worker which has also to be secured. The Capitalist-Socialist issue for them is not as important as it is often supposed. The Conservatives' fondness for aristocracy and for tariff and Labour's plan for collectivist control all appear to Liberals as dangerous to the liberty of the individual. While rejecting Socialism, they advocate considerable reforms in Capitalism. They are prepared to socialise some industries if it can be proved that this would increase efficiency, but do not regard nationalisation as essential for the proper arrangement of society. They go still further and advocate the diffusion of property, i.e., the workers in each enterprise are gradually to become partners by receiving a share of its profits in the form of share in its capital. They also advocate the democratization of enterprise and would have each industry governed by an industrial council representing both workers and employers. In the same way, they would have each work or factory provided with a works council representing both sides. The Liberal Party, in brief, proposes a kind of partnership of management and labour in industrial affairs. Private ownership and management would remain, but through representative councils and profit-sharing schemes the workers would achieve a stake in the business.

The Liberals are not Socialists but they approach Socialism in two directions. First, by advocating the socialisation of all enterprises which can be best conducted by the State, and secondly, by seeking to introduce the principle of social co-operation in the manner just described. "They believe neither in a regime of private enterprise, nor in one of pure socialism, but in a mixed regime which combines features and elements of both, according to the needs of the nation, and progressively changes the proportion of the elements with the movement of national needs." The aim of the Liberal Party is to build a liberal Commonwealth, in which every citizen will possess liberty, property and security, and none shall be enslaved by poverty, ignorance or unemployment. The Liberals, accordingly, claim that they represent not a single class but the whole nation and are not tied to a theory; they consider every proposal on its merits. They oppose the tariff policy of the Conservatives and on immediate problems in the Imperial and foreign field and take a view very similar to that of Labour.

The party is supported by those of moderate incomes and by a lesser proportion of both the rich and the poor. In some districts there is a strong liberal tradition, often associated with Non-conformity. But many of the Liberals feel that they can now make them of more effect by supporting the Conservative and Labour parties and thereby bringing a liberalising influence on their policies. In fact, in a country with a political system which groups citizens into two sides—the side of the government and the side of the Opposition—the position of the third party, with numbers inferior to the other two, is inevitably shaken. Moreover, today it is an almost irresistible temptation to "make one's vote to count" by supporting a party which has a chance to win and the party to win is either the Conservative or the Labour. "The result has been a downward spiral Liberal power." It will be interesting to note that whereas in 1950 the Liberals "bitterly rejected the overtures of the Conservatives, in 1951 seven Liberal candidates received Conservative support."<sup>19</sup> Yet, it is claimed in many Liberal circles that Proportional Representation would allow the strength of Liberal feeling in the country to be fairly expressed. The possibility of such a reform is, indeed, remote in England and it would not be surprising if the Liberal Party is completely jostled out of the political field in the very near future.

**The Labour Party.** The Labour Party which is a political expression of a working class movement, belongs to the present century, though traces of the movement can be found from the Industrial Revolution which created large masses of urban workers divorced from the occupation of land or ownership of means of production. This movement manifested itself in Trade Unions, and in co-operative societies and in the Chartist agitation which demanded universal male suffrage. But it was not until the franchise was extended in the late nineteenth century that an effective political party could arise. The Labour Party was formed in 1906 and from that date it has grown rapidly and emerged from the General Election of 1922 as the second largest party.

Labour presents itself as the party of democratic socialism and the

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19. Carter, G.M., and Others, *The Government of Great Britain*, p. 81.



socialist objectives of the party embrace the public ownership of the key industries and those economic enterprises that are natural monopolies. In all, the Labour Party considers that roughly 20 per cent of the economic life of the country should be owned and managed by the State and the remaining 80 per cent should continue under private ownership, but strictly regulated by government in conformity with the economic planning of the State.

According to Labour Party policy, economic planning and control should be directed by a democratically chosen government. The Party believes that through persuasion a majority of the population can be won to the Labour programme. The regulation and control which a socialist economy requires should not according to the Labour Party, impinge upon the basic civil liberties of the citizen. Freedom of discussion and criticism, they believe, should be adequately safeguarded, and the socialist way must win its victory in free competition with the programmes of other political parties. Here, the Labour Party is sharply opposed to Communist philosophy, however much their economic and social objectives may be alike.

The driving force of the Labour Party is less a passion for socialism than a passion for social equality. It strives to achieve political, social and economic emancipation of all the people, and more particularly of those who directly depend upon their own exertions by hand or brain for the means of life. It is, in fact, as has been suggested, a "party of levellers" in a country which needs levelling, and protect the wage-earning class from the various disabilities which retard their progress and amelioration. In brief, the Labour Party aims to safeguard the individual citizen from the cradle to the grave by providing remedial measures against all social ills and devising means to constantly improving standard of living for all citizens of the country. This programme is the content of a welfare State. The Labour Party, thus, "seeks to light Britain forward into a new era of equality with less of a zest, perhaps, for the technique of social change, and less of concern for the question whether or not that technique involves a policy of socialism, and more far more of a passion for the reality of social change and the actual coming of equality."<sup>19</sup> It carried through substantial nationalisation of industry in its period of office, 1945 to 1951 and fiscal reforms of an equalitarian nature. The Party is sincerely, genuinely, and deeply liberal and democratic and is "inspired by the Bible," as Dr. Finer says, "rather than **Das Kapital**."<sup>20</sup>

Labour's view of the Empire is that self-government should as soon as possible be extended to those territories which do not yet enjoy it. For, the realization of that end, they would encourage the development of colonial resources, the extension of social services and the encouragement of native trade union and co-operative activity. In international affairs, while its ultimate aim is a world Socialist Commonwealth, but its immediate aim is to strive and strengthen the bonds between the United Nations and the establishment of that collective security which the League

19. Barker, E., *Britain and the British People*, p. 48.

20. *Governments of Greater European Powers*, op. cit., p. 61.

of Nations failed to secure. The student of party programmes will, however, observe that the avowed differences between different parties are mostly with regard to the ownership and control of means of production. In "social, imperial and international affairs the professed immediate policies of all parties are very similar: the elector has to judge whether Capitalism or Socialism is more likely to produce the desired results, and, perhaps which party is by its nature, personnel and record the more capable of progress."<sup>21</sup>

Labour Party finds its support among wage-earners in the town, and to much less degree, in the country-side. A number of middle class people, who are hostile to capitalistic structure of society and consider it a menace for the future, also support Labour. And, in fact, from all walks of life come persons who have adopted the socialist view of life.

In organisation, the Labour Party presents a Federation embracing Trade Unions, Socialist Societies like the Fabian Society, and individual members. Its structure is more elaborate than that of other parties and the resolutions passed at its annual conference determine its policy. There is no "leader" in the same sense as the Conservatives have. The leader is elected by the Parliamentary Labour Party, which is composed of all members of the party who have seat in the House of Commons. As long as the party is in Opposition, its day-to-day policy is decided upon in caucus, but when the party is in power, direction rests in the hands of the leaders who are, of course, in the Cabinet. Even then constant liaison exists between leaders and back-benchers and periodic conferences are held in which the Government's policy is discussed. These conferences become quite stormy when a "rebellion" brews, but discipline usually prevails in the end and the party leaders have their way. Such rebellion usually comes from the left wing of the party and the most recent example is that of Aneurin Bevin, who was disowned by the Parliamentary Labour Party and recommended that the whip be withdrawn, though Bevin was given another opportunity by the Party Executive to "mend" himself.

The basic organisation of the party is the party conference. It is composed of delegates from all member organisations. One vote is cast for each 1,000 members of affiliated organisations. The trade unions with their 4½ million members have by far the majority. The party conference elects the National Executive Committee. It manages party affairs and directs the central office. In theory, the Executive Committee is subordinate to the conference, but in actuality it is its leader. The leader of the Parliamentary party is its ex-officio member. The executive is usually the author of the party programme and directs, through the central office, all the vast activities of the party. What makes the executive really powerful is the rule that no one may carry the party label in an election without its approval. Moreover, it has the power to expel individual members or to disaffiliate organisations from the party, though such actions are subject to review before the party conference.

The Labour Party secured a precarious majority of 5 votes to form the Government in the elections of 1964. The total number of votes cast in favour of the Party were 12,205,507 (84.1 per cent) and won 317 seats as compared with Conservatives' votes of 12,052,407 (83.4 per cent) and 303 seats. In 1966 elections it won 363 seats, thus ensuring a majority of 97 votes and polled 47.9 per cent votes.

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## CHAPTER XI

# LOCAL GOVERNMENT

**Importance of Local Government.** "The local assemblies of citizens," wrote De Tocqueville more than a century ago, "constitute the strength of free nations. Town meetings are to liberty what primary schools are to science: they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty." The educative value of representative government, largely depends on the development of local institutions. Local government is a school for democracy. It cultivates a sense of civic duties and inculcates among citizens a corporate spirit of common administration of common interests. All problems of administration are not central problems. It should, accordingly, be the responsibility of the inhabitants of the area concerned to solve their local problems which are peculiar to that area. Neighbourhood makes us automatically aware of interests which impinge upon us more directly than upon others. And what is done by common counsel in the solution of the common problems gives us a degree of satisfaction which is unobtainable when it is done for us by others from outside. Local government may, accordingly, be defined as government by popular elected bodies charged with administrative and executive duties in matters concerning the inhabitants of a particular district or place and vested with powers to make by-laws<sup>1</sup> for their guidance.

**Some fundamental aspects of the English system.** The history of local government in Britain is one of gradual development. Blackstone has correctly maintained that "the liberties of England may be ascribed above all things to her free local institutions. Since the days of their Saxon ancestors, her sons have learned at their own gates the duties and responsibilities." The marked genius of the British for self-government may, accordingly, be traced to the root of local self-government. Parliament became strong, and a system of parliamentary democracy was eventually established, because the counties and boroughs from which the members of Parliament were drawn "had a sap of native vigour and an instinct for self-government." The old methods of local government have, indeed, been greatly altered by the legislation during the past century or so, but "the whole of the change," as Barker puts it, "has only strengthened an old and vigorous system of national liberty—so old that it is anterior to the system of national liberty: so vigorous that it has supplied the sap and the stimulus to that system." The general mainspring and the fountain of initiative is locally elected bodies. These elected

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1. Laws of local application which must be approved by the appropriate Minister.

bodies determine local policies and are organs of local government. As organs of government, they make their own local rules or by-laws, raise and spend their own local rates, and appoint and control their own administrative staffs for carrying out their functions of local services. But as organs of government in local areas, they are parts of the general system of government in the country and as such, subject to the control of Parliament and the Central Government. Parliament determines and can always modify their activities and their powers. The Central Government and its administrative staff audits, inspects and supervises their activities and such a supervision and direction becomes all the more necessary because Parliament subsidizes the local rates by 'grants-in-aid' from the central taxes. In spite of this control local government in Britain is infinitely more self-reliant than is customary on the Continent of Europe. There is no all-powerful Minister of the Interior, as in France, whose hand weighs heavily on the shoulders of local authorities. "Under such circumstances, free men may assemble in their councils, pretty much as of yore, and impress the mark of their personalities on their environment." Many leading statesmen of the country, in the past and during our own times, began their careers in the councils of local government. Taking recent examples, Joseph and Neville Chamberlain were both Lords Mayors of Birmingham. Herbert Morrison first became prominent as President of the London County Council.

**Development.** The history of local government in Britain is one of gradual development. Until modern times its machinery was not organised in accordance with any particular plan, but grew up haphazard to satisfy particular needs. Since there was no co-ordination, the overlapping of functions, disorder, and a loss of efficiency were inevitable.

The present counties and parishes find their origin in the shires and hundreds, vills or townships of pre-Norman days. The Central Government of England was largely super-imposed upon existing local organization. In the Middle Ages each county or shire had its court or governmental assembly, presided over by the Sheriff as the royal representative and composed of the freemen of the county. The county court performed general governmental as well as judicial functions. Within the county were hundred courts similarly composed and under the supervision of the Sheriffs. The manorial courts of the feudal system were the courts of the smaller units, the vill and the township. Boroughs which obtained Charters from the Crown, possessed varying degree of autonomy. From the time of Henry II royal justice began to cover the whole country through the circuits of justices. The local and manorial courts were superseded and with them the office of the Sheriff lost much of its former importance. In the fourteenth century the newly created justices of the peace acquired judicial, administrative and police powers. The parish which was hitherto an ecclesiastical unit, also became the unit of local administration. It was the parish which was responsible for the repair of roads and later for the administration of Elizabethan poor law.

No attempt was made after the Revolution Settlement in 1689 to reimpose central administrative control. Apart from the boroughs, which



were largely autonomous acting under their charter powers, general local administration was in the hands of the county justices sitting in the Quarter Sessions. This was all altered by the century of reform between 1835 and 1935. The results were mainly three. One was the reform and democratization of the organs of local government. The second was a reform and clarification of the powers and functions of local government. The third was a reform and elucidation of the connection between local and Central Government. The reform of the organs of local government was a long and complicated process, because from 1835 to 1888 Britain pursued the curious policy of creating a new ad hoc authority to deal with each new local need that emerged. Not only that, each new authority was given a different area of operation from that of the old authorities. The Local Government Act of 1888 drastically altered all this. It instituted democratic county councils, with a general competence, in place of the old system of Justices of the Peace, mixed with the ad hoc bodies which had recently been added to it. The light has progressively grown. The existing system of Local Government is based mainly on six distinct types of authority—the Administrative County, the County Borough, the Non-County Borough, the Urban District, the Rural District and the Parish. Of the authorities responsible for the government of these six, the first and the second date from 1888; the third from 1835, subject to modifications made in 1882; the fourth and fifth and sixth from 1894. The London County Council was set up in 1889, as successor to the indirectly elected Metropolitan Board of Works.

With regard to the power and functions of local government, and their progressive reform and clarification since 1835, there now exists a system of what may be called **integral** local government, under which each major authority generally conducts the whole of local government in its area. The system of integral local government gives local authority a large initiative in such matters as roads and transport, police, public health, public education, public assistance and the supply of public services such as housing, gas, water, and electricity. Here is a large field for the determination and conduct of local policy. It will thus be obvious that a progressive authority can take action which will vitally affect the health, the growth of the mind, and the general well-being of all its area. It may, however, be noted that since 1945, local authorities have lost their responsibility for hospitals, and for gas and electricity services, and at present there is much pressure for the nationalization of other services, especially education, police and water distribution.

**Connection between Local and Central Government.** It is here that the connection of local government with the central government begins to show its importance. It becomes, accordingly, necessary to know the development and the present method of that connection. The central government has obviously a duty of stimulating local initiative where it is backward and checking it where it abuses its authority or does things beyond its powers. This necessitates a system of contact, of co-operation, and of interaction between the local elected bodies, with their local administrative staffs, and the departments of the central government with their administrative officers. The system

of "grants-in-aid" paid from the public funds in subvention of local finances is a significant step directed to control and supervise the activities of local bodies. In fact, grants-in-aid are paid only on condition that central government and its officials inspect and supervise their spending and the operation of the services on which such grants are spent. The power of the purse of the central government may, therefore, be said to have **bought** a measure of control over local government and it has cost heavily to the autonomy of the local bodies. Another way of financing by the central government is the system of block grants.

Like all other institutions, local government, too, is subject to the supreme authority of Parliament and such laws as it may enact. Beyond that the various government departments supervise the work of local government and see that the statutory authority is fulfilled. The Home Office inspects and to a certain extent supervises the police forces, except in the Metropolitan District of London, where the police is directly administered by the Home Office. The latter is also in charge of local civil defence work, especially the Home Guard. In addition, Ministerial consent is required for certain actions by local authorities, including the making of by-laws, and the appointment of some officials. Building plans require Ministerial approval, and the administration of some services, particularly the police, fire brigade, and education is subject to examination by Ministry Inspectors. Some legislation that gives powers to local authorities, particularly with regard to planning and land development, allows for appeals to the appropriate Minister. The Treasury must give its consent to borrowing by local government. Generally speaking, the appropriate central government departments supervise the work of local authorities, keep them in line, and establish rules with regard to procedure, organization, qualifications of officials, equipment, and general objectives.

Since local powers and duties originate from Acts of Parliament and are enforced by courts, the central government may obtain from the High Court a writ requiring any neglect of legal duty to be repaired. Any private person who has suffered loss as a result of negligence of local authority can bring a civil action. In like manner the courts are used to check action which is **ultra vires**. Central government may also invalidate local ordinances which may go beyond powers granted to the local authorities. In health, housing or other services where neglect can have the gravest results, a Justice of Peace, or simply four ratepayers in the area, can invoke the aid of the Ministry of Health to enquire into local inefficiency and, perhaps, take over the duties itself.

Changing social conditions and broadening conceptions of the functions of government have broken new ground for central government control, and the end is not in sight. New central agencies, notably of the kind we call public corporations, are established to undertake new services or to replace the agencies of local government. Considerable transfer of functions takes place from smaller to larger geographical units in the existing local government structure and even the word "local" takes on a new significance.<sup>2</sup> The policy of co-ordination and

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2. Campion and Others, *British Government Since 1918*, p. 198.

standardization, which is so prominent a feature of our times, has deeply penetrated the realm of local government. The statutory provisions concerning meetings, committees and the form of audit of accounts ensure that in each area there shall be similar machinery whatever the extent to which it is used. Meanwhile the central government brings a constant influence to bear through its inspectors. Not only are satisfactory reports from them the condition of grants-in-aid, but the resulting accumulation of knowledge shows to the central government what changes in the law have become necessary. Circulars acquaint local authorities with the policy which the central government wishes them to pursue and if the latter finds its legal powers insufficient, it can always propose new laws and bring them on the statute. Occasionally, if the local authority uses its power in a way of which the government strongly disapproves, a special Act will be passed handing over the powers to Commissioners appointed by the Minister of Health.

It will, thus be seen that the methods of central control are numerous. Local government though still admired and ardently cherished in Britain, has now become a hazy sphere of local action distinct from central government. Certain services once accepted as purely local have assumed national significance. The local school is part of a national educational system; public assistance is no longer a community task but a national responsibility, even gas and electricity, once characteristically municipal services, have now been nationalized. Much premium has, during recent years, been placed on administrative considerations in demarcating the sphere of central and local government. J.H. Warren while reviewing the changes which have taken place in the scope and system of English Local Government, writes: "The particular sphere to be assigned to local government is not a question which is, or wholly can be determined by considerations of democratic freedom and responsibility, viewed as capable of development by ties of neighbourhood and the activity of local communities; or even by the consideration that local self-government is an educative process and invaluable to democracy on that account. The assignment of local government functions must have some regard to administrative consideration."<sup>3</sup> The assignment of local government functions, particularly after the First World War, is significant of this fact.

Nonetheless local administration and to a limited extent the framing of policy remain functions of local authorities. The central government secures the co-operation of local authorities and the relationship is one of friendly partnership. Local authorities are not branches of Departments in Whitehall, though they operate some of the central services on an agency basis. Their members are elected by the districts they serve. Their services are administered by their own officers. The over-all record of the councils and their committees is splendid. In any system of political governance, the central government must control the local, however autonomous the local government may be. But there is one important difference between the control of local government in Britain and in other countries, such as France. In France the control

3. *Ibid.*, p. 195.

of the central government over the local is a control of an executive character, which goes so far that it practically eliminates local government, in any exact sense of the word, and remits the control of local policy to local administrative officials acting for the central executive. The British system of local government, on the other hand, is a half-way House which combines both legislative and executive control. "The value of this system," according to Barker, "is that it is kinder to local government than pure executive control and more elastic in its application to the differences of local governing bodies than purely legislative control. Parliament offers grants to local authorities as an equal might offer to equals: the executive, watching the actual operation of spending of these grants, can use an elastic discretion to suit each particular case—seeking indeed to standardise, but seeking to do so by stimulating the laggard and holding back the impatient, according to the needs and demands of each particular case." The preoccupation of the local councils and committees with administrative matters guarantees that democratic procedures are maintained on all levels.

### PRINCIPAL TYPES OF LOCAL AUTHORITY

For purposes of local government, England and Wales and Northern Ireland are divided into county boroughs and administrative counties. Administrative counties (outside London) are further divided into three types of county district: non-county borough; urban districts; and rural districts. Rural districts are themselves sub-divided into parishes (except in Northern Ireland). Scotland is divided into counties (including four counties of cities) which are independently administered; large and small burghs; and districts. Each local authority division is administered by a different council. The London Government Act, 1963, which came into force on April 1, 1965, has reduced the number of county, borough and urban district councils in England.

**The Parish.** Although England is divided into Parishes for church purposes, the Parish, as a local authority, exists only in the countryside. Where the population is less than three hundred there is usually no council and the affairs of the Parish are managed by a Parish meeting which all ratepayers may attend. In the larger Parishes a council of from five to fifteen members is elected at a Parish meeting and they hold office for three years. The duties of the Parish Council or Meeting are slight. It acts as a minor education authority and may provide public works, recreation grounds, and protect local rights of way. Sometimes an Act may enable them to see to the lighting of the village, and higher authorities may hand over to them the care of the water supply and the repairing of footpaths. A Parish may have a paid clerk, but there is no other paid official.

**The District.** A group of Parishes forms a Rural District and if the development of industry turns a Parish into a small town, it may request the County Council to make it into an Urban District. The Councils of both types of Districts are elected for a period of three years, one-third retiring after every one year. The Chairman may be one of the Councillors, or chosen from outside, but in either case he has the powers of a Justice of Peace during his term of office.



The Districts enjoy greater dignity and power than the Parish. They are used by central government as housing authorities, and, thus, have the power to acquire land and to build, and the duty of dealing with slums and overcrowding. As sanitary authorities, District Councils may provide for water supply and other sanitary measures. Trunk roads are maintained directly by the Ministry of Transport and other major roads by counties, whereas the unclassified roads, for which no grant is made by the Ministry, must be maintained by the Urban District Councils. In the countryside, although the county is the responsible authority, it frequently delegates the work to the Rural Districts.

District Councils have often owned or shared in the management of public utilities. With the nationalisation of gas and electricity, however, this field of activity has been greatly reduced. District Councils keep a number of paid officials, e.g., a Clerk, Treasurer, Medical Officer of Health, Sanitary Inspector, and Surveyor of Highways. An Urban District Council has some additional powers, such as that to provide allotments, libraries and public baths. Where the population exceeds 25 000 a Specially Magistrate can be appointed. There is, in fact, little to choose between the large Urban District and the smaller Borough.

**The County.** England still clings to the county system of the past that has come down through the centuries. The fifty-two historical counties are relics of former times and are shorn of all important functions. They have no elected councils and have only three principal officials, the Lord Lieutenant, the Sheriffs and the Justice of the Peace. The office of the Lord Lieutenant has great dignity and is usually held by a wealthy county gentleman. He has charge of the county records and recommends suitable persons to be Justices of the Peace. The Sheriff is responsible for making all the preparations necessary for the holding of Assizes.

There are now sixty-two Administrative Counties superimposed over the historical councils. Every Administrative County is divided into Electoral Divisions, each returning one Councillor at the elections, which are held once every three years. The Councillors, when elected, choose a number of Aldermen equal to a third of their own number. Frequently Councillors themselves are Aldermen, and this necessitates a by-election to provide a new Councillor. The term Aldermen goes back to the times of the Saxons when it meant men chosen for their maturity of age and experience to assist in government. Today, it has no reference to age. They are elected for six years, one-half retiring at the time of each Council election. Greater length of office, no doubt, equips them with experience of the Council work. It also enables talented persons, who do not wish to face the mud and mire of election campaigns, to get elected. The Chairman of the County Council is elected in the same manner as the Chairman of a District Council, and has the same right of acting as a Justice of the Peace. The Council can pay a salary to the Chairman and travelling expenses incurred by members when doing Council work.

The County Councils are responsible for the policy and the administration of the county and supervise the work of subordinate bodies. The Councils also act as agents for the central government, co-operating



with it to administer Public Assistance and Pensions. They maintain the ordinary local services, building and systems. They also administer the licensing laws except for liquor, and appoint the regular administrative personnel of the county.

New and very considerable powers and duties have been imposed on the Councils as a result of two important statutes, the Education Act of 1944, and the Town and County Planning Acts of 1946 and 1947. The Education Act of 1944 has made counties responsible for the education service at all stages. This task was previously shared between Counties, Boroughs, and Urban Districts. Legislation passed after the war of 1939-45 has made the County the responsible authority for the Health Service and for Town and County Planning, the latter had become necessary for the reconstruction of war devastated areas in line with a general plan. In addition to this general work, the County Council must give attention to agriculture, and its duties in this respect have been considerably increased.

The old and new forms of county government are brought together by the Standing Joint Committee, half of whose members are Justices, and half County Councillors. This Committee appoints the Chief Constable of the County, and organises a police force in accordance with the law and the Home Office regulations. The police are inspected annually by the Home Office, and if the result is satisfactory, half the expenses will be met by the central government. Subject to this control, the County police are responsible for all police duties within their area.

**The Borough.** A unit of local government of a special type is the Borough, which is simply a Town with a Charter. An Urban or Rural District which desires to become a Borough petitions to Her Majesty in Council for a Charter. If as few as five per cent of the local ratepayers object, an Act of Parliament will be necessary.

The Borough is governed by a Borough Council constituted similar to a County and District Council. The Borough is divided for election purposes into wards, each returning three, or a multiple of three, Councillors. One-third of the Councillors retire each year. The Councillors choose Aldermen to one-third of their number, as for County Councils. The Borough Council selects its own Mayor either from among the Councillors or from outside; and he holds office for a year and may be re-elected. Besides being the Chairman of the Council, he presides over the local bench of the Justices of Peace during his year of office, and continues to act as Justice of Peace for the following year. Generally, his functions are ceremonial.

The Borough status gives a town a much greater degree of dignity and civic pride. It also means larger expenses for pomp and ceremonial occasions. All Boroughs possess, as a minimum, the powers of a large Urban District Council, and those additional powers which the Charter confers. Any Borough may by ancient custom or Royal Order be called a city, but this is only a dignity and involves no legal powers. The Mayors of some of the most famous cities are called Lord Mayors. Just like the County Council the Borough Council operates chiefly through Committees. The Council manages the cor-

porate estate and the borough fund. It establishes the borough rates. It has its own budget and appropriates money. Subject to approval by the central government, it may borrow money. It also administers the municipal services which are often quite extensive.

**The Government of London.** London is the largest capital city and with the exception of New York, the greatest metropolitan area in the world. Today, there is still the old city keeping its boundaries, street names and forms of local administration which as they were centuries ago. Round this city have grown the dwellings of millions, rich and poor. Systematic government for this huge district dates back on to the last century.

The city of London properly speaking is an area of about one square mile located in the heart of London, primarily the business and financial centre, in which over a million people are active during the day but in which few people live at night. It is divided into twenty-six wards each of which returns, according to its size, a number of Councillors to the Court of Common Council elected by those with residence or business qualification in the city. In addition to the 206 Councillors elected annually, the Court of Common Council contains 26 Aldermen, elected directly by citizens and holding their office for life. These together with the Lord Mayor, form a separate Court of Aldermen. Another, and the third body, is called the Court of Common Hall and it consists of the Court of Aldermen and the Liverymen of the city companies. These companies are the survivors of the ancient guilds. Today they have none of their old duties and in reality these are now private societies of wealthy men. The Court of Common Hall annually selects two Aldermen, one of whom will be elected Lord Mayor by the Court of Aldermen.

The Court of Common Council is the real governing body of the city. It relies on the county for its municipal services, although it has a small police force and courts. It also controls certain areas outside the city limits. The city of London is the scene of magnificent ceremonies especially on the annual Lord Mayor's Day held at the Guild Hall.

**The London County Council.** The Act of 1888 set up a County Council for London. Its structure and that of Metropolitan Boroughs are now consolidated in the London Government Act of 1939. The London County Council bears only a general resemblance to other County Councils, there being three important differences. It is organised differently, for the electoral divisions are those used in the return of members of Parliament for the Metropolis, the County Councillors being twice as numerous; the Aldermen are in the proportion of one to six, instead of one to three Councillors; and the Chairman of L.C.C. is a very dignified president with no control of policy. Secondly, an ordinary County Council receives authority once for all over the ancient county area, minus its County Boroughs. The L.C.C. received authority over the Administrative County of London. The third difference is that the L.C.C. inherited the functions of the old Board of Works as well as acquiring those of the County Council.

The hundred and twenty-nine Councillors choose twenty Aldermen

who hold office for six years, half of them retiring at the end of a three-year period. The Chairman of the Council may be chosen from outside as was Lord Snell in 1934. The powers of the L.C.C. are extensive indeed. It is the sole authority with respect to main sewers and sewage disposal, fire protection, tunnels and ferries and bridges. It is responsible for street improvements which are metropolitan. Its power also extends to the construction and operation of tramways, and it has undertaken several rehousing schemes, involving the demolition of slum areas and the erection of workmen dwellings. It is, also, responsible for maintenance of the larger London parks and provision for public recreation. It has comprehensive functions in the matters of education, elementary, secondary, and technical.

**The Metropolitan Boroughs.** The County area apart from the city, is divided into 28 Metropolitan Boroughs. The Councillors are elected for a three-year period and they choose Aldermen to one-sixth of their number for a period of six years, one-half retiring every three years. The Mayor is chosen as in a Municipal Borough and enjoys the same power and dignity except that he is an ex-officio J.P. for his year of office only, not the subsequent year as well. In their functions the Metropolitan Boroughs resemble closely the smaller Municipal Boroughs which have no separate police force, and are not education authorities. Health services are shared between L.C.C. and Boroughs. Some Boroughs have their own housing schemes.

From April 1, 1965, under the provision of the London Government Act, 1963, the London County Council and the Middlesex County Council have been abolished and the area hitherto administered by them, together with adjacent areas of Essex, Hertfordshire, Kent and Surrey, will form the Greater London area. This area will be administered by the Councils of 32 London boroughs and the City of London, which retains the independent status, and the Greater London Council.

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The Government of the  
United States of America

## CHAPTER I

# THE BIRTH OF A NATION

**Towards America.** Within the span of a hundred years in the seventeenth and early eighteenth centuries, a tide of emigration set from Europe to America. The most impelling single force which induced emigrants to leave their European Homelands was the desire for economic opportunity and England was the first to seize it. Between 1620 and 1635 economic difficulties of an unprecedented character had swept England and there was no work for a multitude of people. Even the best artisans could earn just a bare living. Bad crops added to the distress. In addition, England's expanding woollen industry demanded an increasing supply of wool to keep the looms working and the sheep-raisers in their anxiety to make best of the opportunity began to encroach upon soil hitherto given over to tillage.

Simultaneously, religious upheavals played their part. A radical sect of Puritans, known as the Separatists, had migrated to Holland, during the reign of James I, in order to practise their religion as they wished. Some years later a part of this group decided to emigrate to the New World where in 1620, they found the "Pilgrim" colony of New Plymouth. In England, too, immediately after the accession of Charles I to the throne, Puritans, who had been subjected to increasing persecutions, followed the Pilgrims to America and established Massachusetts Bay Colony. But Puritans were not the only colonists driven by religious motives. Dissatisfaction with the lot of Quakers led William Penn to undertake the founding of Pennsylvania. English Catholics, also, under Cecil Calvert's inspiration found Maryland. The pace of emigration accelerated during the arbitrary and despotic rule of Charles I. After the triumph of Cromwell many Cavaliers—"King's men"—left England in sheer horror and colonized in Virginia.

In Germany the oppressive policies of various petty princes helped to mount high the number of the emigrants. On the whole, the settlers who came to America in the first three quarters of the seventeenth century, the overwhelming majority was the English. There was sprinkling of Dutch, Swedes, and Germans in the middle region, a few French Huguenots in South Carolina and elsewhere, and a scattering of Spaniards, Italians, and the Portuguese. But they were hardly ten per cent of the total population. After 1680, however, England did not provide any appreciable number of immigrants. A majority of them had come from Germany, Ireland, Scotland, Switzerland, and France for varied reasons. For a considerably long time immigration remained a steady stream and the population which numbered to about a quarter of a million in 1760 amounted to more than two and a half million in 1775.



**Towards Independence.** The immigrants from England not only brought with them English language, but also the Anglo-Saxon traditions of civil liberty and self-government reinforced as they were by Magna Carta, the Bill of Rights and the Habeas Corpus Act. They transplanted all these traditions, in fact the whole fabric of the Common Law in their new homelands. For the most part the non-English Colonists adapted themselves to the traditions of the original settlers as they adopted the English language, law, customs and habits. This process of amalgamation had the obvious result of intermingling the different cultures and thereby producing a new culture—a blend of English and Continental characteristics conditioned by the environments of the New World.

Before Colonies could be established in America, it was necessary to have legal authorization to do so. This was granted by the King of England in Charters, granted in some instances to trading companies, in others to individuals, and in still others to the colonists. The basis of government in each Colony was the supremacy of the Crown, although there was the lack of controlling influence on the part of the Government in England. The Colonies were, during the formative period, free to a large degree to develop as their inclinations or force of circumstances dictated. This large degree of self-government exercised by the Colonists resulted "in their growing away with Britain" whenever in the years to come the Government in England attempted to regulate their conduct. The Colonists had, indeed, become, with the lapse of time, increasingly "Americans" rather than "English" and this tendency was strongly reinforced by the blending of other national groups and cultures which was simultaneously taking place. How it operated and the manner in which it laid the birth of a new nation was vividly described in 1782 by St. John Crevecoeur: "What then is the American, this new man? He is either an European, or the descendant of an European, hence that strange mixture of blood, which you find in no other country....I could point out to you to a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations. He is an American, who leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys and the new ranks he holds...."

In 1763, at the end of the Seven Years' War the French were driven from the North American Continent. New territories came under British control, and money was needed to administer them. The British Government had incurred huge debt fighting the French and it was decided that the Colonies should bear a part of the expenses of administration and defence of the Colonies. At the same time, attempts were made to enforce the trade laws more rigorously, and to tighten the control over colonial affairs. It spread a wave of deep resentment amongst the Colonists. "Businessmen wanting to develop their own industries; merchants and shippers wishing to trade with nations other than England; planters believing they could get better prices from the Dutch and French than from the English; speculators wishing to buy western

land—all these and others found reason to chafe under the heavier taxes and harsher restrictions.”

But those who resented and protested had hardly thought of independence. What they exactly wanted was the repeal of the onerous laws and to leave the Colonists as much alone as possible. Their protests, however, stirred up popular feelings and radical men like Sam and John Adams in Massachusetts and Patrick Henry and Thomas Jefferson in Virginia seized the opportunity and appealed to the emotions of the colonists in the name of natural rights of men and of government resting on the consent of the governed. They quoted Locke on individual liberty and human rights.

The result was a deliberate disobedience of the “obnoxious” laws and orders. The Colonial Legislatures frequently withheld appropriations of salaries for officials and soldiers until their demands were conceded to or their grievances redressed. After the accession of George III to the throne in 1760, the British Government decided to deal firmly with the recalcitrant subjects. This caused resentment fanned to revolutionary fervour. All attempts at conciliation failed and by 1776, the Colonists were faced with the alternatives of submission or rebellion, and they chose the latter.

**The Declaration of Independence.** The Declaration of Independence adopted on July 4, 1776 announced the birth of a new nation. It declared the colonies States, each independent of the Crown and politically independent of others. At the same time, it set forth a democratic philosophy of man’s natural rights, popular consent as the only just basis for political obligations, a limited government, and the right of the people to revolt against tyrannical government.

The Revolutionary War dragged on for about six years with fighting in every Colony. With Cornwallis’ surrender on October 19, 1781 the military effort to halt the Revolution was, however, over. When the news of American victory reached Britain, the House of Commons voted to end the war. Soon after Lord North’s Government resigned and the new Government assumed office to conclude peace on the basis of the Declaration of Independence. The Treaty was finally signed in 1783. It acknowledged the independence, freedom and sovereignty to the thirteen Colonies which became the States.

The Continental Congress which managed the common affairs of the Colonies during the early stages of the Revolution met and functioned without any constitution or fundamental law. It was created to meet an emergency and was looked upon merely as a temporary expedient. But when war appeared imminent and the advantages of union became more manifest, it was resolved to place the common government on a firm and permanent basis with larger powers and definite authority. On June 12, 1776, the day after a committee was appointed to prepare a declaration of independence, Congress appointed another committee consisting of one member from each colony “to prepare and digest the form of a Confederation to be entered into between these colonies.” In

November 1777, an instrument called the **Articles of Confederation** was finally adopted by Congress, which was to go into effect when ratified by all the States. All States except Maryland ratified the Articles during the years 1778 and 1779. Maryland, too, ratified them on March 1, 1781 and on the same date the Articles went into effect. They constituted the first Constitution of the United States of America.

The Confederation, thus, formed was styled a "firm league of friendship," under the name of the United States, and its declared purpose was to provide for the common defence of the States, the securities for their liberties, and their mutual and general welfare. For "the more convenient management of the general interests of the United States" an annual Congress of delegates, to be chosen by the States, was established. No State was to send less than two and more than seven delegates, and each State was entitled to only one vote regardless of its size or other considerations. Unlike the Continental Congress, the Congress of the Confederation had definite and express powers to deal with certain subjects of common concern to declare war and make peace, to send and receive diplomatic representatives; to enter into treaties; to coin money; to regulate trade with the Indians; to borrow money; to build a navy; to establish a postal system; to appoint senior officers of the United States Army (composed of state militias); and a few other powers of a like character. Approval of nine of the thirteen States was required to make important decisions.

The Articles of Confederation, however, did not give two most important functions to Congress, i.e., those of taxation and regulation of commerce. All that the Congress could do was to ask the States for funds. The Central government, therefore, existed on the doles of the State Governments. Nor had the Articles made any provision for an executive department or for a national judiciary, with the single exception of a court of appeal in cases involving captures on the high seas in time of war.

During the revolutionary period it did not matter much. But the post-war complications created insoluble problems. The war had inflated the currency and it circulated at about one thousandth of its face value. The sky-high prices had dislocated the economy of the country and everybody groaned under the crushing burden of the excessive prices. In the absence of a uniform rate of exchange the international trade had come to a standstill. The Central treasury was nearly empty and the States had become defaulters in their payments. Creditors were reluctant to lend and public securities were sold at a fraction of their face value. The Congress was helpless and it had no means to remedy the chaos. The conditions were yet more demoralising in the dealings of the States with each other and the Central Government. The latter had, according to the Articles of Confederation, sole control of the international relations, but a number of States had begun their own negotiations with foreign nations. Nine States had organised their independent armies and several had little navies of their own. There was a curious diversity of coins minted by a dozen foreign nations, and a bewildering variety of State and national paper bills. Each State regulated its commerce and some States even discriminated against their neighbours. The result was

continuous jealousies, dissensions, and sometimes reprisals and retaliation between themselves. For purposes of foreign and inter-State commerce each State was, in sum, a nation by itself, and the Confederation was simply a non-entity.

**Movement for Revision.** The climax was reached in 1786, when all attempts to improve the Articles of Confederation had failed and the States were on the verge of Civil War. Washington, Hamilton and many other political leaders, who had laboured to bring together the States in bonds of Union, were convinced that the Government of the Confederation must either be revised or superseded entirely by a new system. The Congress of the Confederation was a government of the States and not of the people. It was weak, because it lacked four things which every strong national government must possess: the power to tax, to borrow, to regulate commerce, and to maintain an army for the common defence. And to have a strong government possessing all these four powers, the Central government must really be a government of the people belonging to one single nation. Washington wrote, "I do not conceive that we can exist long as a nation without having lodged somewhere a power which will pervade the whole Union in as energetic a manner as the authority of the State governments extends over the several States."

Disputes between Maryland and Virginia over navigation in the Potomac River led to a conference of representatives of five at Annapolis in September 1786. Alexander Hamilton, one of the delegates, convinced his colleagues at the conference that the subject of trade regulation was bound up with other essential questions and it was, accordingly, necessary to call upon all the States to appoint representatives in order to "devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to exigencies of the Union." The Annapolis convention adopted a resolution for a general convention of delegates from all the States to meet in Philadelphia in May 1787. The Continental Congress was at first indignant over this bold step, but finally it reluctantly endorsed the idea in February of that year. All the States except Rhode Island appointed delegates to participate in the convention.

**Philadelphia Convention.** The Philadelphia Convention was really a Constitutional Convention as it was charged with the purpose of revising the Articles of the Confederation. It assembled on the second Monday in May 1787, and was composed of fifty-five members. It was, in the words of Jefferson, "an assembly of demi-gods." A French **Charge**, writing to his government, said, "If all the delegates named for this Philadelphia Convention are present, one will never have seen, even in Europe, an assembly more respectable for talents, knowledge, disinterestedness and patriotism than those who will compose it." The men who actually twisted the destinies of the nation were George Washington, James Madison, Alexander Hamilton, Benjamin Franklin, Edmund Randolph, Gouverneur Morris, James Wilson, and many other distinguished gentlemen.

The Convention actually met on May 15, 1787, in the Independence Hall and unanimously selected George Washington as the Chairman of the Convention. It was then decided that voting should be by



States each State having one vote, that the deliberations of the Convention should be behind closed doors and kept secret; that a quorum should be seven States and that a majority vote would be competent to ratify all decisions.

Within five days of its meeting the Convention made a momentous decision when it adopted Edmund Randolph's resolution "that a national government ought to be established consisting of a supreme legislative, executive and judiciary." Thus, as Madison later wrote, the delegates "with a manly confidence in their country" simply threw the Articles aside and proceeded ahead with the consideration of a wholly new form of government. The delegates recognised that the predominant need was to reconcile two different powers—the power of the autonomous States and the power of the central government. "They adopted the principle that the functions and powers of the national government, being new, general, and inclusive, had to be carefully defined and stated, while all other functions and powers were to be understood as belonging to the States." They recognised, however, the necessity of giving the national government real power and, accordingly, accepted the fact that it be empowered, among other things, to coin money, to regulate commerce, to declare war, and make peace.

At the end of sixteen weeks of deliberations and after ironing out many vexing problems, on September 17, 1787, a brief document incorporating the organisation of the new government of the United States was signed "by unanimous consent of the States present." But a crucial part of the struggle for a more perfect union was still ahead. The Convention had decided that the Constitution would become operative when it had been approved by Conventions in nine out of the thirteen States. By the end of 1787, only three had ratified it. There was a widespread controversy. Many were alarmed at the powers which the constitution envisaged to give to the centre. These questions brought into existence two parties, the Federalists and the Anti-federalists; those favouring a strong central government and those who preferred a loose association of separate States. The controversy raged in the press, the legislatures, and the State conventions. Impassioned arguments poured forth on both sides. Patriots like Patrick Henry, Richard Henry Lee, and others opposed the proposed constitution on the plea that it contained no Bill of Rights and consequently it would prove dangerous to the liberties of the people.

The **Federalists** conceded to the demand of the inclusion of a Bill of Rights as soon as the new government was organised. This promise, which was carried out soon after the new government came into being by the adoption of the first ten amendments, enabled the wavering States to support the constitution. The Constitution was finally adopted on June 21, 1788.<sup>2</sup> The Congress of the Confederation enacted that the new government should go into effect on March 4, 1789. In the meantime Senators and Representatives were elected as the first mem-

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2. North Carolina ratified the Constitution in November 1789, and Rhode Island in May 1790 after Congress had threatened to deprive her of the privilege of trading with the Union, and secession had been threatened by several countries in which Federalist sentiment was strong.



bers of the new Congress and George Washington was chosen President. Thus, the old Confederation passed away and the new Republic entered upon its great career.

Today, the United States of America consists of 50 States covering an area of 3,022,387 square miles. It is a varied land of mountains, plains and plateaus. About two-thirds of the people live in towns and cities, one-third in rural areas. A publication of the United States Information Service, thus, describes the land and the people: "The United States is a country of great diversity—vast cities and small villages, roaring factories and quiet fields, busy streets and small churches for meditation. Geographically, there is a variety too—lakes and deserts, prairies and mountain ranges, rocky sea coasts and sunbaked plains. And at the core of this varied land are the people—the most varied of all, for they stem from countries and social levels throughout the world. But in spite of many differences, certain traditions—freedom, equality, individual rights—are common to all and are taught in the home, in the church, and in the schools."<sup>3</sup>

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## CHAPTER II

# ESSENTIALS OF THE AMERICAN CONSTITUTIONAL SYSTEM

**The Constitution as a document.** The Constitution that emerged from the Philadelphia Convention was a model of draftsmanship, of linguistic elegance, of brevity, and of apparent clarity. It could not be otherwise, for it was designed to bring unity into the diversity of the new nation. Its provisions were built around several fundamental principles enshrined in the Declaration of Independence and upon these principles the American governmental system has since operated. So enduring and inspiring are these principles that the Constitution has, for more than a century and a half, withstood the onslaughts of time and has served the country in war and peace, in calm and crisis, without fundamental change; 73 of the original 84 clauses of the Constitution stand exactly as they came from the fluent pen of Gouverneur Morris. The people of the United States have so much abiding faith in the sagacity, moderation, and "sense of the possible" shown by the makers of the Constitution that the original document is virtually worshipped. Until 1952, it was kept, along with the Declaration of Independence, in an illuminated shrine in the Library of Congress. Both these documents are now housed in the National Archives building in "a stronghold believed adequate to protect not only against the moth, the rust, the thieves but the atom bomb."<sup>1</sup> The words of Max Lerner are typical of the feelings of every American for their Constitution and its makers. He writes, "Here was the document into which the Founding Fathers had poured their wisdom as into a vessel; the Fathers themselves grew ever larger in stature as they receded from view; the era in which they lived and fought became a Golden Age; in that Age there had been a fresh dawn of the world, and its men were giants against the sky; what they had fought for was abstracted from its living context and became a set of 'principles' eternally true and universally applicable."<sup>2</sup>

The Constitution of the United States is the oldest written Constitution in existence and the shortest of the Constitution of any other nation. It contains only 4,000 words, occupying ten or twelve pages in print which can be read in half an hour. Never was it in the minds of the Fathers of the Constitution to work out in all details a complete and final scheme of government for the generations to come. They sought merely a starting point and provided a skeleton to be clothed with flesh by customs, exigencies, national emergencies, economic deve-

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1. Brogan, D.W., *An Introduction to American Politics* (1954), p. 2 f.n.

2. *Ideas for the Ice Age* pp. 241-42.

lopments, and various other factors affecting the welfare of the nation. The Constitution is, thus, a living document growing, developing and expanding, and it will continue to grow while the nation endures.

Gladstone called the Constitution of the United States "the most wonderful work ever struck off at a given time by the brain and purpose of man." But actually its roots go deep into the past. Some of its provisions are traceable to the Magna Carta and for others its authors drew ideas from the writings of John Locke, Montesquieu and Blackstone. Some basic concepts had an even more ancient origin, as the doctrine of consent. Following are the fundamental principles and distinctive features of the Constitution.

**Popular Sovereignty.** A prime feature of the Constitution is that it gives recognition to the principle of popular sovereignty. The right of the people to ordain, abolish and alter their own institutions of government was asserted in the Declaration of Independence. This inalienable right of the people received constitutional sanctity and the Preamble declares that "we the people of the United States...do ordain and establish this Constitution for the United States of America." The Constitution also provides the methods by which it may be altered or abolished and to institute new form and organs of government which are most likely to guarantee the safety and welfare of the people. It means that the voice of the people is supreme in all matters of political determination in the United States and they reign, said De Tocqueville, "as Deity does in the Universe."

The doctrine of popular sovereignty attributes ultimate sovereignty to the people and consequently substitutes constitutional system of government for arbitrary and despotic authority of any kind. When it is recognised that the people are the safest depository of supreme power and that the will of the people is a better guarantee of wise, efficient, and moderate government, it really means respect for human rights, and in the language of Abraham Lincoln, a government of the people, by the people, and for the people. "The American system," James Madison said, "is based on that honourable determination which animates every votary of freedom to rest our political experiments on the capacity of mankind for self-government." Since the incorporation of the doctrine of popular sovereignty in the American Constitution, "it has," as Bryce says, "become the basis and watchword of democracy."

On the concept of popular sovereignty is erected another pillar of democracy. The Preamble states the great objects which the Constitution and the Government established by it are expected to promote: national unity, justice, peace at home and abroad, liberty and the general welfare. The early State loyalties were strong and loyalties to the States are still strong, but there is the triumph of the nation and unmatched prosperity of the people built on the bastions of democratic ideals which disdain privileges of all kind. The Preamble, in fact, echoes the immortal saying of Thomas Jefferson:

The God who gave us life gave us liberty at the same time.

Error of opinion may be tolerated where reason is left to combat it.

The earth belongs always to the living generation.

Nothing is unchangeable but the inherent and alienable rights of man.

**A Limited Government.** A natural corollary of the doctrine of popular sovereignty is the concept of a limited government, possessing only such powers as have been conferred upon it. The Constitution-makers had, indeed, a horror of unlimited power. While assuming that the people were sovereign, the organization and powers of their governments were set forth in written documents. After carefully stating what powers they wished the Federal Government to exercise, they left all residual powers to the States composing the Union. Next, they separated the three branches of government Executive, Legislative and Judiciary, and made them to operate with elaborate checks and balances. The Constitution also imposes certain positive restraints on all public authorities in the country, high and low, by setting limits and bounds to the actions they may take and the manner in which they may exercise their powers. These limitations are designed to protect the person, property and civil liberties of the individual against arbitrary encroachment by government officials. In some matters the individual is protected against the Central Government, in others against State and local governments, and in still others against all governments, Central, State and local. The Fifth and Fourteenth Amendments together forbid Congress and State Legislatures to deprive any person of life, liberty, or property without due process of law. In a strict sense every line in the Constitution is a vindication of the sovereign rights of the people and a limitation on Government. "In framing a government which is to be administered by men over men," wrote Madison, "the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself." In this sense the Constitution serves a dual function. It is a positive instrument of government enabling the Governors to control the governed. It is also a restraint on a government, a device by which the governed check the Governors.<sup>3</sup>

**A Federal System.** The delegates at the Philadelphia Convention met to find means for establishing an effective national government. At the same time, there was no serious discussion in the Convention of proposals which might have lowered the dignity of the individual States. It is true that Hamilton pleaded for subjecting the State Governments to rather complete Central control but, "while many applauded his eloquence and admired his youthful brilliance none followed his suggestions."<sup>4</sup> They knew that the overwhelming majority of the people were too much deeply attached to their State governments and they would not permit a scheme of government aiming their complete subordination to a central government. The framers of the Constitution were, therefore, confronted with a difficult task: how to make the Central Government strong enough for its duties without impairing rights of States; how to preserve the integrity of the States without weakening

3. Burns and Peltason, *Government by the People*, p. 92

4. Gosnell, C.B., and Others, *Fundamentals of American National Government*, pp. 67-68.

the Central Government. By heroic efforts they devised a plan of government which now carries the nomenclature of a federation.

The Fathers of the Constitution, thus, established a dual system of government within the States of the United States of America. There is the National Government with a complete set of its own governmental agencies—Legislative, Executive, and Judicial—exercising powers delegated to it by the Constitution which are of common national interest. Paralleling this system in each State is another complete set of Legislative, Executive and Judicial organs acting upon the persons within that State and exercising the residuary powers, that is, the powers not delegated to the National Government or denied to the States by the Constitution. Under the Constitution, therefore, the National Government is one of enumerated powers only. Residuary powers go to the State Governments. Each of these two sets of government within its own sphere is autonomous and independent; neither encroaching on the other. If any change is desired to be made in the division of powers it can be done only by amending the Constitution and the method of amendment is provided in the Constitution.

Fears and doubts in the minds of the people existed at the time of the adoption of the Constitution about the practicability of the federal union. Before 1861, lively arguments were waged over whether a state composing the Union had a constitutional right to secede. But the Civil War settled once for all this controversial issue. As the Supreme Court declared in *Texas v. White* (1869), "The Constitution in all its provisions looks to an indestructible union, composed of indestructible states." No State, therefore, can break its constitutional bonds, for the Union is perpetual and indissoluble.

**Federal Supremacy.** Though the powers of the Federal Government are enumerated, yet federal law within its sphere is supreme over all State law. This was the imperative necessity which the Fathers of the Constitution had fully realised. A federal union establishes two sets of government, each independent within its own sphere of jurisdiction. With demarcated powers and authority, conflicts between the National and State Governments are bound to arise and that, too, frequently. Such disputes might threaten the union if the Constitution did not provide for their settlement. The Constitution of the United States, accordingly, provides that disputes arising between the National Government and the State Governments must be settled in the Federal Courts. To guide judges in their decisions, the Constitution says, "The Constitution, and the laws of the United States, . . . and all treaties . . . shall be the supreme law of the land . . ." It means that the Federal Constitution is paramount over all forms of law, State or National. Federal law, therefore, if validly enacted under the Constitution, ranks above the State Law. State Laws which conflict with the National laws or treaties may be declared unconstitutional; and the Supreme Court at Washington is the tribunal of last resort for deciding all cases of conflict of jurisdiction between the Federal and State authorities. But treaties and Acts of Congress must be in accordance with and in conformity to the Constitution if they are to out-rank State Constitutions and laws. Compared with one another, Acts of



Congress and treaties are on a plane of equality. If one conflicts with another, the measure passed most recently prevails.

**Separation of Powers, Checked and Balanced.** That the three functions of government—Legislative, Executive and Judicial—must each be vested in a separate organ or department seemed to most Americans as undebatable as the laws of nature. James Madison wrote, in the **Federalist**: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty, than that...the accumulation of all powers—legislative, executive and judiciary—in the same hands...may justly be pronounced the very definition of tyranny." The theory of limited government, which formed the basis of political thought of that time presupposed separating the three branches of government in order to prevent tyranny and absolutism. The Framers of the Constitution had, accordingly, no hesitancy about invoking the principle that political direction of authority should not concentrate in any one of the branches of government. They had rebelled against the tyranny of the British government and wished to prevent such rulers from coming to power in the United States.

There is in the Constitution itself no direct statement of the doctrine of Separation of Powers. It is inferred from the opening sentence of each of the Constitution's three Articles. Article I begins by saying, "All legislative powers herein, granted be vested in a Congress." Article II begins with the statement that "The executive shall be vested in a President of the United States." And Article III states that "The judicial power shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The Constitution-makers, thus, provided that the operation of each of the three processes of government should be entrusted to a separate agency. The Legislative process be operated by an independent Congress, the Executive process by an independent President and the Judicial process by an independent Supreme Court and subordinate courts.

On the basis of this arrangement the doctrine of Separation of Powers has from the first been clearly established as a principle of governmental organisation in the United States and it has been enforced by the Courts exactly as any other legal rule. One of the many statements of it is found in the judgment of the Supreme Court in **Kalbourn v. Thompson**. The Court declared, "It is believed to be one of the chief merits of the American system of written constitutional law that all powers entrusted to government, whether state or national, are divided into three grand departments, the Executive, the Legislative and the Judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants; and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to its own department and no other."

But even the most convinced believers in the doctrine of the Separation of Powers acknowledged that an absolute separation of the three

departments of government would make government itself impossible. Madison, the ardent advocate of the doctrine of Separation of Powers, wrote in the **Federalist**, that the principle "does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other." He proceeded to prove that "unless these three departments be so far connected and blended as to give each constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained." Unlimited power, it was further argued was always dangerous and the very definition of tyranny unless power was made a check to power. It could also be possible that different officials exercising different kinds of powers might pool their authority together and act in a tyrannical way.

The Framers of the Constitution, accordingly, introduced modification to the doctrine of Separation of Powers when they came to details by setting up what are called "checks and balances"—the giving, especially to both the Executive and Legislative branches, shares of powers which might more logically seem to belong to the others. The object was to make exercise of power limited, controlled and diffused. The final constitutional arrangement, thus, gives to each Department of Government exclusive powers appropriate to that Department, but at the same time, these powers are shared by other Departments lest it should corrupt those who wield power. The Legislative branch is checked by the President through his veto power, but Congress, if it can muster a two-thirds vote, may enforce its views by overriding his veto. The Constitution also armed the President with another kind of veto, described as "pocket veto." The President is, thus, able to check Congress. The Legislative Department checks the Executive through its power to appropriate money and to impeach. The Senate confirms the appointments made by the President and approves treaties negotiated by the President. The Supreme Court depends upon Congress in several respects, for instance, appropriations and appellate jurisdiction as also for the number of justices who serve on that tribunal. Congress may impeach and remove federal judges from office. The President is empowered to appoint Judges of the Supreme Court, and grant pardons, reprieves, commutations and amnesties. And the Supreme Court, shortly after the Constitution became operative, developed the practice of ruling on the validity of Acts passed by Congress and approved by the President. Such a system of checks and balances has thus been described by Bryce: "The ultimate fountain of power, popular sovereignty, always flows full and strong, welling up from its deep source, but it is thereafter diverted into many channels, each of which is so confined by skilfully constructed embankments that it cannot overflow, the watchful hand of the judiciary being ready to mend the bank at any point where the stream threatens to break through."

No feature of American Government, national, State and often local, writes Frederic Ogg, "is more characteristic than the separation of powers, combined with precautionary checks and balances." He further adds, "Nothing quite like it can be found in any other leading country of the

world." It was not the intention of Montesquieu, the author of the concept of Separation of Powers, to neatly divide the powers of government into three separate and distinct departments. What precisely he desired to establish was that power should be a check to power. *Le pouvoir arrete le pouvoir*, and in accordance with this dictum the Framers of the American Constitution divided government into three distinct departments and wove an intricate system of "checks and balances," in order to avoid tyranny emanating from any source. They were thinking not alone of the tyranny of a monarch, as Montesquieu had been thinking, but the possible tyranny of the people or even of a majority under a system of majority rule. "They knew, as we do, that no drug and no beverage is more intoxicating than power over men and that intoxicated men are not to be trusted as unrestrained rulers." The Framers had, thus, a deep horror of the tyranny of the majority rule and they were not disposed to make any exception for a government conducted in the name of the people themselves. If the proper checks and balances are maintained no group is permitted to dominate and the programme of government is refined by the consideration from varied points of view.

The arrangement of government as established by the Constitution was designed to promote co-operation among the three branches of Government as well as checking and balancing them. Without it the machinery of Government, the Constitution-framers thought, would break down. But in actual practice, the system of checks and balances has prevented unity, frustrated leadership, divided responsibility and slowed up action. "Not all the objects which the fathers had in view," says Herman Finer, "have been realized, but their main intention, effectively to separate the powers, has been achieved; for they destroyed the concert of leadership in government, which is now so important in the present age of the minigrant politics." By establishing the Presidential system of government, the Fathers of the Constitution, adds Dr. Finer, "separated the executive sources of knowledge from the legislative centre of their application; severed the connection between those who ask for supplies and those who have the power to grant them; introduced the continuous possibility of contest between two legislative branches; created in each the necessity for separate leadership in their separate business; and made this leadership independent of the existence and functions of the executive." With powers divided between the Executive and Legislative Departments without any means of proper co-ordination, there is always inordinate delay to arrive at an agreement even on pressing matters which demand expeditious disposal. One branch of Government may be operating on one policy whereas the other two may follow quite a different one, particularly when the Executive belongs to one party and the Congressional majority to another. Some Presidents have, no doubt, succeeded to bridge the gap separating them from the Legislature, but "while an emergency may bring temporary co-ordination, and the use of patronage can usually be counted upon to pave the way to some action, the national

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6. *Ibid.*

7. Swisher, Carl Brent, *The Theory and Practice of American National Government*, p. 62.

8. *The Theory and Practice of Modern Government*, *op. cit.*, p. 101.

government is still torn into parts by the provision which the framers made for separation of powers."<sup>9</sup>

From the very beginning of the establishment of the Union, Congress has always emphasised its independent existence and its independent will. Whenever there had been unity of purpose and unity of will as in an emergency like that of 1933, or during the two World Wars, Congress reasserted itself either by rejecting or by altering or modifying Presidential measures. And very often it does so "to draw attention to itself that he (the President) is not the unqualified master of the nation." When in 1940, the United States became more and more involved in the Second World War, Congress conferred immense powers on the President. Protests soon followed both in Congress and outside that the President was gathering legislative power into his own hands violating the doctrine that the powers of government are separated by the Constitution. It was partly in response to this criticism that the new Congress which commenced its life in January 1943, exhibited a revolt against the leadership of Roosevelt by rejecting many proposals which the President had recommended and accepting many Bills to which the President had objected including the two fundamental Acts which he had vetoed. The result is, as Dr. Finer remarks "Legislative procedure had come to differ essentially from that in Britain and France, financial procedure is worlds apart, there is no co-ordination of political energy or responsibility, but each branch has its own derivation and its morsel of responsibility. All is designed to check the majority, and the end is achieved." But, "At what cost?" Finer puts it. The cost, he replies, cannot be calculated unfortunately in dollars. And yet the principle of the Separation of Powers as Professor Beard observes, "is indeed a primary feature of American government and is constantly made manifest in the practices of government and politics." Somewhat ironically, even checks and balances "designed to promote over-all equilibrium, often operate rather to aggravate than to ameliorate the ill-effects of separation, as for example, in the case of the Presidential veto and senatorial assent to treaties."<sup>10</sup>

Corwin remarks that "latterly the importance of this doctrine (the Separation of Powers) as a working principle of government under the Constitution has been much diminished by the growth of Presidential leadership in legislation, by the increasing resort by Congress to the practice of delegating what amounts to legislative power to the President and other administrative agencies, and by the emergence in the latter of all the three powers of government, according to earlier definitions thereof."<sup>11</sup> The rise of political parties, a fact which was unforeseen by the Framers of the Constitution, and their functions have tended to redistribute the authority divided by the Constitution and have established

9. Zink, Harold, *Government and Politics in the United States*, p. 12.

10. Tourtellot, A.B., *An Anatomy of American Politics*, p. 83.

11. Finer, Herman, *The Theory and Practice of Modern Government*, p. 101.

12. Beard, C.A., *American Government and Politics*, p. 16.

13. Ogg, F.A., and F.O. Ray, *Essentials of American Government*, p. 39.

14. Corwin, S.E., *The Constitution and What it Means Today*, p. 2.



the leadership of the Executive to a considerable extent indeed. Congress, too, has, as said before, not stood in the way of prompt and forceful action in times of emergencies. It has also on its own initiative delegated to the Executive the power of making rules and regulations in the pursuit of positive governmental programmes, and all such rules and regulations have the effect of statute law. Still there are limits beyond which the breaking down of the division cannot be permitted to go. Congress can delegate to the President a great deal of power, but it cannot abdicate its functions and delegate its legislative authority to him. Even if it does, as Congress did in 1933, the Supreme Court intervenes declaring such delegation of authority void. The Supreme Court held in *Field v. Clark* (1892), that "the Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the Constitution." The Court in 1935, unanimously invalidated the National Industrial Recovery Act, partly on the ground that Congress had by that law delegated to the President its power to make what amounted to laws and consequently such a delegation of authority violated the principle of the Separation of Powers. However, the Court's subsequent policy has been to permit administrative rule-making provided the terms of the law are reasonably specific. And what is reasonably specific is, again, determined by the Court.

Both the principles of American government—Separation of Powers and checks and balances—have frequently been a cause of confusion and conflict. They have resulted in great variations in the relationship between the President and Congress, variations in terms of personalities as well as external events. It is also impossible to deny, as Woodrow Wilson remarks, that "this division of authority and concealment of responsibility are calculated to subject the government to a very distressing paralysis in moments of emergency." Certainly, the Separation of Powers had been used, at various periods of American History, to check and balance government so effectively that nothing could be accomplished even when the need for governmental action was most apparent. The more power is divided the more irresponsible it becomes. Power and accountability are the essential constituents of good government. And today, when the area of governmental activity has broadened so enormously, can the system of Separation of Powers and checks and balances be reconciled with the need for strong, effective and responsible government? This issue was brought into the forum of serious discussion by Woodrow Wilson's **Congressional Government**, and since then many proposals designed to bring about greater harmony in the Executive and Legislative Departments have been suggested. Woodrow Wilson had urged the superiority of a responsible Cabinet system of government and his doctrine has been championed by effective writers. A few have, on the contrary, wielded the cudgels in defence of the American system. Some suggest a compromise by establishing a joint executive-legislative Cabinet, that is, the Representatives and Senators should be included in the President's Cabinet. Still others suggest that Secretaries of the Government (Cabinet members) may be permitted to appear in the two Houses of Congress to explain Government's programme and policy, and answer questions. A few advocate changing the Constitution to prevent the Supreme Court from declaring law unconstitu-



tional. Nothing tangible has come out so far although under the existing conditions the Separation of Powers on the whole is working better than the Framers could have foreseen. The system of checks and balances has been greatly modified by the political parties. Political parties join what the founding fathers had separated. The increasing important function of the President as legislative leader and other aspects of American political process owe their existence to adjustments necessitated by the Separation of Powers. Summing up the system of Separation of Powers and checks and balances, William Havard remarks, "The system as a whole is a going one despite a certain clumsiness in its general operation; to attempt to shift to some of parliamentary government, as a great many critics have urged, would seem to be as uncertain in practical effect as it is unlikely in terms of political feasibility."

**6. Presidential Type of Government.** The system of government emerging from the principles of Separation of Powers and limited government is quite different from parliamentary democracies. Americans separated their institutions of government whereas there was fusion of governmental institutions in Britain. There was another important factor which influenced the deliberations of the Philadelphia Convention. Parliamentary democracy is unworkable without distinct political parties, each with its own programme and platform. The framers of the Constitution forthwith rejected such a system of government which weakened national solidarity and created sharp cleavages and narrow loyalties. They strived to establish an energetic yet dignified Executive capable of enforcing laws firmly and one that should lend a note of stability. That is the Presidential Government.

It is a single Executive. The President is alone, one combining the functions of the Head of the State and head of the government. He is responsible to the people who elected him and to the Constitution to which he swore allegiance when he took office. He has no seat in the Legislature and is not accountable to that body. Nor does he depend upon it for the retention of his office: it goes by calendar. The Secretaries he appoints and make his 'Cabinet' and over which he presides, is not what Bagehot called a "Committee of the House of Commons." They are the President's nominees, appointed by him and responsible to him. If any one is a member of the legislature at the time of his appointment, he must resign his seat therefrom before accepting such an appointment. The Executive Department is, therefore, independent of and co-ordinate with the Legislative Department and, as such, negation of the Parliamentary system.

**A Rigid Constitution.** A Constitution which is written and establishes two sets of government with defined powers and both are equal in status, must be rigid. The procedure for amending it is prescribed in the Constitution and is distinct from the procedure adopted in making an ordinary law. The amendment of the Constitution also necessitates participation of both sets of government. It is consequently unlike that of Britain. The Constitution provides for two definite methods for amend-

ing and we discuss these methods in the later part of this Chapter. The methods are extremely elaborate and rigid and account for only twenty-five amendments during the last 180 years. Yet, in spite of its rigidity, it is the remarkable adaptability of the Constitution that has enabled it to survive the rigours of democratic and industrial revolutions, the turmoils of the Civil War, the tensions of a major depression, and the dislocation of the two global Wars.

**Judicial Review.** As a corollary of the twin doctrines of limited government and the Separation of Powers, there has developed the doctrine of judicial review by which courts exercise the power of annulling any Legislative or Executive act which in their opinion goes beyond the Constitution. The federal judiciary, in fact, acts as a guardian of the Constitution. It interprets the Constitution and decides the competency of Congress or State legislatures. If in the opinion of the Courts a particular act is beyond the authority given to Congress or State Legislatures or that it encroaches upon the domain of either of the two Legislatures or seeks to deny or abridge the civil liberties of the people, then, such an act is declared unconstitutional or *ultra vires*. Similarly, any act of the Executive, which is deemed in excess of or beyond its constitutional authority, may be held unconstitutional. When in 1933, Congress in a desperate effort armed the President with large discretionary powers to deal with the economic crisis, the Supreme Court intervened and in the *Panama Refining Company v. Ryan* it was held that this was an invalid delegation of legislative power to the Executive. Another part of the National Industrial Recovery Act authorised the representatives of each industry to make codes of fair practices applicable to all members of the industry under the supervision of the President and empowered him to promulgate the codes as law. This provision the Supreme Court also declared void.<sup>16</sup> "We think," the Court observed, "that the code making authority thus conferred is an unconstitutional delegation of legislative authority."

The doctrine of judicial review has been subjected to scathing criticism during recent times. Its supporters defend it as necessary to preserve a free and limited government, and that it also helps to establish a stable government by guarding against legislative precipitancy. The critics, on the other hand, assert that the courts infringe upon the Legislative and Executive functions and retard the working of representative government. It is further maintained that the process of judicial review delays pressing social and economic policies so necessary to meet changing conditions. We shall revert to the details of this controversy at its appropriate place.<sup>16</sup>

**The Bill of Rights.** The Constitution as it emerged out of the Philadelphia Convention did not contain the Bill of Rights embodying the rights and liberties of the people. Repeated efforts were made towards the end of the deliberations of the Philadelphia Convention to secure a Bill of Rights to the draft constitution, but all failed. But

16. The Twenty-fifth Amendment setting out the way the office of President is filled in the event of his incapacity became law on February 10, 1967.

17. *Schechter v. United States*.

18. See below, Chap. VII.

omission became such a burning issue that it nearly defeated ratification of the Constitution by the States. The Federalists ultimately conceded to the demand of the inclusion of Bill of Rights as soon as the new government was organized and the first Ten Amendments were added to the Constitution in 1791, to constitute the Bill of Rights. In these provisions are enshrined the rights and liberties of the people of the United States. A zone of freedom is, thus, established wherein no government may legally operate. Although the boundaries so set by clauses are by no means self-defining, yet they do whatever can formally be done to safeguard those individual rights which history has found to be the hallmark of a just and free society. Freedom of speech, of worship, the right of habeas corpus, from arbitrary deprivations except by due process of law, and no unreasonable searches and seizures.

**The Right to Due Process of Law.** Both the Federal and State governments are forbidden to deprive anyone of life, liberty and property "without due process of law." Due process of law means that anyone suspected of violating the law must be dealt with according to established rules and not arbitrarily. It also means that the government must be the product of law and "powers must be applied not erratically to some people or to others as governors see fit, but uniformly to all people similarly situated." Finally due process of law means that acts of Legislatures and Executives, both at the Centre and in the States, must be reasonable. There has been a good deal of controversy over what is reasonable and what is not. Before 1880, the Courts had held that what was reasonable was a political decision and, therefore, reserved to Legislatures and Executives to determine it. Since that time, however, Courts have said that the "due process of law" clauses require the Courts to make the final determination as to whether actions or laws are reasonable or not. This has led judges to disagree sharply among themselves and has provoked widespread criticism, as we shall observe in the pages to follow. Nevertheless the Courts insist that "due process of law" guarantees both proper procedure and the reasonableness of the laws themselves.

## GROWTH OF THE CONSTITUTION

The Constitution of the United States, as it emerged from the Philadelphia Convention, was a brief document consisting of a Preamble and seven Articles condensed into 89 sentences. Since then the Constitution has been steadily changing, developing, expanding and adapting itself to the new conditions. The framers knew that if the Constitution was to endure, it must be a living Constitution capable of flexibility and adaptability to cater to the expanding needs of the people and the country. They, therefore, did not try to reduce all details into writing but rather left room for the system to grow. Chief Justice Marshall observed in McCulloch v. Maryland, "A constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means to which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules,

for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur." Therefore, the American Constitution, as Bryce says, "has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore, in its own spirit." A written Constitution does not mean a set of clear-cut rules which inexorably control political authorities in the discharge of their public duties. "It is," according to Charles Beard, "a printed document explained by judicial decisions, precedents and practices and illuminated by understanding and aspiration. In short, the real Constitution is a living body of general prescriptions carried into effect by living persons."<sup>19</sup>

The American Constitution is, thus, not the written fundamental instrument of the Federal Government framed at Philadelphia together with its amendments. It also includes statutes enacted by Congress, particularly those dealing with the organisation of the government and the powers assigned to the agencies Congress has created; executive orders and actions which enable the government to function efficiently; the monumental decisions of the Supreme Court interpreting the Constitution and thereby affecting the powers and operations of the government; and the innumerable political habits and governmental usages which chisel the Constitution to achieve the dynamic political purposes. Considered in that manner, the difference between the Constitution of the United States and of Britain remains only of a degree. Judge Cooley defined a Constitution as "the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised." And Woodrow Wilson described the Constitution as a "vigorous taproot" from which has evolved "a vast constitutional system—a system branching and expanding in statutes and judicial decisions as well as in unwritten precedent."<sup>20</sup>

**Development by Statute.** The Fathers of the Constitution, as said before, left many matters to be determined by the Acts of Congress in order to complete the framework of government. The judiciary Article (Article III), for example, states only that there shall be "one Supreme Court," and "such inferior Courts as Congress may from time to time ordain and establish." The Judiciary Act of 1789 laid the foundation of the American judicial system, fixed the number of Judges of the Supreme Court and their salaries, provided for the Court's organisation, and set forth its jurisdiction. This Act has been amended from time to time. Several times Congress has passed laws changing the number of Judges of the Supreme Court. Similarly, Article II of the Constitution assumes administrative departments, but it says almost nothing about them. The elaborate organisation of the federal administration has been established by statute, with federal departments or independent agencies created, reorganised, or given new functions by Congress. Still more, nowhere does the Constitution prescribe the precise way in which minor officers of the government are to be selected. Congress enacted a civil service law providing for their appointment by competitive examinations.

19. Beard, C.A., *American Government and Politics* (1932), p. 15.

20. Wilson, Woodrow, *Congressional Government*, p. 9.



Some of the manifold laws of Congress are so basic that "they are more a part of the total constitution than many of the written sentences." The Presidential Succession Act, 1947 determines succession to the Presidency, and in the event of the death of Vice-President the officers who will follow him. It is the Act of Congress that specifies that members of the House of Representatives shall be chosen from single-member districts. The Act of 1887 fixes in detail the method of counting electoral votes. The Rules of Procedure and internal organisation and practices of Congress itself are the result of statutory authority.

After enumerating the various powers of Congress, the Constitution concludes with a sort of general grant empowering Congress to make all laws which it may deem necessary and proper for carrying into execution the jurisdiction assigned to it. This is sometimes called "the elastic clause" and many matters that Congress might not otherwise feel authorised to deal with have been covered under this provision. In the same way, by broadly interpreting the Constitution, Congress has established a huge defence establishment, created scores of administrative boards and bureaus, entered into the business of education, banking insurance, construction, transporting, generating electric power, and found authority to regulate the economic and social life of a highly industrialised nation. The policy of liberal interpretation was first adopted by Chief Justice Marshall and his associates, and with rare exceptions has been followed by the Court throughout its entire history. The Supreme Court has declared as a fixed principle that it will show great respect for the interpretations of Congress and will overrule them only when they are clearly and palpably wrong.

**Development by Executive.** Likewise the nation's chief executives have greatly helped to develop the Constitution by their decrees, orders and actions. It is, indeed, no exaggeration that Presidents Jackson, Lincoln, both Roosevelts "have had an impact" on the Constitution "at least equal to that of any of the original framers." By their vigorous use of the Presidential powers they made the Presidency an office of Legislative as well as Executive leadership. In fact, a considerable number of political techniques in the United States rest on precedents set by one or another President. The Constitution is silent about the existence of the "Cabinet" and the President's obligation to consult it. But Washington created one and began consulting it. This practice has been followed since then making the "Cabinet" an established organ of government that meets ordinarily once a week. The Constitution states that only Congress can declare war, but the Presidents have used their authority to send troops into action in such a way as virtually to assure the creation of a state of war. Woodrow Wilson did it and so did Franklin D. Roosevelt. Constitutionally, all treaties must be approved by a two-thirds majority of the Senate, but recent Presidents have often substituted 'executive agreements' or 'gentlemen agreements' for treaties, made and concluded by themselves not requiring Senate approval and yet considered by the Courts as binding. President Franklin D. Roosevelt assumed unprecedented powers manning the entire life of the nation



during World War II. under his authority as Commander-in-Chief of the armed forces.

Then, by statutes passed under the authority of the constitutional provisions and regulations made thereunder it is determined how commerce is carried on, the process of naturalization, the procedure and the methods of taking census, obtaining of patents and copyrights. Congress has also delegated to various executive officials and administrative boards the power to supplement statutes by regulations and orders. These regulations are not laws but they have the force of law "They are, as it were, the twigs on the branches which have sprung from the main trunk, which is the Constitution."<sup>21</sup>

**Development by interpretation.** In the oft-quoted observation made by Chief Justice Hughes lies the truth how the American constitutional system has developed through the process of judicial interpretation. He said, "We are under the Constitution but the Constitution is what the judges say it is." The judges have to interpret the Constitution and the Constitution, like that of United States, written in concise, general words and phrases often admits of varying interpretations. And to give "a phrase a new interpretation is to give it a new meaning; and to give it a new meaning is to change it." Almost every clause of the Constitution has been before Courts and the interpretations of the judges have virtually remade parts of the Constitution. The doctrines of Implied powers, of inherent powers, of the sanctity of contracts and many other decisions of the Supreme Court stand conspicuous in determining the course of government. The Supreme Court vested the power of dismissal in the President excluding the Senate altogether. The Constitution entrusts the Federal Government for controlling the means of communications and transport. The decision of the Supreme Court interpreted means of communications to embrace telegraphic, telephonic, and radio communications. In the means of transport were included railroad and airways. A similar liberal interpretation was given to the "armed" forces broadening thereby the jurisdiction of the federal authority. The Constitution declares that "Congress shall have power...to regulate commerce." What is meant by the word commerce and what does it include, the Supreme Court has given it varied meanings to suit new situations and make it responsive to new problems. "It has been the work of the Supreme Court, through its power of judicial interpretation," says Dr. Munro, "to twist and torture the term 'Commerce' so that it will keep step with the procession."<sup>22</sup>

Professor Edward S. Corwin stated in 1938, "the Supreme Court has handed down not far from 30,000 opinions...and of this total probably one-fourth at least comprises cases involving constitutional points."<sup>23</sup> That means that by 1938 some 7,500 decisions rendered by the Supreme Court involved interpretation of some part of the Constitution or appealed some fundamental doctrine of the American constitutional system. The court

21. Munro, W.B., *The Government of the United States*, p. 69.

22. *Ibid.*, p. 70.

23. *The Living Constitution*, p. 38.

has the last word; its declaration of meaning is final, unless and until some subsequent decision gives yet a different interpretation.

Thus, judicial interpretation has been the most important method of determining the meaning of the Constitution. "Whatever is enacted by Congress and approved by the Supreme Court," declared Howard Lee McBain, "is valid even though to the rest of us it is plain violation of an unmistakable fiat of the fundamental law. There is no limitation imposed upon the national government which Congress, the President, and the Supreme Court, acting in consecutive agreement, may not legally override. In this sense the government as a whole is clearly a government of unlimited powers; for by interpretation it stakes out its own boundaries."<sup>24</sup> It means that the Supreme Court is the final arbiter on questions of constitutional interpretation and it determines what the Constitution really means in the context of the new developments which emerge in the country. Woodrow Wilson maintained that the Supreme Court is "a kind of constitutional convention in continuous session," constantly adjusting constitutional provisions to new circumstances. It adapts the document of 1789 to a changed nation of 1970 and 2000. The Supreme Court has, thus, made the Constitution a living, growing thing; has modernized it in each successive decade. And the Court's power to do so has not been brought about by any formal provision or amendment but by interpretation of the court itself in the case of *Marbury v. Madison* in 1803.

**Development by usage.** The Constitution has, also, considerably developed, expanded and modified by usages and customs. "What habit is to the individual, usage is to the State. Nations, like men, get into the habit of doing things in a given way. Habit then hardens into usage, which becomes difficult to change." These political customs and usages, which have their basis neither in laws nor in judicial decisions, are essential parts of the basic framework of the fundamental rules of the government. In fact, the Constitution has been greatly modernised, amended and democratised through the development of these unwritten rules. They make flexible the otherwise rigid Constitution.

The most notable example is the extra-constitutional development of the political parties. It is scarcely possible to conceive of the Federal or State Government in the absence of political organisations. Yet the Constitution makes no provision of the political parties. It is, again, the political parties which bring about co-ordination between the legislative and executive branches, and the presidential office has been made more responsible to the people.

Another example is that of the "Cabinet" which advises the President. There is no basis for this in the Constitution. The Congressional statutes have simply set up the departments from which the "Cabinet" members are drawn up. President Washington found it useful to have a small group of advisers to whom he could look for counsel and other Presidents have continued with it and, today, it is impossible to dispense entirely with such a body. Senatorial courtesy, presidential nominating conventions, and other party activities, the residence requirements in the case of the Representatives all these rest, not

24. Corwin, Edward, S., *Court Over Constitution*, pp. 93-94.

upon the Constitution, but upon usage. Legislative Committees are not authorised in the Constitution, but custom and usage have made them as permanent as if they were.

The most notable example how can a custom change or supplement constitutional provisions is found in the procedure of electing the President. The Constitution makes a simple provision that he shall be elected by electors, chosen in their respective States. The Constitution-makers assumed that these electoral groups in the States would be actually deliberative bodies and that they would weigh the relative merits of each candidate before exercising their choice. But custom has rendered the Presidential election direct and nullified the intention of the Constitution-makers, if not the spirit of the document itself. To cite another equally important example, though the Constitution provides that Money Bills must originate in the House of Representatives, Senate's consideration of revenue measures by tradition is as much recognised as that of the House of Representatives.

President George Washington set precedent that the President should not seek election for more than two terms. This became a custom and was scrupulously followed till 1940 when Franklin D. Roosevelt sought election for the third time and was elected. He was elected for the fourth term as well. Under the stress of national emergencies and influenced by the dynamic personality of Roosevelt, the people succumbed to the violation of the custom. But the popular opinion in the United States was so much in favour of the two-term election that eventually a constitutional amendment was made in 1951, limiting the tenure of office of the President to two terms. The custom became a constitutional law and that shows sanctity of customs. The growth of the American Constitution has, therefore, it may be asserted, heavily depended upon custom and usage. Professor Beard makes a bold statement when he says that customs and usages in the American system of government form as large an element as it does in the British Constitution.<sup>25</sup> This is, however, not exactly correct, although customs have in some respects changed the basic characteristics of the Constitution.

**Growth by Amendment.** The framers of the Constitution prudently realized that future context of things and experience would need a change in the Constitution, and they, accordingly, provided for the process of formal amendment. Article V reads—

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of the three-fourths of the several States, or by Conventions by three-fourths thereof as the one or the other mode of ratification may be proposed by the Congress;..."

The process by which the Constitution is amended may be divided

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25. Beard, Charles A., *American Government and Politics*, p. 60.

into two parts: **proposing** an amendment (initiation or proposal of the amendment), and **ratifying** an amendment. There are two ways in which an amendment may be proposed:

- (1) by a two-thirds vote of both Houses of Congress, or
- (2) by a national constitutional convention called by Congress upon request of the Legislatures of two-thirds of the States.

It may be ratified:

- (i) by the Legislatures of three-fourths of the States, or
- (ii) by special conventions in three fourths of the States.

To explain this fully: an amendment may be proposed by Congress, in which case it may be introduced in either House as a joint resolution and must pass in both the Houses separately by a majority of two-thirds vote. Or an amendment may be proposed by a national convention convened by Congress upon request of the Legislatures of two-thirds of the States. Such a request might indicate a general nature of the amendment that is desired or it might simply ask that a convention be called for the purpose of revising the Constitution. Congress would then prescribe the number of delegates, mode of their election and the time and place of their meeting. But the difficulties inherent in this procedure have ruled it out as a mode of initiating amendments to the Constitution. Therefore, all the amendments hitherto proposed have originated with Congress, that is the first method.

In whatever manner the proposal for amendment is initiated, Congress prescribes which of the two ratification procedures is to be followed; State Legislatures or State Conventions. State Legislatures have been used in all instances, except in the case of the Twenty-first amendment, when Congress provided that State Conventions were to be used. When State Conventions are used, the Legislature of each State decides on the size of the Convention, how the delegates are to be elected, and the time and place of meeting.

A few important observations with regard to the process of amendment may be noted. The relevant Article in the Constitution does not say anything on the following points:—

(i) What does "two-thirds of both Houses" mean; two-thirds of the total membership of each House or two-thirds of those present and voting? The Supreme Court has ruled that a two-thirds of those present and voting fulfils the constitutional provision. The latter interpretation has prevailed and it now means two-thirds of the members present.

(ii) It does not, also, say whether or not the action of Congress in voting to propose a constitutional amendment requires the assent of the President and Governors. The Supreme Court has held that amendment is solely a legislative function and the President need not sign proposed amendments before they are sent to the States. Nor do the State Governors need to sign instruments of ratification.

(iii) Can a State Legislature, which has ratified the constitutional amendment, later, before the necessary three-fourths has been obtained, rescind its previous decision? Congress by its resolution has declared



that it cannot. But a State Legislature may, however, first refuse to ratify it and, then, at a later date may ratify it.

(iv) The Constitution does not fix any time limit within which the ratification must be completed. But Congress may do it on its own initiative as it was done in the case of the Eighteenth, Twentieth, and Twenty-first amendments and fixed seven years as the maximum time for ratification in each case. The Supreme Court has held that it is within the competency of Congress.

(v) Can a State Legislature, when a proposed amendment comes before it for ratification, refer it to the people for their approval? It has been held that it may be done provided the State Legislature itself takes formal action after the people have given their verdict. But a State Legislature may not submit an amendment to the people for final decision, thus, abdicating its own powers. The Supreme Court held that it was neither within the constitutional power of National nor that of the State Governments to alter the methods of ratification which the Constitution itself prescribes.

(vi) Are these limitations, express or implied, on the subject matters of amendment? The Constitution provides for only one limitation, that no State shall be deprived of its equal representation in the Senate without its consent. This limitation is designed to protect individual States or a small group of them from a discriminatory action by a dominant three-fourths of the States.

**Criticism of the Amending process.** The process of amending the Constitution is difficult and circuitous and consequently there have been only twenty-five amendments since the Constitution came into being in 1789. The first ten amendments were "the price of ratification" and were embodied by 1791. In fact, the Constitution was accepted by the States of Massachusetts, Virginia, and New York on the definite assurances that a series of amendments guaranteeing individual rights would be speedily added to the original document. The next fifteen amendments brought about various alterations, deleting many provisions and adding new ones to fit in the needs of time and consistent with political aspirations of the people.

Here are some of the important points of criticism of the amendment procedure:—

1. The inconsistency of majority rule requiring two-thirds votes of both Houses of Congress and ratification by three-fourths States is really inconceivable. Even two-thirds votes of Congress are difficult to secure. So far, out of thousands of resolutions introduced in Congress only twenty-nine have mustered the necessary two-thirds votes of both Houses. Out of these twenty-five have been ratified by the necessary number of States and have become effective. It has been suggested that only a majority vote in both Houses of Congress and ratification by two-thirds of States should be made necessary to effect constitutional amendments. But the proposal has not evoked sufficient enthusiasm.

2. For ratification, States rather population are required. It is asserted that this is too conservative a system, for thirteen small States



may pool together and hold up the aspirations of an overwhelming majority of population. This is tantamount to a veto of an absolute nature. "In other words, about one-tenth of the people of the nation, distributed in the thirteen geographical districts, can prevent nine-tenths of the people from effecting innovations in their system of government."

3. The submission of amendments to Legislatures instead of to ratifying conventions has been criticised as undemocratic. It means that the ratification is to be effected by a relatively small number of persons who happen to be in the Legislature. And these legislators had been elected for other purposes than the issue involved in the constitutional amendment. This objection can be removed by providing for ratification through State conventions. When the Twenty-first amendment was submitted to the ratification of State conventions it was hoped that a new precedent had been set and that in future this democratic method would continue to be followed. But when Congress in 1947 proposed the Twenty-second amendment to limit the Presidential tenure, it reverted to the previous practice and submitted the amendment to State Legislatures for ratification.

4. Finally, there is no prescribed time limit for ratification unless specifically determined by a resolution of Congress as in the case of Eighteenth, Twentieth and Twenty-first amendments. Absence of such a prescription makes the issue a plaything of the States and indefinite delay takes away the purpose underlying the amendment. For example, the child labour amendment was proposed by Congress in 1924 without specifying the time limit for ratification. So far only twenty-eight States have ratified it, the last one being Kansas in 1937.<sup>26</sup> On one occasion Ohio ratified an amendment submitted 80 years earlier.<sup>27</sup> Connecticut, Georgia and Massachusetts voted in 1939 to ratify the first ten amendments—150 years after they had been submitted to them for their ratification, although these constituting the Bill Rights, have been operative in those as in other States since 1791. On the whole the time required for ratification has been short "varying between 3 years and 7 months for the Sixteenth amendment and only seven months for the Twelfth. The average for the twenty-five amendments is 21 months."<sup>28</sup>

Amendment is, in brief, an integral part of the Constitution and the twenty-five amendments made to date have an equal influence on the American political life as any other factor that has contributed to the development of the Constitution. All the amendments except the Twenty-second seem to have had a direct or indirect democratising tendency. The expansion of suffrage, the direct election of Senators, the protection of individual rights, the social and economic implications of the graduated income-tax and even the adjustments in Presidential elections and the dates of assuming office "have all made some contribution to the concep-

26. Burns and Peltason, *Government by the People*, p. 108. But the prohibition of child labour under the Fair Labour Standards Act, 1938 has substantially eliminated interest in the pending amendment.

27. Ferguson, J.H. and McHenry, D.E., *The American System of Government*, p. 70.

28. *Ibid.*

tion of a government resting on as broad a basis of popular sovereignty as possible.<sup>29</sup>

### FEDERAL CENTRALIZATION

**Growing needs of the State.** Centralization is the shifting of governing authority from lower or member units to higher units, with a tendency for power to grow at the top. Federal centralization is, accordingly, the tendency for the national government to assume influence or control over functions which formerly were considered under State jurisdiction. The Constitution limited the authority of the Central Government by prescribing that Congress might exercise only those powers expressly enumerated while the residuary powers were given to the States. This was specifically stated in the Tenth Amendment. But it was inevitable in the state of things in which United States began its career as a federation that the process of centralization should grow rapidly and the development in the expansion in the power and authority of the Federal Government had been continuous. There were three principal factors which have significantly contributed in increasing federal authority. The first is the part played by the Federal judiciary. Secondly, the express powers of Congress have considerably expanded and in effect added to by legislative, judicial and administrative interpretation. Finally, certain express powers of Congress, particularly the commerce clause, have been chiefly responsible for centralizing tendencies.

"A chief actor in the entrenchment of a strong federal government was John Marshall of Virginia, staunch Federalist and Chief Justice of the United States from 1801 to 1835."<sup>30</sup> His decision in the famous case of **Marbury v. Madison** gave the power to the courts to interpret the Constitution and declare acts of Congress unconstitutional, although the Constitution itself contained no express provision to this effect. In 1819, Marshall, again, in the case of **McCulloch v. Maryland** established the doctrine of federal supremacy over the States and enunciated the principle of implied powers<sup>31</sup> of Congress. Both these doctrines are landmarks which made federal centralization inevitable. But Marshall went even beyond the doctrine of implied powers by invoking the theory of resultant power. A resultant power is a power that is deducible from two or more express powers. "Thus where the doctrine of implied powers has a broadening effect, the concept of resultant powers has no limits at all except the judiciary itself exercises restraint."<sup>32</sup>

Marshall also declared in **McCulloch v. Maryland** that the United States was a union of the people and that the Central Government was both in theory and in fact a national government resting directly on

29. Havard, William C. *The Government and Politics of the United States*, p. 41.

30. Dimock, Marshall Edward, and Dimock, Gladys Ogden, *American Government in Action*, p. 70.

31. An implied power is a power that is deducible from an express power.

32. Dimock, M.E., and Dimock, G.O., *American Government in Action*, p. 134.

the people. He aimed to emphasise that the federal government was held to have its powers direct from the people and not by way of the States. The Constitution only established a framework in which a national government could and should develop. This point was further stressed by Justice Holmes in *Missouri v. Holland*. The words of the Constitution, he observed, "called into life being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation." The nation has grown and expanded and so have its needs. Since 1787 United States has grown from a poor, sparsely populated agricultural country to a rich, densely populated, and highly integrated industrial nation. Until recently United States had no positive foreign policy. Her isolated geographic position, a favourable balance of power in Europe, and no embroilments in Asia, enabled her to keep aloof and repose in her security. Today, it has all changed and United States takes on herself the burden of maintaining world peace. The obvious result is that all these changes involve a powerful impact on government. The altered social, economic, political and international conditions require the re-allocation of responsibilities and the over-all general tendency has been strengthening the national government at the expense of the States. With all these changes there has been simultaneous change in people's attitude towards the national government, irrespective of the party in power. Determined to make America great and strong, the platforms of both the major parties reflect the wishes of the people and their programmes call for greater activity by the Central Government helping its domain to grow.

In fact, from the beginning the logic of events have helped the national government's sphere to expand. But the real swing in the Federal-State relations begins from 1860, when the Federal government began to exercise what had hitherto been regarded as exclusively the reserved powers of the States. Many factors and various devices have contributed to that end and the national government is today doing more things, spending more money and coming much closer to the people than was contemplated by the framers of the Constitution. It engages in such activities as public health, agriculture, poor relief, highway construction, labour relations and many others and yet the formal constitutional powers of the national government remain the same today as they were in 1789.

An important way to bring about the present Federal-State inter-relations is the system of grants-in-aid, that is, the amount of funds flowing from the national to State treasuries. The Committee of the Council of State Governments defines federal grants-in-aid as "payment made by the national government to State and local governments, subject to certain conditions for the support of activities administered by the States and their sub-division." This aid is given under the power granted in the taxation clause<sup>33</sup> which authorises the use of Federal

33. Article I, Sec. 8, Clause I,

funds to provide for the "general welfare." The practice is based on the assumption that some activities conducted by the State and local governments, like housing, agriculture, education and health are matters of "general welfare" and consequently justify support by the Federal government. Then, the revenue resources of the Federal government are enormous as compared with those of the States. Grants-in-aid are the means by which the Federal Government provides aid in financing State functions which otherwise would have been either insufficiently performed or tardily performed. Finally, the modern idea of the functions of the States does not compartmentalise its role within geographic jurisdictions of administrations. All functions are national in scope and though there is virtue in their local administration, yet, they must be standardised at a high level. The Central Government, therefore, gives to the States financial aid up to a certain proportion of the total amount of expenditures on the beneficent departments, on the condition that the States and their local units administer the programme in accordance with rules laid down by Central Government.

The earliest grants made to States were in land or money without the imposition of conditions on their use. Today, the grants given are almost wholly conditional. This means that grants are made for specified purposes and subject to conditions stipulated by Congress or the administrative agency. It is a matter of common experience that one who gives money has a loud voice in calling the tune. Grants-in-aid are a prolific source of centralisation. They offer "a middle ground between direct federal assumption of certain State and local functions and their continuation under exclusive State and local financing, with haphazard coverage and diverse standards. It makes possible the achievement of national minimum standards, yet retains most of the benefits of administration close to the people."<sup>34</sup> Thus, by the grants-in-aid the federal government is able to promote programmes in schemes of social services which it could not have legally required short of a formal constitutional amendment.

One of the vexatious problems of the Confederation period was the trade barriers which the States had been erecting against one another. The Annapolis Conference of 1786, which led directly to the Constitutional Convention of the following year, was really summoned to relieve the embarrassing commercial situation so created. The Constitution, therefore, contains a clause conferring upon Congress the "power to regulate commerce with foreign nations and among the several States..."<sup>35</sup> In defending this power of Congress, Hamilton wrote in the *Federalist*<sup>36</sup> that "a unity of commercial as well as political interests, can only result from a unity of government." What Hamilton meant was that the political power "must be commensurate in its range with the matter which it is permitted to regulate."<sup>37</sup> Today, the problem of

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34. Ferguson, J.H., and McHenry, D.E., *The American System of Government*, p. 111.

35. Article I, Sec. VIII, Clause 3.

36. No. 11.

37. Gonsell, C.B., and Others, *Fundamentals of American System of Government*, p. 73.



inter-State and foreign commerce is not the same as it existed in 1787. It is now a gigantic problem and includes all commercial activities covering production, buying, selling, and transporting of goods. The power of Congress to regulate commerce should, accordingly, grow at equal pace with the growth of that commerce. The Supreme Court has consistently accepted this argument. Laws have, therefore, been enacted, upheld by the Supreme Court, and subsequently administered in such fashion as to indicate that apparently no appreciable area of economic life lies outside the sphere of federal intervention.

The power to regulate is the power to prescribe rules by which commerce is governed, that is, the right to foster, promote, protect and defend all commerce that affects more States than one. Since today there are few aspects of the United States economy that do not affect commerce in States more than one, and as the term commerce now includes the whole complex mass of transactions covered by the word "business," most business transactions are subject to national regulation. As such, significant aspects of employment as collective bargaining, hours of work, wages, working conditions, and the conduct of strikes in large sectors of American industry have been largely withdrawn from the jurisdiction of the States. Summing up the astounding expansion of federal government's powers under this heading, Ferguson and McHenry remark, "In the decade of 1930 to 1940 alone, Congress has validly employed the commerce power to regulate labour relations, control radio broadcasting, provide retirement system for railroad employees, fix minimum wages and maximum hours, regulate inter-State bus and truck lines, control small streams even of doubtful navigability, regulate stock exchanges, forbid transportation of strike breakers, punish extorters, kidnappers and vehicle thieves."<sup>38</sup> All these are federal encroachments on the constitutional powers of the States.

The Central Government is constitutionally responsible for protecting the country from external aggression and, when necessary, for waging war. The problem of common defence today is entirely different from what it was in 1787. No country can afford to wait for defence until war is declared. It must always be prepared to ward off the probabilities of war and to win, if it actually comes. It means the ability to man the industrial resources of the country and to apply nation's scientific knowledge to the task of defence. Everything from the physics course taught in schools to the conservation of national resources and the maintenance of economy affects the war-making potential. When the country is in the midst of hostilities it must gear up the entire life of the nation in a bid to win war. It means to conscript men, control all the channels of production, transportation, distribution, and in fact nearly every aspect of economic and social life in the country.

And when the war ceases the government must tackle problems of demobilization and post-war reconstruction. The change-over from war-time conditions to peace-time conditions must be smooth and it needs proper planning and co-ordination. It must also give aid to war veterans and to remove the maladjustments in the economy caused or aggravated by war. "In brief, the national government has the power to wage

38. *The American System of Government*, p. 122.



war and wage it successfully. In total war this means total power. As long as we live in a world where war is an ever-present possibility, the defence activities of the government will be many and varied, and they will impinge on all aspects of our lives."<sup>39</sup>

The people of the country at all stages of its development had always looked to the national government for solving their problems. Their desire to make the country big and prosperous necessitated "big business, big agriculture, big labour", and, "all add up to big government." The World Economic Depression of 'thirties of the present century considerably enhanced the prestige of the Central Government. There were over twelve million unemployed out of a total labour force of fifty million, and many more million were destitute. The resources of the States were absolutely inadequate to give relief on such a mass scale and simultaneously devise means to steer the country out of economic and financial difficulties. The national government came to the rescue of the people and the bold policy of Roosevelt led the country to the path of recovery.

Simultaneously to the increased confidence of the people in the national government there has been a decreasing tendency to holding on to the traditional ties of loyalty to the States. This is due partly to the development in the means of communications and transport and consequently greater mobility of the population. Secondly, most of the States had no independent existence prior to their becoming members of the Union. There developed, accordingly, no strong feelings of local pride and the original settlers long looked to the Central Government for their betterment. The States themselves, too, are in a way responsible for it. Even within the limits of their jurisdictions and their resources most States have not kept abreast and, thus, failed to instil local loyalty. Washington D.C. is "almost a model of perfection when compared to some State capitals which are graft-ridden, inefficient, and unable to provide the services that the people expect."

All this process of centralization raises a question as to whether the United States is any longer properly classified as a federation. "Constitutionally speaking," observes Griffith, "it would appear as though the Supreme Court would no longer impose any substantial barriers to national legislation in the economic sphere as constituting an invasion of the States' rights. As for all other areas of constitutionally permissive governmental action, it would appear to be open to the National Government to dictate or at least to dominate policy through the use of conditional subsidies."<sup>40</sup> He concludes that exclusive jurisdiction, even in the most traditional State and local functions, the smaller units may no longer have. But autonomy they still have in large measure. "Their vitality is still very great. The same social conscience that was among the factors causing the Supreme Court to let down the barriers or increased governmental activity nationally has its counterpart in its wide extension of the sphere of permissible State activity." Congress, too, in practice has shown very considerably restraint in curtailing State discretion through conditional grants-in-aid. Internal-level co-operation

39. *Government by the People*, op. cit., p. 142.

40. Griffith, Ernest, S., *The American System of Government*.

has considerably increased and regional administrative units, often federal in nature, are created with problems (chiefly river basin conservation and development) on wider than State lines. Loyalties to the States are still strong among all the fifty States. "The traditional advantages of federalism—experiment, differentiation, political education, diffusion of power—still have great opportunities for expression in the United States, to a degree very largely lost in Britain." But in terms of governmental functions, it cannot be denied that federal government has assumed inconceivable powers, and federalism, as practised in the United States, is today no obstacle in assuming functions which in the interest of national strength it is important to handle at the national level. This has necessitated, as many assert, revision in the theory of federalism.

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## CHAPTER III

# THE PRESIDENCY

### ORGANISATION, MODE OF ELECTION, AND POWERS

**The need of a single executive.** One of the grave weaknesses in the organisation of government under the Articles of Confederation was the absence of executive authority to carry into effect the determinations of Congress and the treaties of the United States. The imminent need with the framers of the Constitution at the Philadelphia Convention was to provide an executive department co-ordinate with the legislative department. It was, accordingly, declared that the executive power should be vested in an officer called the President of the United States.

Two basic considerations dominated the discussions relating to the Presidency. The first was, the need to have an "energetic yet dignified" executive capable to enforce national laws firmly, and one which should lend a note of stability to the new government. The other was, a fear that the people would be critical if the executive was made too strong. Many alternatives were suggested and discussed. Men, like James Wilson, wanted a strong executive independent of the legislature. It was argued, and Locke and Montesquieu were freely quoted in support of their advocacy, that if the Separation of Powers was desirable, it was logical to have three co-ordinate branches of government with no one predominant over the others. There were others who wished to have the "executive magistracy" appointed by Congress and subject to its mandate. Some delegates favoured one-man executive; others advocated for a plural executive composed of two or three men possessing equal power.

The final decision on the Presidency was a compromise. The President was to be single and independent of the legislature. Even after the single executive was agreed upon, many argued to associate with the President an executive council which should share with him the exercise of the executive power in certain important fields. The proposition was rejected and in its place the Senate was charged with acting as an executive Council to the President in negotiating treaties and the making of appointments. The Philadelphia Convention, in brief, finally decided to vest in the President considerable executive power, but he was hemmed in by the system of checks and balances. In this way, the framers of the Constitution accomplished both their objectives. By making him independent of the legislature and eligible for re-election, stability and continuity were assured. By sufficiently checking his powers the fears of the people of that time, who had a horror of unlimited power, were avoided. Sections 2 and 3 of Article II of the Constitution are devoted to enumeration of Presidential powers. But much of the President's authority has accrued to him by virtue of factors beyond the powers conferred upon him by the

Constitution. "No important institution," as Prof. Laski observes, "is ever that the law makes it merely. It accumulates about itself traditions, conventions, ways of behaviour, which, without ever attaining the status of formal law, are not less formidable in their influence than law itself could require." And the growth in power and prestige of the Presidency of the United States is a prominent example of the unforeseen possibilities of a written Constitution. If with the Founding Fathers the problem was how strong should the executive be, the same problem confronts the Americans even today. The people ask also: Why has the President become so powerful? Is this a dangerous tendency? We shall deal with this aspect at a later stage in this Chapter. But one thing is clear. No longer could a James Bryce write on the subject, "Why Great Men are not chosen Presidents."

**Qualifications and compensation.** The Constitution requires that the President shall be a natural born citizen, that he must have attained the age of thirty-five years, and must have been for fourteen years a resident of the United States. The question of residence was raised in connection with Herbert Hoover, who had lived abroad for many years, "but interpretation of this clause or requiring residence of 14 years continuously and immediately preceding election appears unwarranted."

The salary and other emoluments of the President are fixed by Congress. They cannot, however, be increased or diminished during his term of office. From 1909 to 1940, the salary of President was \$75,000 a year. In 1949, it was raised to \$100,000 plus \$50,000 tax-free expense allowance. In 1953, the tax-free features of the latter sum were eliminated and the salary became \$150,000 for all practical purposes. According to the Presidential Increase Act, 1969, the salary has been increased to \$200,000. This legislation was assented to by President Johnson on January 18, 1969; two days before he relinquished his office on January 20. President Richard M. Nixon is the recipient of the new increase in salary. Separate budgetary provisions are made for his travel, official entertaining, and White House, the official residence of the President. After relinquishing office, Ex-Presidents, under a Presidential Retirement Law of 1958, get a \$25,000 yearly annuity, free office space and up to \$65,000 a year for office staff. The President is immune from arrest for any offence and is not subject to the control of courts. No process can be issued against him or compel him to perform any act. He can be removed from office only by Impeachment but after removal he is liable to arrest and punishment according to law.

**Succession.** Article II, Section I, Clause 5, specifies that if the President vacates his office, the Vice-President succeeds and in case both

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1. *The American Presidency*, pp. 13-14.

2. Ferguson and McHenry, *The American System of Government*, op. cit., p. 301.

3. So far nine Vice-Presidents have succeeded to the Presidency and all because of the deaths of the Presidents. Harrison died in April, 1841, one month after his inauguration, and was succeeded by Taylor. General Zachary Taylor died in 1850 and was followed by Fillmore. Lincoln was succeeded by Andrew Johnson. President Garfield who was assassinated in 1881 left the

the offices of the President and Vice-President fall vacant, Congress determines by law "...what officer shall then act as President..." The Congressional Act of 1886 provided the following order of the heads of the Executive Departments in which they should succeed: State, Treasury, War, Justice, Post Office, Navy and Interior. The Twentieth Amendment provides that if no President is chosen by the beginning of the next term, or if the President-elect fails to qualify, the Vice-President-elect shall act as President until such time as President qualifies. If both the President-elect and the Vice-President-elect do not qualify, Congress may provide by law who shall act as President and such person acts accordingly, until a President or Vice-President shall have qualified.

In 1947, Congress passed a new Act providing that should both the President and Vice President become unable to discharge the powers and duties of the President, the succession should be: Speaker of the House of Representatives, President *pro tempore* (for the time being) of the Senate, and Heads of the Executive Departments as listed in the Act of 1886, except that the posts of Agriculture, Commerce and Labour were added to the end.

But what is to happen when there is no Vice-President, as there was none when Truman succeeded Roosevelt and Johnson succeeded Kennedy. The Twenty-fifth Amendment provides that whenever there is a vacancy in the office of the Vice-President, the President shall nominate a Vice-President who shall take office upon confirmation by a majority vote of both Houses of Congress.

The Twenty-fifth Amendment also sets out the way the office of the President is to be filled in the event of his incapacity. It is now provided that the Vice-President will take over the duties and responsibilities of the Presidency as Acting President:

1. Whenever the President transmits to the President pro-tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the duties of his office.

2. Whenever the Vice-President and a majority of either the principal officers of the Executive Departments or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office.

Thereafter, when the President transmits to the President pro-tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall assume the powers and duties of his office. But if the Vice-President and a majority of either the principal officers of the Executive Departments or such other body as Congress may by law provide, transmit within four days to the

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*(Continued from previous page)*

vacancy for Chester A. Arthur. McKinley's assassination in 1901 made room for Theodore Roosevelt. Harding's death in 1923 and Franklin D. Roosevelt's in 1945 left the Presidency for Calvin Coolidge and Harry S. Truman respectively. Johnson succeeded Kennedy on his assassination on November 22, 1963.

4. Adopted in 1933.



President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the duties of his office, the Congress shall then decide the issue. If the Congress determines by two-thirds majority of both Houses that the President is unable to discharge the powers and duties of his office, the Vice-President shall continue to discharge the same as Acting President, otherwise the President shall resume the powers and duties of his office.

**The Presidential term.** There was a pretty vexing discussion in the Philadelphia Convention regarding the term of office of the President. It was first agreed that the term should be seven years with provision against re-election. On reconsideration, however, it was ultimately fixed at four years and nothing was said with regard to reeligibility. When the Constitution simply stipulates that "he shall hold his office during the term of four years," the framers, no doubt, allowed the indefinite reeligibility of the President. The first President, Washington, set a two-term custom and it was followed for a century and a half, although two unsuccessful bids were made for a third term by Grant and Theodore Roosevelt. Grant failed to secure the party nomination whereas Theodore Roosevelt was defeated at the polls. When the question of possible third term for Calvin Coolidge first arose, the Senate passed a resolution declaring that any departure from the two-term tradition "would be unwise, unpatriotic, and fraught with peril to our free institutions."

Thus, the tradition seemed to have been fairly well established when in 1940, President Franklin D. Roosevelt decided to accept the Democratic nomination for the third successive term and his victory at the polls repealed the tradition. He was elected even for the fourth term in 1944, although he died soon after the inauguration.<sup>5</sup> But the breaking of the tradition by Franklin Roosevelt was not to become a precedent for indefinite re-elections. The Twenty-second Amendment, adopted in 1951, bars any person from being elected President more than twice.<sup>6</sup> Eisenhower was the first President barred from seeking a third term.

**Mode of election.** Perhaps no other question consumed so much time of the Philadelphia Convention as that relating to method of choosing the President. Various schemes were proposed. Some proposed a direct election by the people, and others urged election by Congress. The direct method of election by the people was ruled out of various considerations. The framers of the Constitution intended to establish a method which would, as Hamilton put it, "afford as little opportunity as possible to tumult and disorder," and would not "convulse the community with any extraordinary or violent movements." Against the me-

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5. Article II, Section 1.

6. Franklin Roosevelt died in April, 1945.

7. This was not applicable in the case of Harry Truman who was President when the Amendment was proposed. Truman, however, did not seek election for the third term. President Johnson was eligible for election again in 1968 as his elevation to the White House from the Vice-Presidency on the death of President Kennedy came more than half-way through the latter's own term of office, but he did not offer himself.

thod of election by Congress, it was urged that such a method was the negation of the unanimously accepted principle of the Separation of Powers and that it would make the President a mere creature or tool of that assembly.

The finally adopted plan was the expedient of indirect election. The Constitution provided that the President shall be chosen by electors appointed in each State in such manner as the Legislature of that State may direct, and each State to have as many electors as it has Senators and Representatives in Congress. The method, thus, adopted enabled the electors to meet in due course, each group in its own State, and give their votes in writing for two persons, of whom at least one must not be an inhabitant of the same State as elector. The ballots were then sealed and transmitted to the presiding officer of the Senate who counted them in the presence of both Houses and announced the result. The person receiving the highest number of votes was to be the President and the one obtaining next to him was to be the Vice-President, provided both had obtained a clear majority of all the electoral votes. In case no one obtained a majority of the electoral votes, the House of Representatives was to choose, voting by States and each State having one vote, from among the five highest. In the event of a tie in the electoral vote, it was provided that the issue would be settled in the same way.

The Founding Fathers had expected that the electors of the different States would be talented and leading citizens presumably well acquainted with the qualifications and merits of the candidates for Presidency. They had also hoped that the electors would meet at their respective State capitals, discuss among themselves the qualifications and merits of each candidate, and, then exercising their best judgment, cast their votes for the fittest. In the first two elections the quiet and dignified procedure contemplated by the framers functioned exactly as they had expected. At the third election (1796), however new shape of things began to emerge and long before the electors met, it was well known that most of the Presidential electors would vote for either John Adams or Thomas Jefferson, although in no case were any pledges exacted.

By this time two national parties, Republican and Federalists, had come into existence and when the Presidential election took place in 1800, the electors were party functionaries pledged to vote for the candidates of their own parties. The Republicans who elected a majority of their electors, had their candidates Jefferson for President and Aaron Burr for Vice-President. It so happened that Jefferson and Burr each had polled exactly seventy-three votes. According to the Constitution the election was thrown to the House of Representatives which was still controlled by the Federalists. It was with the greatest difficulty that Jefferson was elected, because some of the Federalists had toyed with the idea of making Burr President. However, this incident disclosed that the mode of election was defective and must be amended. Immediately thereafter the Twelfth amendment was adopted<sup>8</sup> to avoid the repetition of such an incident. Each voter now separately votes for the

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8. It was adopted in 1804.

President and the Vice-President and one who secures the majority of votes in each case stands elected. If no candidate for Presidency secures a majority of electoral votes the House of Representatives chooses from the three highest, and if no man receives a majority of the votes cast for Vice-President, the Senate chooses between the two men with the highest votes. A law of 1887 declares that each State shall determine the authenticity of its selection of electors.

Thus, the constitutional indirect method of President election has been upset by the growth of political parties and political practices. Although the language of the Constitution relating to Presidential election remains unchanged, but the business of nominating candidates for Presidency, carrying on campaigns, and casting ballots has become a popular operation of first rate national importance. "It is an operation of the first magnitude," graphically observes Charles Beard, "putting at stake the ambitions of individuals, the interests of classes, and the fortunes of the entire country. Nearly everybody in America takes part in it, from the President in White House, busy re-electing himself or helping in the selection of his successor,\* down to the bootblacks and garageboys, who discourse on the merits and demerits of candidates with as much assurance as on the outcome of latest prize fight. The performance involves endless discussions, public and private oratory, tumult and balloting, the election of thousands of delegates to grand national conventions, the concentration of opinion on a few ambitious leaders, a nation-wide propaganda as the sponsors for various aspirations exhibit the qualifications of their favourites to the multitude and the expenditure of millions of dollars on publications, meetings, "rounding up delegates" and "seeing that goods are delivered."

What happens now is that within the constitutional framework described above, a standardized State procedure has developed under which electors are elected on a general ticket basis. The list of electors is made up by the official party organisation in each State and this honour goes to distinguished citizens or to partisans willing to make liberal contribution to campaign funds. On the election day the voter does not directly vote for President and Vice-President, but for all the Presidential electors put up by his party in his State. Normally, the party which secures a plurality of the popular votes in any State is entitled to all the electoral ballots of the State for President and Vice-President. Not too many hours after the polls close, it is usually known who will

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9. Eisenhower not only picked up Nixon as his successor but also helped in his campaign for the Presidency.

10. Beard, Charles A., *American Government and Politics*, op. cit., p. 152.

The costs of Presidential electioneering are impossible to estimate exactly. But they are growing at an alarming rate. For what the figures are worth, the President's 1962 Commission estimated joint expenditure on Presidential and Vice-Presidential candidates by the national Committees of the two major parties as follows:

1952	\$11.6 million
1956	\$12.9 million
1960	\$20.0 million

The Commission estimated the total expenditure on all candidates in 1960 at \$165-\$175 millions.

be the next President of the United States. However, the voters' verdict in the election of the electors is the last act in the Presidential drama. Technically, the voters have only elected the electors and it is the job of the latter to elect the President.

Each of the States possesses as many Presidential electors as it has Senators and Representatives in Congress. The total number of electors constituting the electoral college is 538 including the District of Columbia, although it is not entitled to have any member in the Senate or the House of Representatives. A simple majority of 538 electoral vote total (270) is needed to win the Presidency. The electors automatically vote for their party's nominee and since no elector dare break faith with the party which nominated him, the work of the electoral college is a final formality before the successful candidate becomes the constitutionally elected President. In this way, "the deliberative, judicial, non-partisan system designed by the framers of the Constitution has been overthrown by political custom."<sup>11</sup>

If no candidate for the Presidency receives the necessary electoral majority on election day, the issue is thrown for decision into the House of Representatives. There each State, irrespective of its population and size, casts one vote for one of the three men who earlier had received the most electoral votes in the election. There had been only three occasions in the American history in 1800, 1824, and 1876 elections, when the State-wise voting in the House of Representatives had decided Presidential election.

The precise practice as it prevails today may, thus, be summed up: the first stage to the Presidency is the selection of delegates to the national convention of the political parties. In most states, delegates are selected by the parties at their State conventions. But in 15 States they are chosen by the voters at primary elections usually in March, April and May of the year preceding the Presidential election. The second stage comprises of holding the conventions when the Party selects its candidates for President and Vice-President, and adopts a programme of objectives. In the first week of September starts the election campaign and the candidates for Presidency and Vice-Presidency selected by their parties crisscross the nation, explaining their positions on key issues, domestic and international. By train, plane, bus and car they travel to nearly every state. They make hundreds of public appearances, and scores of speeches from platforms, over radio stations, and before television cameras. As many as 20 speeches may be given in a day. Then, comes the polling day for the election of the electors early in November (on Tuesday following the first Monday in November). National election day is a legal holiday in most States. In other States, employees are given time off so that they may vote conveniently. The polling stations open as early as 6 a.m. for 12 hours or more. The ballot is direct and secret. Over 64 million Americans voted in the election of 1964. In 1968, the popular votes cast were over 71 million. Individual votes are counted State by State and by custom the Presidential candidate receiving the most votes within a State is declared

11. *Ibid.*, p. 160.



the winner of all the State's electoral votes. The result is known in a few hours after the election is over. Once the outcome is clear it is customary for the defeated candidate to make a concession speech thanking his supporters for their efforts and congratulating his opponent on the victory.

The formal balloting for President takes place long after polling day through the machinery of the Electoral College. The practice now is for the Electors to vote for the candidate who carried their State in the November Presidential election. The Electoral College does not actually formally meet. The various State groups of electors assemble at their respective State capitals, as required by the national law of 1934, on the Monday following the second Wednesday in December after their November election to vote for President and Vice-President. The votes of the State electoral groups are sent to the President of the Senate, opened and counted before a joint session of Congress on January 6, and formal announcement of the result of the election made. The new President is inaugurated at noon on January 20 to run a four-year term of office.

**Removal from office.** Removal of a President is by Impeachment, and only for treason, bribery, or other high crimes and misdemeanours. No President has ever been so removed. President Johnson's Impeachment failed by one vote. The House of Representatives has the power to initiate Impeachment proceedings by a majority vote. The case is tried by the Senate, with the Chief Justice of the Supreme Court presiding. It requires two-thirds vote for conviction which makes the President liable to removal from office and disqualification. He is also liable to trial under ordinary judicial procedure.

### THE VICE-PRESIDENCY

The Vice-President must meet all the qualifications of President since he may succeed to the Presidency in the event of the President's death, resignation or removal. The framers of the Constitution might have omitted the Vice-Presidency but when the method of electing the President through the medium of Electoral College was decided upon, it became necessary to provide for an office the incumbent of which should succeed to the Presidency without delay. It would have been politically undesirable to leave the office of the President vacant until new electors could be chosen and they had chosen the President. But even when the office of the Vice-President had been created, the framers were not too enthusiastic about it. Benjamin Franklin took the position so slightly that he proposed to have its holder addressed as "His Superfluous Highness." This is, in fact, an apt description. John Adams the first to hold the office of Vice President, lamented to his wife: "My country has, in its wisdom, contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived." Thomas Jefferson, his successor, said something more apparent and meaningful than he realized when he described the "second office of government" as "honourable and easy," "the first" as "but a splendid misery." The rise of the political parties and the Jefferson-Burr episode, already referred to, and the consequent adoption of the Twelfth Amendment further contributed to the decline of the office,



It is an office of obscurity and glory and it is rarely occupied by a man for whom the majority of the people would have voted as a candidate for the Presidency. Even the potential importance of the Vice-President as 'heir-apparent to the President,' and nine had succeeded in 180 years, had not been sufficient to attract leading political figures to seek it as a matter of course. "Most men of ability and ambition," observes Clinton Rossiter, "would still rather be a leading Senator or Secretary of State than Vice-President, even after all the good and exciting times that Richard Nixon has had."<sup>12</sup> The Vice-Presidency is, therefore, an office unique in its functions or rather lack in its functions."<sup>13</sup> Woodrow Wilson described the position of the Vice-President as "one of anomalous insignificance and curious uncertainty." Franklin Roosevelt said that he would rather be a Professor of History than Vice-President. John Nance Garner, who was Roosevelt's running-mate in 1932 and 1936, described the post as "not worth a pitcher of warm spit." Thomas R. Marshall, who was Vice-President under Woodrow Wilson, described himself as "a man in a cataleptic fit," who "is conscious of all that goes on but has no part in it." Such are the dimensions of impotence of the Vice-Presidency "and impotence is the mark of a second-class office."<sup>14</sup>

**Election.** The Vice-President is elected in the same way as the President, and, according to the original provisions of the Constitution, the man getting the highest number of votes next to the President-elect was declared the Vice-President of the United States. The Twelfth Amendment has changed the method of election. The electors have now to vote separately for the President and the Vice-President. There are two considerations which govern the choice of a candidate for this office. First that he would not be from the same geographical district as the Presidential candidate.<sup>15</sup> For example, if the President is from the Middle West, the Vice-President will be from the East, and *vice versa*. Wilson was from New Jersey; Marshall from Indiana. Harding came from Ohio; Coolidge from Massachusetts. Franklin D. Roosevelt came from New York; Garner from Texas. Second by no means so strictly applied, that the candidates for the offices of President and Vice-President shall represent different wings of the party. In 1940, Henry Wallace of Iowa was united with Franklin Roosevelt, and Charles McNary of Oregon with Wendell Wilkie of New York and Indiana.<sup>16</sup>

**Functions and Duties of the Vice-President.** The framers of the Constitution thought desirable to give to the Vice-President something to do besides waiting the death, resignation, incapacity, or removal of his chief. The Constitution, accordingly, ordains that he should preside over the sessions of the Senate. Even as a presiding officer of the Senate his responsibilities of office are not great. The Senate is a body with customs and

12. Rossiter, Clinton, *The American Presidency*, p. 102.

13. Corwin, E.S., *The President: Office and Powers*, p. 73.

14. Rossiter, Clinton, *The American Presidency*, p. 102.

15. Amendment XII provides, "The Electors will meet in their respective States and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves...."

16. Beard, C.A., *American Government and Politics* (1947), p. 153.

traditions that the presiding officer must respect and accept. He votes only in case of a tie and in all other matters plays an impartial role. The Senate refused to accept. In fact, it refused to listen patiently to the proposals of Vice-President Dawes who tried to modernize the House. The result is that a "vigorous man gets restive under such conditions; his frustration is noticed and the prestige of office degenerates accordingly."

During recent years, however, the potentialities of the office have been demonstrated. President Harding associated Vice President Coolidge with Cabinet work. Franklin Roosevelt entrusted many responsibilities to Henry Wallace. Although less close to Roosevelt in outlook, Truman was able to help the President with Congressional problems. The Vice-President, as Rossiter says, "has experienced something of a renaissance" under Truman and Eisenhower. Aiken Parkley was probably the most distinguished man nominated for the office since John C. Calhoun and he proved extremely useful to Truman as a link to Congress. In 1949, the Vice-President was made by law a member of the National Security Council. Richard Nixon was the busiest and most useful Vice President within memory. Eisenhower believed that no President in the future can relegate the Vice-President to its former stand by status in the Government. He showed the path that the Vice-President must be a working member of the administration, fully informed in every detail. He deputed Nixon on an itinerary of Latin America, the Middle East countries, India and Pakistan, and the extent of the economic and military aid given by the United States to Pakistan was largely based upon his report. Nixon sat by invitation in the Cabinet and even presided over some Cabinet meetings in the absence of President Eisenhower. Vice-President Johnson in Kennedy administration continued in the Nixon pattern, with assignments overseas and Chairmanship of several inter-departmental Committees. Johnson was also Kennedy's Counsellor as a member in the "Ex Com" of the National Security Council, an *ad hoc* group of a dozen top administration officials who aided the President in working out his responses to the 1962 Cuban crisis.

The 'New look' which Eisenhower gave to the office was intended to give to the Vice-President training at least with the major national and international policies so that if he is compelled to take over the White House he may be able to steer through domestic problems and international complexities. Truman said, "It is a terrible handicap for a new President to step into office and be confronted with a whole series of critical decisions without adequate briefing." But the powers of the Vice-President are only potential; authority comes to him only with the demise or other incapacity of the President. So far as the office of the Vice-President itself is concerned, it is up to the each future President to make whatever can be made "of this, disappointing office." In all, the Vice-President has been chiefly useful to the President by relieving him of ceremonial duties and making goodwill journeys abroad.

**Succession to the Presidency.** Nine Vice-Presidents have so far succeeded to the Presidency and all in the event of death during their terms. The Constitution provides: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of his said office, the same shall devolve on the Vice-Presi-

dent. . . ."<sup>17</sup> This provision, it will be noticed, does not give the Vice-President any constitutional right to assume the title of the President. It simply provides that the duties and powers of the Presidential office shall devolve upon the Vice-President. But John Tyler, the first Vice-President to fill a vacancy, took the title of the President for all practical purposes and did not differentiate himself in position and powers from the regularly elected holders of the office. His example has since been followed. According to the Twenty-second Amendment a man succeeding to the Presidency and serving more than two years may be elected President in his own right only once."<sup>18</sup>

No case of Impeachment has made a vacancy for a Vice-President. Nor has there been an occasion on which "the inability to discharge the powers and duties" on the part of the President may have resulted into the moving up of the Vice-President. President Garfield was physically unable for more than two months in 1881 to perform any important official work. President Woodrow Wilson was similarly incapacitated for a considerably long time during the latter part of his second term. Even absence from the United States for months together, as it happened during the terms of office of Woodrow Wilson, Franklin Roosevelt and Harry Truman, did not constitute "inability to discharge the duties" of Presidency. This is for two reasons. In the first place, neither the Constitution, till the Twenty-fifth Amendment became law on February 10, 1967, nor the laws provided who was competent to determine and under what circumstances a President might be considered unable to discharge his duties. Secondly, there had been extreme reluctance on the part of even ailing Presidents and their families to surrender authority. The result was that the question of succession to Presidency, except in case of death, remained obscure.

The Twenty-fifth Amendment provides that the Vice-President would take over the duties and responsibilities of the Presidency: (1) if the President states in writing that he is unable to carry out his duties, and (2) if the Vice-President and a majority of the Heads of Executive Departments believe that there is Presidential disability and send to Congress a declaration to that effect. But it is only in his acting capacity that the Vice-President takes over the office of the President. When the President resumes office after the incapacity does not exist, he reverts to his original office of Vice-President. If, however, the Vice-President and a majority of the principal officers of the Executive Departments inform in writing to the President pro tempore of the Senate and the Speaker of the House of Representatives that the President was unable to discharge the duties of his office, Congress then decides whether the President was unable or not to discharge his duties. If it decided that incapacity still existed the Vice-President continues to remain the Acting-President otherwise the President shall resume the duties of his office.

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17. Article II, Section 1, Clause 5.

18. "No person shall be elected to the office of the President more than twice and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. . . ."

## THE POWERS AND DUTIES OF THE PRESIDENT

**The Sources of the President's Authority.** The powers and duties of the President are partly determined by the Constitution, partly by Acts of Congress and treaties, partly as a result of usages and precedents, and partly by judicial interpretations. Article II of the Constitution, which deals with the office of the President, is primarily devoted to the methods of election, his term, qualifications, compensation, and oath of office. The clauses relative to his powers and duties are few and brief. Some of them are specific, but many of them are general in terms and hence open to interpretation. But a great deal of responsibility which now rests on the shoulders of the President may be traced to laws which Congress has, from time to time, enacted. Congressional statutes authorise the President to determine policies which may have far-reaching effects, make important appointments, and to issue orders which for all practical purposes have the force of law. Congress may also bestow upon him the exercise of wide discretionary powers within the framework of the laws passed by it. In 1933, for example, Congress vested the President with the discretionary power to reduce the gold contents of the dollar, to issue additional paper money, and to purchase silver as a partial currency. In 1941, the Lend-Lease Act gave to the President enormous discretionary powers in the matter of furnishing ships, munitions and supplies to the countries fighting against the Axis powers. Similarly, the programmes of economic and military aids in different parts of the world give to the President a wide range of discretion in the allocation of money and direction of aid.

The Supreme Court, too, has defined Presidential powers; for example, it has held that the President's power to remove from office can be exercised without consulting the Senate.<sup>19</sup> Where the Constitution is silent, the judiciary has been called upon to articulate. The Constitution gives the President the power to pardon offenders, but it does not say whether he may pardon a man before he is convicted. The Supreme Court held that the President possesses such a power and may pardon the offender even before he is convicted.<sup>20</sup> In some cases the Supreme Court has refused to take jurisdiction on the ground that the matter involved political questions belonging to the sphere of the President or Congress as it was held in *Luther v. Borden* (1849). The Court affirmed that the constitutional guarantee to every State of a "republican form of government" presents a 'political question'. But more recently Justices "have appeared willing, even eager, to jump into what Mr. Justice Frankfurter aptly called 'the political thicket.'"<sup>21</sup>

Finally, some Presidential powers and duties have been acquired through custom and usage. For example, the President is accepted as the leader of his party and is conceded the right to be consulted on all matters affecting the interest of his party both inside and outside Congress. The custom of Senatorial courtesy has now developed into a

19. *Myers v. United States* (1926).

20. *Ex-parte Garland* (1886).

21. Irish, Marian D., and Prothro, James W., *The Politics of American Democracy*, p. 186.



well-recognised policy for purposes of political patronage. Washington assumed he was master of his own family (the Cabinet) and Congress eventually concurred. He also established himself as the sole vehicle of communication with foreign governments and in the "Whisky Rebellion" he established the responsibility of his office for suppression of domestic disorder. President Jackson is responsible for the exercise of veto power over legislation on policy grounds; previously it has been more or less assumed that the use of the veto was to be confined to questions of unconstitutionality.

**Extent of President's Power.** But the real extent of the powers of the President depends upon his own personality, the influence he wields, and the state of affairs under which the office is administered. In times of national emergencies the powers of the President may be so expanded as to be limited in effect only by the necessities of the national existence. The powers wielded by President Lincoln during the Civil War were so enormous that he was frequently referred to as a dictator.<sup>22</sup> Both Wilson and Franklin Roosevelt assumed vast and unprecedented powers.

Since many provisions of the Constitution relating to the powers of the President are general in terms, it all depends upon how the President takes a view of his responsibilities and duties as the chief executive. He may take a narrow view and may be satisfied with the bare duties of enforcing the Constitution and the law and conduct of routine administration. To put it bluntly one may, like President Coolidge, not strive to be "a great President." Some may take a broad view of his powers and responsibilities, as did Theodore Roosevelt, who asserted that it was the President's right "to do anything that the needs of the nation demand unless such action is forbidden by the Constitution or the laws." The famous Monroe doctrine laid down in 1823, the essentials of United States' foreign policy and it still continues to hold good.<sup>23</sup> In the early stages of the first World War President Woodrow Wilson so defined the American rights of commerce and travel that it dragged the country eventually into war. Immediately after his inauguration in 1933, President Franklin Roosevelt assumed leadership to steer the country out of the economic crisis through his policy of New Deal. Later, he so formulated his foreign policy towards the Axis powers that it involved the United States in actual hostilities. The role of the President is, therefore, affected by his personality and the times. The people and the times, the complicated and fast-moving stream of events of the twentieth century, need strong and decisive leaders to occupy the White House.

**Classification of Presidential powers.** The powers of the President may be divided broadly into: (1) those chiefly or exclusively executive in character; (2) those arising out of the legislative process; and (3) those

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22. Justifying the use of his executive prerogative in the absence of expressly granted authority, Lincoln declared, "No organic law can ever be framed with a provision specifically applicable to every question which may arise. The whole of the laws are being resisted and all will be destroyed if not protected....I am to sacrifice one law in order to save the rest....The Constitution is silent on the emergency."

23. President James Monroe in a message to Congress in 1823 laid down his foreign policy commonly known as the Monroe Doctrine.



which flow to him as a national leader. The executive powers of the President may further be divided under the following headings: (i) supervision over the administrative agencies of the federal government, (ii) enforcement of the laws, (iii) to make appointments and removals, (iv) granting of pardons, (v) to conduct diplomatic relations and negotiate treaties, (vi) to act as Commander-in-Chief of the armed forces of the United States, and (vii) to act in emergencies.

### EXECUTIVE POWERS

**The President as chief administrator.** The President assumes high technical responsibilities as head of the national administration. It is the duty of the President, as chief executive, to see that the Constitution, laws and treaties of the United States, and decisions rendered by the federal courts are duly enforced throughout the country. He may, accordingly, direct the heads of the departments and their subordinates in the discharge of the functions vested in them by the Acts of Congress. It is true that Congress has assumed the power of deciding the structure and extent of authority of administrative departments, but it does not detract the right of the President to control administration. There are some departments which are placed by law under his direct control. Moreover, the Constitution entrusts him with the duty of the faithful execution of the laws.<sup>24</sup> The Constitution also permits him to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." This provision when supplemented by the decision of the Supreme Court that the President is bound to see that an officer faithfully carries out the duties assigned to him by law, makes the legal position of the President supreme. Finally, the President has the power to remove the head of the Department who refuses to obey his orders. His authority to determine and direct, within the framework of law, the steps to be taken by that officer is clear and definite. "He is not likely," observes Charles Beard, "to quarrel with a Cabinet officer over details but when there is a serious conflict over important public policies, the President, if firm in his views, will prevail, and the officer will yield, resign, or be dismissed. Such a conflict occurred in the administration of President Coolidge in 1924 between the President and his Attorney-General, Harry M. Daugherty; and the Attorney-General was forced to resign under protest."<sup>25</sup>

Thus, upon the President rests the overwhelming responsibility for the administration of the national government. The simple provision of the Constitution which vests in him the duty of seeing that all the laws of the United States are properly executed carries "the awesome significance of this responsibility." The Report of the Hoover Commission on Organisation of the Executive Branch of the Government stated: "The critical state of world affairs requires the government of the United States to speak and act with unity of purpose, firmness, and restraint in dealing with other nations. It must act decisively to pre-

24. Article II, Section 2, Clause 1.

25. *American Government and Politics*, op. cit., p. 170.

serve its human and material resources. It must develop strong machinery for the national defence, while seeking to construct an enduring world peace. It cannot perform these tasks if its organisation for development and execution of policy is confused and disorderly, or if the Chief Executive is handicapped in providing firm direction to the departments and agencies.<sup>26</sup>

A century and a half ago, when Jefferson became President, the federal government employed 2,120 persons. Today, by latest count, the President heads a colossal establishment of over 2½ million federal civilian employees. These employees work in 2,117 component units of federal administration—in 2,117 departments, services, bureaus, commissions, boards, governmental corporations and other types of agencies. They are spread throughout the world and their wages alone amount to over \$10 billion a year. It is impossible for any President, whatever be the extent of his drive and however dynamic personality he may possess, to keep proper supervision over all the administrative agencies. And despite the immensity of the job, the President is only a part-time administrator. His other tasks demand most of his time, attention, and energy. It, therefore, necessitates some integrated system of organization which should facilitate the President for leadership and control.

This is provided, in the first place, by the Presidential Secretariat consisting of the President's Secretaries and the staff that functions under them. They make a total of over 250 employees in the White House Office. The Secretaries are an able core of attaches to aid him in keeping abreast of administrative work. A recent development is the authorization of administrative assistants to the President in addition to the executive Secretaries. The President's Committee on Administrative Management urged that the lack of staff assistants to the President be remedied by the appointment of six administrative assistants who "should be possessed of high competence, great physical vigour, and a passion for anonymity." The Administrative Reorganization Act of 1939 provided for six Administrative Assistants to the President. Their duties are not precisely described by law but they include: collecting information for the President on all matters of interest to him as Chief administrator and head of his party, smoothing out troubles in politics and administration; scrutinizing and reporting on appointments to offices and work done by the civil servants, keeping the President in touch with Congress and keeping a liaison between the President and Congress, and keeping the President informed about the flow of the public opinion, grievances and needs of the citizens and of States and local government with respect to the work of the federal agencies.

In addition to the three Secretaries and six administrative assistants, the President has his personal staff consisting of an assistant to the President, a special counsel to the President, an executive clerk, and Army, Navy and Air Force aides. Outside this inner circle are the heads of a number of staff agencies who advise the President on policy and "help him run the administrative leviathan." The most important

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26. *General Management of the Executive Branch*, p. 2 (1949).

of these is the Director of the Bureau of the Budget. Several other Presidential agencies have also vital functions especially in the making of economic and military policies. They are: the Council of Economic Advisers, the National Security Council, the Office of the Defence Mobilization, Board of Impartial Analysis, and Office of Personnel. The Executive office of the President has since been expanded to a personnel of some 1,200 Executive Secretaries, officials, assistants, clerks and other employees. Within this large group is the White House Secretariat.

**Power of law enforcement.** The Constitution commands the President to "take care that the laws be faithfully executed."<sup>27</sup> It also prescribes that the President must take an oath at the time of inauguration that "he will protect and defend the Constitution of the United States."<sup>28</sup> As law enforcement official for the nation, the President's responsibility is not limited to the execution of the specific provisions of Congressional statutes. It includes as well the duty of protecting the whole constitutional system of government, guarding it against attack from any source, and ensuring to all citizens protection against rebellion or other danger to the rights the Constitution guarantees to them. The law the President enforces embraces all phases of the Constitution as interpreted by the Courts. If the enforcement of laws encounters a violent resistance the President may use the armed forces of the nation to see that the laws are faithfully executed. President Eisenhower dispatched federal troops to Little Rock, Arkansas, on September 24, 1957, to enforce the Federal Court's ruling on desegregation. Addressing the American nation on the situation in Little Rock and justifying the presence of federal troops there, the President said, "When large gathering of obstructionist made it impossible for the decrees of the court to be carried out, both the law and national interest demanded that President take action." Five years later (September 1962) there occurred the greatest clash since the Civil War between the Federal Government and the State of Mississippi, where Governor Barnett defied a Federal Court injunction to admit a negro, James Meredith, to the hitherto all white University of Mississippi. Seven hundred Federal Marshals were sent to enforce the law against the State national guards who surrounded the University on the Governor's orders and even threatened to resist by force if the Federal Marshals brought Meredith to the University. President Kennedy thereupon ordered the mobilization of the Mississippi national guards thus placing it under the command of the Federal Government. Troops and military police were also sent and James Meredith was finally enrolled. In 1894, President Cleveland, despite the protests of the Governor of Illinois, sent soldiers to Chicago where a great railway strike, affecting the movement of commerce and mail, had taken place. President Wilson, too, resorted to the same action on the occasion of the labour dispute among the steel workers at Gary, Indiana. Even if the President apprehends that laws are not likely to be obeyed, or there is the possibility of their being obstructed, he may order out the troops. President Harding ordered the troops to stand by in 1922, when a strike threatened to tie up the railways. Troops were sent to take over the plant of the

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27. Article II, Section 3.

28. Article II, Section 1.

North American Airplane Corporation in 1944, when strikers refused to heed the repeated appeals of the President.

The extent of the President's authority as chief law-enforcement officer of the nation is nowhere better illustrated than in the Supreme Court's decision in *In re Neagle*, one of the most dramatic cases in the American Constitutional History. In 1890, the Attorney-General of the United States, under direction of the President but without any specific statutory authority, detailed United States Marshal Neagle to act as bodyguard of Justice Stephen J. Field of the Supreme Court, whose life had been threatened by a citizen of California. The Justice was attacked in a railroad restaurant when Neagle shot to death the assassin. Neagle was arrested and indicted for murder by the California authorities. Neagle sought a writ of habeas corpus to secure his release from California authorities, an action eventually appealed to the Supreme Court. His defence hinged upon finding legal authority for his special assignment, that is, the authority for the President's appointment of an agent without statutory authorization. The Supreme Court held that inasmuch as it is the duty of the President "to take care that the laws be faithfully executed" there was vested in the President authority for Neagle's assignment, although there was no specific statute of Congress allowing the President and the Attorney-General to direct the Marshal to protect Supreme Court Judges. The Court further declared that the President's duty was not confined "to the enforcement of the Acts of Congress or of treaties of the United States according to their express terms," but included "the rights and obligations growing out of the Constitution itself, our international relations and all the protection implied by the nature of the government under the Constitution."

Presidents before and after Neagle's time have not hesitated to use the immense power which the Constitution vests in them as such. But it does not mean that President's power is not without limit. It is true, that the Chief Executive may sometimes act, as President Washington did in sending troops (15,000 of them) in crushing the Whisky Rebellion of 1794; Lincoln took immediate action, with Congress not even in session, to move against 'treasonable individuals' who defied the power of the Union in southern States, or as is in the Neagle's case, without specific authorization from Congress. But he has no *carte blanche* to do so in all cases. The Supreme Court recently acted as a brake to slow down unlimited expansion in the powers of the President. In 1952, President Truman seized the nation's steel mills justifying his action on the grounds of the grave national emergency facing the nation if the strike should take place. The President was not supported in his action by authorization of Congress. The Supreme Court in *Youngstown Sheet and Tube Co. v. Sawyer*, found the President's action invalid. The majority of the Court held that the President had transcended his authority, for no support of the seizure order could be found in the Acts of Congress, in the President's power as Commander-in-Chief of the Armed Forces, or in the general constitutional grants of executive power to the President. The President, in this instance, was making basic law rather than executing it and the exercise of such a power he did not have under the doctrine of the Separation of Powers.



**The power of appointment.** The power to appoint is one of the most important and effective in the list of Presidential powers. It gives the President the means to command the allegiance of a huge number of federal officers and enables him to secure the active support of the members of Congress for his programme. The Constitution gives the President the power to nominate and by and with the advice and consent of the Senate to "appoint ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Thus, appointments to the federal services fall under two groups: officers whose appointment is entrusted by the Constitution or by an Act of Congress to the President and Senate, and "inferior officers" whose appointment is vested by Congress in the President alone, the courts of law, or the heads of departments.<sup>29</sup> There has never been made a logical line of division and distinction between the "superior" and "inferior" officers. In the first category, however, are included heads of departments, judges, diplomats, regulatory Commissioners, Marshals, and Collectors of Customs. Some bureau chiefs and virtually all subordinate employees fall under the second category.

Taken together, the officers belonging to superior category now number several thousand. In filling these posts the President and the Senate are subject to no restrictions, except in some cases when Congress by law may fix some qualifications as citizenship, professional qualifications, technical training, etc. The Tenure Office Act of 1820 fixed the tenure of great bulk of offices at four years, and even where the term is not prescribed by statute, the custom is to replace most of them at the expiration of four years. So in practice the four years' tenure is universal, except for federal judges, and each President during his term has at his disposal an enormous extent of patronage, subject to the approval of the Senate. During 1954 Eisenhower sent in 45,916 appointments to the Senate for confirmation. Not one of these was rejected. Of the total, 420,57 were military appointments, which are customarily automatically confirmed. Of the 3,859 civilian appointments, just half were postmasters.

There are some appointments which are the personal choices of the President and the usual practice for the Senate is to ratify them promptly and without objections even if the Senate is in the hands of the party in opposition to the President. It rarely interferes with the President's selection of his own Cabinet, that is, heads of Departments, ambassadors and Supreme Court Justices. The only two exceptions during the last forty years were Charles B. Warren nominated by President Coolidge as Attorney-General and rejected by the Senate, and its refusal to confirm Eisenhower's nominee for Secretary of Commerce, Lewis, L. Strauss, for

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29. The only appointments made by courts of law are: clerks, reporters, and other ministerial officers. There are, however, a large number of inferior officers in the various Departments who are appointed by the Heads of Departments.



political reasons.<sup>2</sup> The choice of the diplomatic representatives is also left largely to President's discretion, although Senate's rejection of Martin Van Burn as Minister to Britain will be remembered from the Jackson administration. On occasions, the President may be obliged to withdraw the diplomatic nomination on grounds of political expediency. In 1943, President Franklin Roosevelt nominated Edward J. Flynn to the post of ambassador to Austria. A storm in the Senate broke out and Flynn was attacked as a politician with a "clouded past and a man utterly unqualified for the position in question." President Roosevelt withdrew his name. Military and naval appointments, especially in times of crisis, are principally subject to Presidential determination. Finally, Supreme Court Justiceships are filled by the President and nearly always approved. The Senate, however, refused to approve President Hoover's appointment of Circuit Judge John J. Parker in 1930, largely because of labour and negro opposition. The Senate on April 8, 1970 rejected President Nixon's nomination of Harrold Carswell to the Supreme Court. In November 1969 Clement Haynsworth's nomination was rejected.

In all other instances Senate freely uses its power to ratify or reject the appointments as it sees fit. As a rule, the Senate usually gives its consent unless there are substantial reasons to reject. Much, however, depends upon its political complexion. If the majority of the Senators belong to the President's party, then, all Presidential appointments are usually confirmed, for it requires just a bare majority of the Senators present. Confirmation of appointments need not require a two-thirds vote as in the case of ratification of treaties.

A good many of the federal offices, specially those of a local nature, are subject to a custom called **senatorial courtesy**. This is an unwritten rule which requires that the President would confer with and secure the consent of the Senators of his party from the State in which appointment is made. If the President does not do so and insists on his own personal choice, the other Senators, acting under the rule of senatorial courtesy, will probably reject the nomination. One of the best examples of the operation of senatorial courtesy was the Floyd H. Robert case of 1938-39. President Roosevelt appointed Robert as Judge of the Federal District Court for Western Virginia. This appointment was objected to by both the Senators belonging to the State of Virginia, and the President's party. The President without heeding to their objections sent the name to the Senate for confirmation and the Senate rejected it. A similar conflict occurred in 1951 between President Truman and Senator Paul H. Douglas (Democrat) over two federal judgeships. When the President refused to accept the Senator's candidates, Douglas opposed the President's nominees and the Senate unanimously refused to confirm the President's nominees. In case the federal vacancies to be filled are located in a State which has no Senators of the President's party, the President has some discretion, but even here he is bound to consult party leaders in the region concerned.

The above statement of senatorial courtesy is not the actual practice. Ordinarily, the Senators do not wait to be consulted. They keep their eyes on the possible vacancies and send messages, through the

30. Altogether there had been eight such rejections.

President's liaison representative for Congressional affairs, requesting that certain of their followers be nominated to the positions. The President may attempt to inquire into the qualifications of the nominees of the Senators, but in many instances he simply endorses their desires. In fact, he has no time for all that.

Another class of officers subject to Presidential nomination are minor authorities like revenue officials, marshals and Federal Attorneys within Congressional districts. The custom is that the Representative, if he belongs to the President's party, names the person to be appointed for his district and the recommendation is always accepted unless for special reasons the President desires to make a "personal" appointment. If the Representative does not belong to the President's party, the patronage may go to the Senator if there is one of the President's political party. Extension of such a kind of patronage to the Representatives is of considerable utility for maintaining their political organisation.

Finally, are the great variety of federal appointments to minor offices which do not require confirmation of Senate at all. The power of all such appointments is vested by the Acts of Congress in the President alone or in the heads of various Departments and more than 95 per cent of federal appointments come under this category. By far the greater portion of them are now regarded as "classified services" and the appointment is made under civil service rules. Still, from 20 to 30 per cent are treated as patronage. When Congress carries the majority of the party to which the President belongs, and the relations between the two are harmonious, then, it is inclined to increase the proportion of officials whose appointment is vested in the President alone or in heads of Departments. But in times of conflict Congress exhibits its hostility. For example, in 1943, Congress was in "revolt" against President Roosevelt's domestic policy and it severely criticised some of the appointments made by him. The Senate went to such an extent as to actually pass a Bill providing that the selection of all officials, with certain exceptions, carrying a salary of \$4,100 a year or more, should be subject to the approval of the Senate. Such a threat is always 'a gun behind the door' which Congress may employ in controlling the exercise of the President's appointing power.

**The power to remove.** While the Constitution expressly authorises the President to appoint officers, with the consent of the Senate, it is completely silent on the question whether he may remove an officer, either with or without the consent of the Senate. The only provision in the Constitution in regard to removal is that by Impeachment. But this process of removal is cumbersome and unwieldy. Moreover, the resort to Impeachment to remove a person from a petty inferior office "would be," as Garner puts it, "very much like shooting birds with artillery intended for destroying battleships."<sup>31</sup>

The issue of dismissal assumed an important topic in the first session of Congress. There was difference of opinion as to whether that power lay with the President alone or he could do so with the consent of the Senate only, or whether the power lay with Congress to prescribe how removals might be made. It was finally decided that the President

31. *Government in the United States* (1930), p. 303.

might remove alone and there was no necessity of securing the consent of the Senate. This last interpretation has been the one accepted by the Supreme Court. In 1866, Congress passed the Tenure of Office Act forbidding the President to make removals except with the consent of the Senate. The Act reversed the custom which had been in practice for seventy-eight years and recognised the unlimited right of the President to remove officers securing the consent of the Senate. President Johnson violated this law regarding it unconstitutional and it was one of the chief causes of his Impeachment in 1868. The Act was, however, repealed in 1887.

In 1876, an Act of Congress was passed providing that certain classes of postmasters could not be removed from office except with the advice and consent of the Senate. The constitutionality of this Act was contested in the Supreme Court and it was decided in *Myres v. United States* that the statute was unconstitutional and that the power to remove was implied not only from the power to appoint, but also from the general authority of the Executive to see that the laws are executed faithfully.<sup>32</sup> But this decision was modified in 1935. The Supreme Court held in *Humphery's* case that a regulatory commission's powers are quasi-legislative and quasi-judicial in nature and that the President's removal authority could be limited in respect to officers exercising such powers.<sup>33</sup>

To conclude, as to purely administrative offices, for which the President bears constitutional responsibility for the faithful performance of the duties thereof, complete and independent removal power rests in the President to be exercised on any ground. But three classes of officers cannot be removed by the President. First, the judges of the Federal Courts who can be removed by Impeachment only. Second, members of the various Boards and Commissions with part legislative and part judicial powers who are protected by statutory limitations on the removal power. Third, all officers and employees who are appointed under Civil Service rules and may not be removed "except for such causes as will promote the efficiency of the service."

**The power of pardon.** The President's power to grant pardons and reprieves is judicial in nature, and it is exclusive. The Constitution authorises the President "to grant reprieves and pardons for offences against the United States except in cases of Impeachment." The President cannot, of course, pardon offences against State laws. Nor can he do it in regard to Impeachment offences. Otherwise, his authority of granting pardons is very wide and if he chooses he may grant a pardon before as well as after conviction. A reprieve postpones the execution of the penalty. A general pardon, granted to a large number of offenders, is called an amnesty and is granted by proclamation. A good example of amnesty is Jefferson's freeing all persons convicted under the Sedition Act of 1798. In 1865, Johnson issued a pro-

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32. Justices McReynolds, Brandeis and Holmes did not agree with the majority opinion. The majority opinion declaring the Act of 1876 unconstitutional and giving full power of removal to President was written by the former President, Chief Justice Taft.

33. *Humphery's Executor (Rathbun) v. United States* (1935).

clamation offering amnesty to all those who had borne arms against the United States, with certain exceptions and subject to certain conditions.

In actual practice, the President does not himself exercise his discretion in granting pardons. He has delegated his responsibility to a large extent to the Department of Justice and acts upon its recommendations, though he may take, as President Harding personally took, steps to arrange pardon for Deles.

**The military powers of the President.** The Constitution declares that the President shall be the Commander-in-Chief of the army and navy and the State militia when called into the service of the United States. Provisions of law empower the President to appoint military and naval officers with the advice and consent of the Senate and in time of war to dismiss them at will. The power to declare war belongs to Congress, though the President may through the conduct of the foreign affairs of the country bring about the situation when declaration of war may become a virtual necessity. President McKinley despatched a battleship to Havana, where it was blown up, and it helped precipitate war with Spain. In 1918, President Wilson sent American forces to Siberia to help Allied troops, when no state of war existed between the United States and Russia, fighting the Bolsheviks. Under Harding and Coolidge armed forces were employed to suppress "disorders" in certain Caribbean countries. The United States declared war against Germany in 1941, but the navy had begun to fire on submarines threatening the convoys to Britain long before that. In fact, "a shooting war" had started in 1940. President Truman had no authorization from Congress in 1950 when he ordered American forces to resist aggression in Korea.

When war actually comes, there is tremendous enhancement in President's power both as executive head and as Commander-in-Chief. As Commander-in-Chief, he decides where the troops are to be located and where the ships are to be stationed. It is upon his orders that troops are mobilised, the fleets assembled, and the militia of the States called out. He may direct the campaign and might if he wished, take command of military operations, though in practice he never does so. But all major decisions of strategy, and many of tactics as well, are his alone to make or to approve. Congress may still more add to his powers by enacting blanket legislation giving him discretionary authority in matters of vital importance in domestic and foreign affairs. In World War I President Wilson was given power to control production, purchase and sale of various kinds of material for war purposes and food supplies for troops. He had power to take factories, mines, pipe lines, etc. In fact, he had a vast reservoir of power in planning broad strategy, raising military and industrial man power, and mobilising the nation's economy for war. In World War II, Congress again delegated vast authority to the President and Roosevelt became a sort of constitutional dictator. Roosevelt used "Lincolnian as well as Wilsonian" precedents. In 1942, he demanded that Congress must repeal within a month a provision in the Price Control Act that protected the farmer and which it had refused to repeal earlier. This threat of Roosevelt was characterised as "a claim of power on the part of the President to suspend the Con-



stitution in a situation deemed by him to make such a step necessary."<sup>34</sup> Anyway, Roosevelt's threat succeeded and Congress "meekly" repealed the provision. The Supreme Court has expressed its unwillingness to pass judgment on war policies. In the West Coast—Japanese curfew regulations case in 1943, the Court declared, "The Constitution commits to the Executive and to Congress the exercise of the war power. . . . It has necessarily given them wide scope for the exercise of judgment and discretion. . . . It is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."<sup>35</sup> In the atomic age of absolute weapons in which we live the next war-time President will have the right, of which Lincoln spoke, to take "any measure which may best subdue the enemy."

Some forms of the Constitution, no doubt, are suspended during actual hostilities. But two basic constitutional rights do remain or have so far remained during all wars of the United States. One is the ultimate control of the President by the people, that is, Presidential elections must be held during peace and war. In the midst of Civil War Lincoln had to campaign for re-election and seek the verdict of the people. Roosevelt had twice to do the same in World War II. Similarly, despite certain restrictions, the basic liberties of free speech and free press "have survived the hard test of war."

The President may establish military government in conquered territory and in territory acquired through cession, subject to the Acts of Congress. After World War II, military governments were set up by the United States in Italy, Japan, and in certain sections of Korea, Germany and Austria. These military governments functioned until the signing of the peace treaty and were administered by a combination of American and local personnel.

At home, the President may use troops in executing federal laws against resistance that cannot be overcome by ordinary civil process. It is also his constitutional duty to guarantee to each State of the union a republican form of government, protect it against invasion, and to order out troops to suppress domestic violence upon the application of the State Legislature or Executive, as stated in an earlier part of this Chapter.

**The President and Foreign Affairs.** The Constitution does nowhere expressly declare that the President is the chief foreign policy maker and the accredited official spokesman of the country in international affairs. But constitutional interpretations and practices accept him so and ascribe such functions to him. In 1799, John Marshall spoke of the President as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." In the *Curtiss-Wright* case in 1936,<sup>36</sup> the Supreme Court referred to the "exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for

34. Corwin, E.S., *Total War and the Constitution*, p. 64.

35. *Hirabayashi v. United States* (1943).

36. *United States v. Curtiss-Wright Export Corp.* See also *University of Illinois v. United States*.



its exercise an act of Congress, but, which like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." According to the Constitution, the President appoints ambassadors, and other public ministers, by and with the advice and consent of the Senate, he negotiates and concludes treaties with foreign governments subject to the ratification of two-thirds majority of the Senate, and he receives ambassadors and other public ministers from foreign countries.

The power to appoint ambassadors and to receive them is important, because it involves the vital power of recognition. The President has complete discretion to recognise or not new governments or States. In 1902, Theodore Roosevelt recognised the new State of Panama a few hours after a revolt had been staged with the help of United States forces. President Wilson withheld recognition from Mexican Governments which he disapproved. President Hoover tried to restrain Japan from an aggressive policy by refusing to recognise its puppet Manchukuo. Roosevelt recognised the government of Soviet Russia in 1933.<sup>37</sup> But the Communist regime in China has not so far been recognised. Withdrawal of diplomatic agents or alterations in their assignments or instructions amounts to disapproval with the policy of the country concerned. For example, after the conquest of Ethiopia by Italy in 1936, the American legation in Addis Ababa was reduced to a consulate. A more extreme form of indicating displeasure with a country involves closing its consulates as in the case of Germany in 1940.

The President shares his treaty-making power with the Senate. But there are many other methods by which the President may by-pass the Senate. The first of this kind are the executive agreements. Executive agreements "are pledges of certain action by executives of two countries." A famous example is the "gentleman's agreement" between President Theodore Roosevelt and the Emperor of Japan under which Roosevelt agreed to exert his influence and persuade Congress to kill exclusion legislation and the Emperor of Japan agreed to prohibit the emigration of coolies. Some executive agreements have marked famous events: The Boxer Protocol of 1901, the Atlantic Charter, and the "destroyer bases" agreement. The Supreme Court has held that executive agreements within range of the President's power are to be the law of the land. "Such precedents," says E.S. Corwin, "make it difficult to state any limit to the power of the President and Congress, acting jointly, to implement effectively any foreign policy, upon which they agree, no matter how the recalcitrant third plus one man of the Senate may feel about the matter."<sup>38</sup>

In addition to the executive agreements, Congress may confer authority on the President to make agreements with other nations. The most notable example of such Congressional authority is the Reciprocal Trade Act of 1934, which authorised the President, for a period of three years, to enter into trade agreements with foreign countries, and lower tariff

37. Wilson, Harding, Coolidge and Hoover had refused to recognise the Russian Soviet Government from 1917 to 1933.

38. *The Constitution and What It Means Today*, p. 102.

rates by proclamation to the extent of fifty per cent without securing the ratification by the Senate. This Act was extended once in 1937 and again in 1940. In 1943 the term was extended for two years only.

The President may resort to secret diplomacy and consequently enter into secret agreements with foreign powers and commit himself to the pursuit of a specific policy. This he does by appointing personal emissaries of ambassadorial rank, without submitting their names to the Senate for confirmation as required in the case of more permanent appointees. President Theodore Roosevelt sent a high emissary to Tokyo in 1905, and came to terms with Japan on certain important matters in the Far East. On her part Japan undertook to respect American dominion in the Philippines. Roosevelt, on his part, committed his government to accept the establishment of Japanese sovereignty on Korea. He also impressed upon the Japanese Premier that the people of the United States were determined to see that peace is maintained in the Far East and that "whatever occasion arose, appropriate action of the government of the United States...for such a purpose could be counted upon by them quite as confidently as if the United States was under the treaty obligation." The whole negotiations were so quietly arranged that nothing was known about it in America until after the death of Theodore Roosevelt. Before and after United States entered into World War II, Franklin Roosevelt held top secret conferences with British Prime Minister and heads of other governments. Some of the agreements reached at these conferences were made public, others were kept secret. From Washington's Proclamation of neutrality in 1793 to Eisenhower's decision to go to the Summit in 1955, the President has repeatedly committed the nation to decisive attitudes and actions abroad, more than once, to war itself. Truman was not exaggerating much when he told an informal gathering of the Jewish War Veterans in 1948: "I make American Foreign Policy."

If properly evaluated the powers of the President as chief foreign policy maker and as Commander-in-Chief are, indeed, real, matter of fact, and colossal. And it is not surprising that the President's figure looms large in world politics. In an age of international complexities and mounting tension in which we live, every word uttered by the President of the United States is searched for meaning in foreign offices throughout the world. Whenever people talk in the capitals of their respective countries "what is the United States going to do?" they actually mean therefrom "what is the President going to do." As Commander-in-Chief he deploys America's armed forces abroad and occasionally supports policies with what is known as "Presidential war-making." It must, however, be noted that in spite of the immensity of his powers in the fields of foreign relations much depends upon the personality of the President, the state of conditions prevailing in the country and his ability to persuade Congress to approve or at least finance his programme. The President has, no doubt, the authority and capacity to act even independently of Congress, but he cannot act beyond Congress. Congress provides money and unless it provides what the President asks for, no President can succeed in his efforts. Checks and balances operate in foreign policy-making and cannot be ignored.

**The President and Emergencies.** Emergencies arise in the life of

every nation and it is the fundamental right of every State to meet them and preserve its existence. Emergencies in the past concerned with the security of the State and martial law had long been justified as an emergency power to be exercised at the time of great stress to restore law and order and ensure the security of the State. But during the last two decades or so, emergencies have been used as a reason for the exercise of other governmental powers as well, chiefly in order to combat economic emergencies that seemed to threaten the life of the nation. "In recent years," writes Gosnell, "crisis has followed crisis, emergencies have appeared to create new emergencies. One wonders if the United States will ever return to what was formally considered normal times."<sup>39</sup> An associated cause of the growth of Presidency, according to Griffiths is the shattering series of emergencies, both foreign and domestic that has been America's lot during the past century. Rossiter makes us to accept an axiom of Political Science that great emergencies in the life of a constitutional State "bring an increase in executive power and prestige, always at least temporarily, more often than not permanently."<sup>40</sup> He cites the examples of Lincoln, Wilson and Franklin Roosevelt. "Each of these men left the Presidency a stronger instrument, an office with more customary and statutory powers, than it had been before the crisis."<sup>41</sup>

The Constitution of the United States does not specifically provide for any kind of emergency. The Supreme Court, too, has held that "emergency does not create power"; nor does it increase power already given in the Constitution.<sup>42</sup> The exercise of the emergency powers by the President is based either on his military power, his responsibility to see that the laws are faithfully executed or an emergency power delegated to him by Congress. In times of military emergency the President has always resorted to extraordinary means. But, it was not until 1933, that the President first made use of emergency powers to meet an economic crisis and since then Presidents have issued proclamations declaring both "limited" and "unlimited" national emergencies.

The laws passed by Congress are not uniform concerning actions which may be taken in case of emergencies. Under a few such laws the President may act only after Congress itself has declared that an emergency exists. But ordinarily Congress authorises the President himself to determine whether there is an emergency. "The use of emergency powers is both salutary and dangerous. Properly used they are restorative; improperly used, they may become a prelude to dictatorship."

But such a contingency cannot happen in the United States. The system of checks and balances limits the emergency powers of the President. As said earlier the Supreme Court, in *Youngstown Sheet and Tube Co. v. Sawyer* (1952), refused to uphold President Truman when he issued an order directing the Secretary of Commerce to take possession of and operate most of the nation's steel mills. The President's justification for his action was that to avert national catastrophe it was

39. *Fundamentals of American National Government*, op. cit., p. 285.

40. Rossiter, Clinton, *American Presidency*, p. 65.

41. *Ibid.*

42. *Home Building and Loan Association v. Blaisdell* (1934).

necessary. The Supreme Court declared that there was no source of authority for the President's action either in the Constitution or in any Act of Congress. It was not even a valid exercise of the military power of President, for, according to Justice Black, the Commander-in-Chief does not have the power "to take possession of private property in order to keep labour disputes from stopping production. This is a job for the nation's law-making, not for its military authorities....The Constitution does not subject this law-making power of Congress to Presidential or military supervision or control."

From the decision in the *Youngstown Sheet and Tube Co. v. Sawyer* following inferences may be drawn when the President may act without the authorization of law: (1) There must be a real emergency; (2) it must be of a type for which Congress has not already legislated; (3) and it must be one which has arisen suddenly not affording sufficient time for action by Congress. These are valid limitations to the exercise of emergency powers of the President, yet the President may still act in time of emergency. There may be times when these limits are obscure. Justice Clark, agreeing with the majority decision in the case cited above, declared, "In my view....the Constitution does grant to the President exclusive authority in times of grave and imperative emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself." This is "but a substantiation of the doctrine," says Gosnell, "that when emergency power is used properly, it is restorative in nature."

So long as America held relatively aloof from the world, cognisance of national emergencies could be taken alone. Now America has assumed for itself the status of a major world power and it has upset the old balance of the nineteenth century completely and finally. Woodrow Wilson wrote, in Theodore Roosevelt's last year in office, "The President can never again be the mere domestic figure he has been throughout so large a part in our history. The nation has risen to the first rank in power and resources. The other nations of the world look askance upon her, half in envy, half in fear, and wonder with a deep anxiety what she will do with her vast strength....our President must always, henceforth, be one of the great powers of the world, whether he acts greatly or wisely or not....We can never hide our present President again as a mere domestic officer....He must stand always at the front of our affairs, and the office will be as big and influential as the man who occupies it." Rossiter maintains that it may be taken as an axiom of Political Science that the more deeply a nation becomes involved in the affairs of other nations, the more powerful becomes its executive branch. "The authority of the President", he says, "has been permanently inflated by our entrance into world politics and our decision to be armed against threats of aggression, and as the world grows smaller, he will grow bigger."<sup>43</sup>

### LEGISLATIVE POWERS

The Presidential system of government, as explained earlier, sepa-

43. Rossiter, Clinton, *The American Presidency*, p. 64.

rates the Executive and Legislative branches, assigning to each a major role in the government. No machinery is provided for integrating the two. But while the chief duty of the President is to execute the laws, he is at the same time given a share in their making. Rossiter characterizes the President as the Chief Legislator, though it appears to be an extravagant title. He says, "Congress still has its strongmen, but the complexity of the problems it is asked to solve by a people who assume that all problems are solvable has made external leadership a requisite of effective operation. The President alone is in a political, constitutional, and practical position to provide such leadership, and he is therefore expected, within the limits of constitutional and political propriety, to guide Congress in much of its law-making activity." President's share in law-making is both positive and negative.

**Presidential Messages.** The Constitution ordains that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may on extraordinary occasions convene both Houses or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. . . ." The Constitution in the presence of this specific provision contemplates Presidential leadership in matters of legislation and, indeed, as Charles Beard says, "it is not too much to say that the fame of most Presidents rests upon their success in writing policies into law rather than upon their achievement as mere administrators."<sup>44</sup> Presidents who successfully directed Congress in policy-making are Jackson, Lincoln, Theodore Roosevelt, Wilson, and Franklin Roosevelt. The nation had rated them "great" Presidents.

The information required to be furnished is contained in an annual message (State of the Union message) communicated at the beginning of each session, and in special messages communicated from time to time during the session. The Presidential message may be delivered orally in the presence of both Houses, or sent to them in a document. The annual message is major in significance and may roughly be compared to the Speech from the Throne in England. Washington and Adams came in person to Congress to deliver information and make recommendations. Jefferson adopted the practice of communicating what he had to say in the form of a written message. This was the rule for 113 years, when in 1913, President Wilson returned to Washington's custom and began delivering his messages to Congress personally. While reviving the earlier precedent Woodrow Wilson said, "the President of the United States is a person not a mere department of the government hailing Congress from some isolated island of jealous power, sending messages, not speaking naturally and with his own voice; he is a human being trying to co-operate with other human beings in a common service."

For a time Wilson's successors followed in his footsteps. President

44. *Ibid.*, p. 19.

45. Article II, Section 3.

46. *American Government and Politics*, *op. cit.*, p. 185.



Hoover read his first message to the general public over the radio as well to Congress, but subsequently he resumed the old practice of sending written messages. Franklin D. Roosevelt restored the practice of reading personally the messages as a means of drawing the attention of the whole nation to his programme—with the invaluable help of radio and camera. This was followed at short intervals by a succession of special messages, each dealing with a particular problem and outlining in some detail the administration's proposed measure for dealing with it.

The annual message contains a review of the activities of government during the preceding year, a declaration of party policies, and recommendations for such legislation as the President deems the interests of the country require. Sometimes the message may contain an important announcement, warning some other country against pursuing a certain course of action. It may also contain a momentous statement of principles as the Monroe Doctrine incorporated in President Monroe's message of December 1823 or Roosevelt's four freedoms which summarised objectives of American foreign policy in 1941. In 1954, session of the Congress President Eisenhower presented some sixty-five proposals for new legislation in his opening address and seven supplementary later messages, plus the budget message and the annual economic report.

Less obvious, but equally important, are the frequent written messages sent from the White House to Congress on a vast scale of public problems. These messages are read by a Clerk, often indistinctly, and printed in the Congressional Record. They indicate the needs of the government and the necessity for an appropriate legislation and, thus, is a gesture to friendly legislators to the President to initiate the required measures. Often, these messages are accompanied by detailed drafts of legislation and the friendly legislators take them up as they are.

The consideration which the Presidential message receives at the hands of Congress depends upon the influence which the President wields with the two Houses. If he belongs to a different political party from that which is in control of Congress, or if for other reasons Congress is out of sympathy with his policies, his recommendations receive very little consideration. Franklin Roosevelt assumed unprecedented leadership in legislation and every important measure enacted by Congress between 1933 and 1943 either emanated from the Executive Department or was sponsored by the President. But the Congressional election of 1942 made a sharp change in the attitude of Congress with a reduced Democratic majority and a general disapproval of his domestic policy. The new Congress struck down one after another measures sponsored or favoured by President Roosevelt. All the same, aside from the impact of the Presidential personality, the oral delivery of the messages gives greater public emphasis to executive recommendations than is possible in a written message. The attendant publicity is frequently a factor in mobilizing public opinion in support of Presidential proposals. If, in addition, they receive popular approval, the Presidential prestige is enhanced considerably. In summing up the legislative powers of the President, Rossiter says, "The President who will not give his best thoughts to guiding Congress, more so the President who is

temperamentally or politically unfitted 'to get along with Congress' is now rightly considered a national liability."

**Power to call extraordinary sessions.** The President has power to call extraordinary sessions of Congress for the consideration of special matters of an urgent character. The President cannot, of course, compel Congress to adopt his recommendations at a special session any more than at a regular session but "he can some time hasten action and if he is backed by a strong public opinion he may be able to accomplish even more." In earlier days when the second regular session of every Congress ended on March 4, with the next regular session not commencing until after the following December, special sessions were fairly numerous to deal with extraordinary situations especially in years like 1909, 1913, 1921, 1929 and 1933. Under the new calendar introduced by the Twentieth Amendment the need for special sessions is less, because the intervals between regular sessions are now shorter and the new President after his inauguration finds a new Congress already in session." In 1939, a special session was necessitated by the outbreak of War in 1939. Since 1939, there had been only one occasion when President Truman called "a Congress back to Washington after it had gone home without expectation of returning."

The President is also given the power to adjourn Congress when there is disagreement between the House of Representatives and the Senate as to time of adjournment. But this power has never been exercised, for Congress has always been able to agree on this subject.

**The Budget.** A sound, complete, effective and practical budget system was inaugurated in 1921 under the Budget and Accounting Act. Before there was an Executive office to enable the President to discharge the responsibilities of a Manager with regard to the expenditure of the administrative agencies. Each Department of Government submitted and defended its budget directly to Congress and the President did not review the financial demands of Departments and independent agencies. The Budget and Accounting Act, 1921 vests in the President the sole responsibility for requesting the grant of funds by Congress and empowers him to assemble, correlate, revise, reduce, or increase the estimates of the several Departments and establishments. He is required to submit to Congress a complete statement—Budget—of estimated revenues and expenditures and activities of the government as recommended programme. Budget is, thus, a detailed statement of policy objectives with means of achieving them for the guidance of Congress.

The Act of 1921 created the Budget Bureau as the organ for performing the work required of the President. It is empowered to supervise the spending activities of the various agencies and to advise the President on steps to be taken to introduce greater economy and efficiency in the administrative services. The Director of the Budget, who is head

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47. The Amendment was adopted on February 6, 1933. Section 1 reads. "The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January...." Section 2 provides "The Congress shall assemble, at least, once in every year, and such meeting shall begin at noon on the 3rd day of January unless they shall by law appoint a different day."

of the Bureau, is appointed by the President and acts directly and solely under the President. Since 1939, the Bureau has been located in the Executive Office of the President and has become the President's largest and most valuable staff agency. The Act also created the independent General Accounting Office, headed by the Comptroller General. "In taking the initiative for transferring the Bureau of Budget to the Executive office of the President, providing high level advisers within the White House Office and creating an executive planning organization, Roosevelt made it possible for a President to come closer to fulfilling the charges of the office than would have been conceivable before these steps were taken."<sup>48</sup>

**Power to issue ordinances.** Under the legislative functions of the President may be included what is known as the ordinance power, that is, the power to issue certain orders and regulations having the force of law. The issuing of ordinances or "executive orders," as it is sometimes called, has now become such an important phase of the President's legislative powers that in 1935 Congress passed a law.<sup>49</sup> requiring that all executive orders, decrees or proclamations having general applicability and legal effect must be published in the **Federal Register**, which is issued daily.

Some of these regulations are issued by the President and other administrators under express authority conferred upon them by Acts of Congress; others are issued as a result of the necessity of prescribing means for carrying into effect the laws of Congress and the treaties; while still others are issued in pursuance of the constitutional powers of the President, and this he does as Commander-in-Chief of the armed forces. It has now become a normal practice with Congress to pass laws in general terms leaving discretionary authority with the President or the executive Departments to fill in the gaps and this is tantamount to legislating in fact. The National Recovery Act, 1933, authorised "the President to organize and regulate the industries of the United States to create new agencies, to make regulations for them, to delegate functions for subordinates, and to do other things deemed necessary to bring about economic prosperity." The Trade Agreement of 1934 empowered the President to make the trade agreements with foreign nations and lower the existing tariff rates by 50 per cent. And even more radical kind of delegation was contained in the Re-organisation Act of 1939. Franklin Roosevelt, in fact, broke all records. Within a short time after his inauguration he prevailed upon Congress to delegate large powers to him and, thus, started an era of executive orders. Senator Herink Shipstead compiled the statistics and figured that President Roosevelt had issued 3,073 executive orders prior to 1944. During the same period 4,553 laws were passed by Congress.

The Congressional delegation of discretionary authority to the chief executive has been a subject of deep controversy and described by many as a violation of the theory of Separation of Powers and an inroad on

48. Harvard, William C., *The Government and Politics of the United States*, pp. 96-97.

49. The Federal Register Act.

the legislative competence of Congress. The Supreme Court has established the general rule which requires that Congress should set standards and enunciate the policy under which the ordinance power is to be exercised by President or his subordinates. In the National Recovery Act case, for example, the Court found that Congress had given the President power without the required constitutional standard of policy.

**The Veto Power.** Finally, the President is given an important share in legislation through his veto power. The Constitution requires that all Bills and resolutions, except proposed constitutional amendments, must be submitted to the President before becoming law. If he approves, he appends his signatures thereto and is promulgated as law. If he disapproves, he returns it to the House in which it originated with his objections, within ten days. Congress, by a two-thirds vote in each Chamber, may then pass it over his veto. If the President fails to sign or veto the Bill within ten days, excluding Sundays, it becomes law without his signatures. If Congress adjourns within ten days after the President receives the Bill and he takes no action, the Bill is automatically killed. This is known as the **pocket veto** and it is absolute. Towards the end of a session numerous Bills and resolutions are passed by Congress in order to clear up its accumulated business. A considerable number of the last-minute Bills, to which the President may be opposed or for which he does not want to take responsibility, thus, fail to become law as a result of the President. Presidents have used the **pocket veto** rather generously.

The veto power has been used more vigorously during recent times than formerly. Eight Presidents, John Adams, Jefferson, J.Q. Adams, Van Buren, W.H. Harrison, Taylor, Fillmore and Garfield, did not veto any Bill. The first six Presidents vetoed only three Bills. But in contrast to this Franklin D. Roosevelt alone vetoed 631 Bills (9 were overridden). Truman vetoed 251 Bills (12 overridden) and Eisenhower 86. Both Franklin D. Roosevelt (1944) and Harry Truman (1948) ventured into new territory when they vetoed tax Bills, though both were overridden by Congress.

Washington and other early Presidents vetoed only those Bills which they regarded unconstitutional. Jackson was the first President to use this power to safeguard the Executive branch of government against the encroachments of the Legislature. Now Presidents veto Bills which they regard "as inexpedient, contrary to public policy, or for any other reason that is considered compelling." Eisenhower vetoed the first Farm Bill to come to him in 1956, on the ground that it was "bad legislation."

## THE PRESIDENT AS A LEADER

**Party Leader.** The President combines in his person the two offices of King and Prime Minister, or as Theodore Roosevelt said, "A President has a great chance; his position is almost that of a King and Prime Minister rolled into one." On the one hand he is party leader, the spokesman and representative of the popular majority "more or less organised in the party that he heads." Originally, the chief executive was not a party man and Washington thought himself identified with no party.



But when political parties had become definitely established, we have it from Jefferson's time that Presidents began to be elected as party men and party leadership became as truly a function of the President as of the British Prime Minister. And today his position as a political leader of the party is as much a source of his power as the authority which the Constitution confers upon him. Chosen as a party man to head a government operated under a party system, the President surrounds himself with advisers of his own faith, consults usually with men belonging to his party in Congress for appointments, confers with his own men in the party in framing policy, and he uses his power as chief legislator to push through the party's programme to a crowning victory. Sometimes it troubles good Americans to watch their dignified chief of the State deeply submerged in party politics, which torment Washington's spirit. "Yet if he is to persuade Congress, if he is to achieve a loyal and cohesive administration, if he is to be elected in the first place (and re-elected in the second), he must put his hand firmly to the plow (plough) of politics."

**The Voice of the People.** At the same time, the President is the voice of the people; the leading formulator and expounder of public opinion in the United States. While he acts as political leader of some, he serves as moral spokesman for all. Woodrow Wilson, well before he could become the President, explained the essence of this role: "He (President) is the only national voice in affairs. Let him once win the administration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest for action so much as when its President is of such insight and calibre." The President is the head of the State and the personal spokesman of the people, even of those who voted against him and who still oppose him. Former President Truman in a TV-radio interview with Edward R. Munrow in 1958, graphically described the President as "lobbyist for all the people."

As an administrator the President must faithfully administer the laws, no matter whether these laws were passed by Democratic or Republican majorities in Congress. As Commander-in-Chief, he represents the whole nation. He does not direct war for the benefit of any single party or any class of people. He, indeed, acts for all the people. The rank and file of the people identify the President with the federal government, and even with the American way of life. The White House is one of the few national sacred buildings. The President embodies the nation and as well leads it. The people naturally look to him for guidance in all sort of matters. It is he who labours to make the United States a better and prosperous place to live in. Even in democracy the people need a leader. "They need some one who will personalise government and authority, who will simplify politics, who will symbolise the protective role of the State, who will seem to be concerned with them." The eyes of the whole nation are, in fact, riveted towards the first citizen. There is a corps of astute journalists in Washington who



shadow the President wherever he goes. They are always left to catch even the most trivial phrase that falls from his lip at press conferences, at luncheon chats, or off-hand and spread it to reflect throughout the length and breadth of the country. His messages to Congress, State of the Union surrs the country and it is the one great public document which is most widely read and discussed. The President, wrote Woodrow Wilson just before his first inauguration "is expected by the Nation to be leader of his party as well as the Chief Executive Officer of the Government, and the country will take no excuses from him. He must play the part and play it successfully or lose the country's confidence. He must be Prime Minister, as much concerned with the guidance of legislation as with the just and orderly execution of law, and he is the spokesman of the Nation in everything, even in the most momentous and most delicate dealings of the Government with foreign nations."

**Head of the State.** In an essay on British Government, Ernest Barker has described the Monarch as "a symbol of unity, a magnet of loyalty, and a centre of ceremony." The President as Head of the State serves the American people in the same capacity. Apart from the Chief Executive, the Constitution-makers had expected him to perform, like the Monarch, what Bagehot called, the "dignified functions." Today, the "dignified" functions of the President surpass the expectations of the Founding Fathers. "Throwing out the ball at the first base ball game, lighting the White House Christmas tree, sponsoring Easter egg rolling on the White House lawn, receiving monarchs and delegations of almost reverential school children, the President is a dignified embodiment of the nation in a nation where official dignity is scarce and the supply normally exceeds the demand." The American people need such a symbol and it has been useful "as a cement of national feeling." This symbolic character of the office of the President has strengthened its practical powers.

Speaking of the President's powers in general, Justice William O. Douglas of the Supreme Court said in a recent opinion, "the great office of President is not a weak and powerless one. The President represents the people and is their spokesman in domestic and foreign affairs. The office is respected more than any other in the land. It gives a position of leadership that is unique. The power to formulate policies and mould opinion inheres in the Presidency and conditions our national life." Professor Laski simply epitomises the whole truth when he says, "The President of the United States is both more or less than a King; he is also both more or less than a Prime Minister. The more carefully his office is studied, the more does its unique character appear." His military role, his ceremonial functions, and his national responsibilities combine to make him a powerful chief of the State representing the whole nation.

**Presidential power: Peril or Promise?** The problem of the powers of the President has echoed and re-echoed throughout the history of American nation. Writing about President Andrew Jackson, Henry Clay

50. Barker, E. *Essays on Government*, p. 6.

51. Brogan, D.W., *An Introduction to American Politics*, op. cit., p. 273.

said, "we are in the midst of a revolution hitherto bloodless, but rapidly leading towards a change of the pure republican character of the government and to the concentration of all power in the hands of one man" The problem has become more critical in the present century. This is largely because of the two major evils of war and depression. The government has had to fight "hot wars" and wage "cold wars," prevent periodic trade and financial crises and to create conditions of security in all the avenues of the nation's life. The government has also to mitigate labour-management conflicts, check monopolistic trends, provide decent housing, education and health facilities, and secure civil rights. These government efforts have literally forced a modern President to be what Woodrow Wilson called a "big man."

This "big man" as a symbol of power for good and evils has evoked varying responses. There are those who share the view that the Presidential power has increased, is increasing, and ought to be diminished. They warmly supported the Twenty-second Amendment to the Constitution which limits the President's tenure to two terms in office. By this limitation they hoped that the vast expansion of executive power will not lead to dictatorship and the destruction of representative democracy. Corwin, on the other end, suggests that why such fears of Presidential dictatorship or domination are exaggerated. He notes the restraints on Presidential power that still exist. He reminds us that public opinion in the United States has strongly demanded vigorous Presidential leadership. Corwin, however, emphatically urges improved relationship between President and Congress as a possible solution of the still inadequate status of the Presidency today.<sup>52</sup>

Laski finds many hindrances to the exercise of effective Presidential leadership. Instead of fearing power, he maintains that power, equal to the function the President has to perform, and suitably criticised and controlled, should be given to the Chief Executive.<sup>53</sup> Laski endorsed the views of the President's (1937) Committee on Administrative Management which were, in general, shared by the Hoover Commission, supporting administrative reorganisation in the interest of a strong, energetic, unified, efficient and responsible executive. Both the President's Committee and the Hoover Commission agreed that the President must be given administrative authority commensurate with his constitutional responsibility.<sup>54</sup>

Presidency of the United States is, indeed, an office of great power. A number of factors, some historical and some institutional, have converged in modern times and have changed radically the character of the office as it was conceived by the framers of the Constitution. At the same time, the limits upon the Presidency are many and they have a way of exerting themselves even in the midst of grave crisis. No significant policy can be made effective without the approval of Congress, the law making and money appropriating body, and always jealous to assert its authority and independence. Congress also investigates through its com-

52. *The President: Office and Powers*, pp. 356-58.

53. Laski, H.J., *American Presidency*.

54. Report, pp. 1-3, 53.

mittees the activities of the Executive Departments and their agencies. No unconstitutional action can escape the probity of the Supreme Court. "The opposing party, the free and active press, the permanent civil service, the governments of the fifty States and the giant corporations and labour unions and functions and universities, all these independent centres of power can frustrate any President who attempts to overstep the boundaries of his rightful authority." If he becomes so desperate to cross the boundary, the President can be Impeached. As Clinton Rossiter says, "Every President's conscience, training and sense of history have joined to halt him short of the kind of deed that would destroy his fame and his standing with the people."<sup>55</sup>

Presidency, therefore, has a promise that it is an instrument of constitutional government. "And it is one of the two prides of the American people that no one of their Presidents has been a scoundrel or a tyrant." The other is the tradition of American democracy, personal liberty and moral behaviour. And that is the real strength of Presidency. Summing up the extent of the Presidential powers, Nelson Polsby says, "Measured against the opportunities, the responsibilities, and the resources of others in our political system and in other nations, the powers of the Presidency are enormous. It is only when we measure these same powers against the problems of our age that they seem puny and inadequate."

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56. *Ibid.*

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## CHAPTER IV

# THE CABINET AND THE EXECUTIVE DEPARTMENTS

**Origin and nature of Cabinet.** The Executive Departments of the Government of United States of America are: State; Treasury; Defence; Interior; Agriculture; Justice; Post Office; Commerce; Labour and Health; Education and Welfare. Each Executive Department is headed by a Secretary appointed by the President with the consent of the Senate. The ten Secretaries are recognised as the top political figures in the national administration and they are in the line of succession to the Presidency. They sit in the President's 'Cabinet'. The Constitution has nothing to say about a Presidential Cabinet. It simply mentions that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."<sup>1</sup> But the framers of the Constitution had in their minds the importance of counsel in determining policies though they "apparently deemed it unnecessary to insert any formal provision, taking it for granted that the President would have sufficient sense to avail himself of advice upon important occasions."<sup>2</sup> They did, of course, give to the Senate a measure of such authority in connection with appointments and treaty making.

Washington, had, in the beginning, expected that the Senate would serve the same purpose that the Upper Chambers in the Colonial Legislatures had fulfilled, that is, it would be an advisory council with as much executive as legislative responsibility. The Constitution more or less implied this function of the Senate when it provided that the President shall have the power "by and with the advice and consent of the Senate" to make treaties and appointments. Washington sought the advice of the Senate in connection with Indian affairs but he was "snubbed." Relying on the precedent of English and Colonial courts, the President sought the assistance of the Supreme Court to render opinions of an advisory nature, but here again he was "rebuffed." Washington, therefore, began talking over certain questions with the principal officers of government and by 1791, he called regular conferences of key officials for consultation not only on matters pertaining to their particular Departments but in regard to questions of general executive policy. Since 1793, the name "Cabinet" came to be applied to these joint meetings of the Chief Executive with his heads of the Departments. Unknown to

1. Others may be invited to Cabinet meetings at the discretion of the President.

2. Article II, Section 2, Clause 1.

3. Zink, H., *A Survey of American Government*, op. cit., p. 254.



the Constitution, Cabinet is extra-legal and is a child of custom and tradition. But it is simply an advisory body, though its growth is an example of the manner in which usage has shaped the Constitution to meet the pressure of necessity.

Early in his administration, Andrew Jackson dispensed with Cabinet meetings altogether and acted on the advice of several of his intimate friends. This "Kitchen Cabinet," as it popularly came to be known, served the purpose of the President's advisers. His successors, however, followed the custom of calling the heads of the principal departments into an informal conference for the discussion of complicated problems, and thus, began a series of Presidents who depended rather heavily on their Cabinets. With the coming in of Woodrow Wilson the reverse phase began. He preferred his own sources of advice or depended upon the council of a very few personal agents such as Colonel Edward M. House. Wilson's successor, President Harding, however, was excessively reliant on his Cabinet, invited the Vice-President to attend its meetings and included in its membership "men who knew a great deal more about public affairs than did he himself." President Roosevelt did not lean heavily on his Cabinet, although he did not dispense with its regular meetings. In the beginning, particularly in fashioning his New Deal, he looked for advice to a little group of younger people known as the "brain trust." For a time, he tried a "super cabinet," the National Emergency Council, which included in its membership more than thirty persons drawn from the Cabinet and independent establishments. But eventually he returned to the old system, although Roosevelt and Truman leaned heavily on personal friends such as Harry Hopkins and George Allen. President Eisenhower did his best to restore the Cabinet to full duty. He invited such key officials as the Director of the Budget and the Chairman of the Civil Service Commission to attend regularly. He even established a formal Cabinet Secretariat to organise its work and to keep the necessary records. Eisenhower, accordingly, used an expanded and augmented cabinet quite extensively as a sounding-board and policy-making group. President Kennedy, on the other hand, preferred to deal directly with those Cabinet members involved in a particular problem, and he avoided large-scale formal meetings.

**Features of the Cabinet.** Though unknown to law,<sup>4</sup> yet it has become an integral part of the institutional framework of the United States. But it is not a Cabinet in the sense in which we understand it under a system of Parliamentary government. The members of the American Cabinet are not members of Congress and neither they take part in its debates nor do they go there to initiate and pilot legislation or to defend the policy of government or stand in need of seeking its confidence. They are essentially the advisers of the President. The President can, and often he does, override the opinions of his 'ministers' or he may not seek it or even if he does seek, it is for him to decide whether to consult them individually or collectively. The use of the Cabinet depends on the President's desire.

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4. The term Cabinet is referred to by name in Chief Justice Marshall's decision *Marbury v. Madison* (1803).

The Cabinet meets ordinarily once a week and it is for the President to decide what matters come before it. "Proceedings are decidedly informal and there are no rules of debate." Only rarely is there a vote and no minutes or official records were kept of its proceedings. President Eisenhower established a Cabinet Secretariat to organise its work, keep its records and follow through on decisions. In addition to setting up a sub-cabinet to support the Cabinet itself, he continued the practice of authorising Cabinet level committees to deal with special problems. But Cabinet members have no corporate rights which are uniformly recognised by custom. This is well illustrated by two anecdotes, one relating to America and the other to Britain. "Seven nays, one aye, the ayes have it," announced Lincoln following a Cabinet consultation in which he found every member against him. The only vote that counts is the President's own. This is so often contrasted with Lord Melbourne putting a question on Corn Laws to the vote in his Cabinet and saying, "it does not matter what we will say, as long as we all say the same thing." Unanimity of decisions is the basic principle of Cabinet government and essence of collective responsibility. The Cabinet members in America may make speeches in support of the general policy of the administration. They may even initiate a line of policy which, having been approved by the President, may be described as their own special contribution, as the agricultural policy of Wallace and the reciprocal low tariff agreements of Hull, in Roosevelt's administration. "But, in general, the American Cabinet minister lives and moves and has his being in the context of Presidential thought. However, able and distinguished, he is bound to be eclipsed by the major significance of his chief."

**The selection of members.** The Cabinet in the United States is, in fact, the "President's family." President Monroe thought himself as merely a *primus inter pares*. But, as Brogan puts it, "even Monroe was *primus* and he had chosen his peers." A British Prime Minister may have a choice in selecting his colleagues upon whom he can rely, yet the party expects certain men to be in the Cabinet and the country, too, expects them to be there. In America the President unlike the Prime

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5. President Taft observed, "As it is, the custom is for the President to submit to its members questions upon which he thinks he needs their advice, and for the members to bring such matters in their respective departments as they deem appropriate for Cabinet conference and general discussion."

6. It is reported that Franklin Roosevelt sometimes related a story or an amusing incident. Lincoln, too, was fond of stories.

7. Laski, H.J., *The American Presidency*, pp. 79-80. President Roosevelt did not refer to his Cabinet the proposal to reforming the Supreme Court as contained in his message to Congress in 1937. This is narrated by the late Harold Ickes and it illustrates how the President may commit the administration to a bold or even a rash course of action without consulting his Cabinet. Harold Ickes said, "I have always deprecated the fact that President Roosevelt did not consult his Cabinet in advance and that nobody knew about the particular plan, except the President himself and the Attorney General. The Cabinet was called together hastily at eleven o'clock one morning. The message was already on the way to the Hill (i.e., Congress). Even if our advice had been sought, it would have been ineffective. We were confronted with a choice of supporting the President—or of resigning from the Cabinet and opposing it." As quoted by D.W. Brogan in *An Introduction to American Politics*, pp. 176-277 f.n.

Minister in Britain, does not make a team. The considerations which influence his choice are different from those of a Prime Minister belonging to a country with a Parliamentary system of government. Some of his colleagues may hardly be known to him when he chooses them. President Wilson had never met Lindley Garrison, his Secretary of the Interior. He may, again, appoint persons not belonging to his own party, though since 1795 the principle of party solidarity has been adhered to rather closely.<sup>8</sup> Cleveland appointed Walter G. Gresham as Secretary of State and he had been thought of as a Republican candidate for the Presidency. Theodore Roosevelt and Taft each appointed a Democrat Secretary of War and Hoover made a Democrat Attorney-General. Roosevelt appointed Henry L. Stimson as Secretary of War, and Frank Knox as Secretary of Navy in 1940, although both were prominent Republicans and the latter had only four years previously been his party's candidate for Vice-President. Eisenhower thought it good politics to recognize the "Democrats for Eisenhower" by naming Texas Democrat, Mrs. Oveta Culp Hobby, as his first Secretary of Health, Education and Welfare. President Kennedy's Cabinet included two Republicans, the Secretary of Treasury, Douglas Dillon, and Secretary of Defence, Robert McNamara. Lyndon Johnson continued with the members of Kennedy's Cabinet, after his assassination.

If the President makes his Cabinet, he can also unmake it at his will. It is true that the choice of the President is not so unrestricted as it is generally imagined. He is limited by party necessities geographical considerations and it is politic also to recognise the major religious groups. President Kennedy appointed his brother Robert Kennedy as Attorney-General and it was obviously a personal matter. Wilson was compelled to make Bryan as Secretary of State and for the same reasons that compelled Gladstone to take in Chamberlain in 1880 and Lord Palmerstone to offer a place in his Cabinet to Cobden. But once Wilson had become settled, he was able to drop Bryan with no trouble at all. It happens only in the United States, because there cannot be a Cabinet crisis in the British sense. Leaving aside Lincoln and Wilsons even weaker Presidents can get rid of any member of the Cabinet as President Arthur got rid of Blaine, the most popular Republican and the greatest force in the party. The conclusion is obvious. In the United States the Cabinet is only what the President wants it to be. "It is his tool" and as for its members, "a breath unmakes them as a breath has made." Its composition is unpredictable. Many of its members, after their term of office, retire into the obscurity from which their elevation had brought them.<sup>9</sup> "Cabinet office," in the words of Professor Laski, "is an interlude in a career; it is not itself a career. There is no technique of direct preparation for it; there is no certainty that it will continue because it has begun; there is no assurance that the successful performance of his functions will lead to a renewal of office in a subsequent adminis-

8. Washington made Jefferson Secretary of State and Hamilton Secretary of the Treasury. But friction soon arose and it proved desirable "to bring the chief offices into the hands of men who saw eye to eye in political matters."

9. Laski, H.J., *American Presidency*, p. 80.

tration." A President can get rid of all his Cabinet as Jackson did; he can get rid of his predecessor's Cabinet as Taft and Truman did.

**Utility of the Cabinet.** Nevertheless the Cabinet has a character and importance of its own. Membership in it continues to be the ambition of many politicians.<sup>10</sup> And although there is considerable variation in its prestige and influence from administration to administration, yet it must meet once a week and transact two types of business. In the first place, the broad policies of the government are examined and discussed. The President may frequently consult the Cabinet on matters of top policy. He may accept their opinion or not, but the discussions bring out useful information and opinion, clarify views and promote morale in administration. Cabinet discussions help to sustain the President and render him more responsible to the people.

The second type of work it does is rather more routine. The President co-ordinates the activities of different Departments and resolves inter-departmental conflicts which are bound to arise in a complicated and gigantic administration, as one found in the United States. What the President does is that he frequently meets the individual departmental heads and agency chiefs, listens to their complaints and limitations and, then, asks the Cabinet to attempt co-ordination. Cabinet meetings and discussions help to iron out departmental differences and misunderstandings. The Cabinet meeting may also serve to produce a sense of administrative responsibility and coherence in an administrative structure that is fragmented, specialised, and diffused.

While evaluating the role of the American Cabinet, let it be repeated that it is a body of advisers to the President and not a council of his colleagues with whom he has to work and upon whose approval he depends. Cabinet discussion, as Professor Laski says, "is the collection of opinions by the President with a view to clarifying his own mind, rather than a search for a collective decision." The Cabinet members cannot publicly oppose the direction of the President. Roosevelt made it significantly clear. He said, "when a Cabinet member speaks publicly, he usually speaks on the authorization of the President, in which case he speaks for the President. If he takes it upon himself to announce a policy that is contrary to the policy the President wants carried out, he can cause a great deal of trouble."<sup>11</sup>

A few significant suggestions have been made for making the Cabinet a more potent factor in administration. One suggestion is that the Cabinet could be transformed into a vigorous institution simply by making the proper appointments. "A good Cabinet," commented Professor Laski, "ought to be a place where the large outlines of policy can be hammered out in common, where the essential strategy is decided upon, where the

10. *Ibid.*, p. 95.

11. Prof. Brogan cites a case in which he was an eye witness. He writes, "I was present towards the end of 1948, at a discussion of the new Cabinet, Mr. Truman was expected to announce. It was suggested that Mr. Dean Acheson would be made Secretary of State and it was objected that he had resigned as Under-Secretary of State on the ground that he couldn't afford the job. A friend of Mr. Acheson's remarked, 'He couldn't afford to be Under-Secretary, but any body can afford to be Secretary of State'."

12. Truman, Harry S., *Memoirs*, Vol. I, p. 329.



President knows that he will hear, both in affirmation and in doubt, even in negation, most of what can be said about the direction he proposes to follow." A Cabinet functioning in this spirit could, indeed, stimulate administrative leadership, but thus far the Cabinet has fallen short of such an ideal. It has also been suggested to establish closer relations between the members of the Cabinet and Congress by giving them seats in the Senate and the House of Representatives and the right to participate in debate without the right to vote. The Secretaries (Cabinet members) are now limited to appearing before the Congressional Committees. The proposed arrangement could conceivably be a mutual advantage. It has been contended that there is no constitutional obstacle if this arrangement is brought about. But there seems slight prospect in fact of the adoption of this plan. Congress itself is hesitant.

## ADMINISTRATIVE ORGANISATION

**Constitutional and Statutory provisions.** The Constitution is silent regarding the administrative structure. The framers of the Constitution were not concerned with the organisation of the executive branch other than the office of the President. But having provided for the three Departments: Foreign Relations, the Military Forces, and Fiscal Affairs, it was evidently assumed that Congress would provide for additional Departments as the needs arose. This conclusion is supported by the constitutional provision that the President can require an opinion in writing from the principal officers in each of the Executive Departments. The Constitution further provides that Congress can vest by law the appointment of inferior officers in the President alone, in the Court, or in the heads of the Departments. It is on this basis that Congress creates Departments, commissions and other federal authorities.

Today, the executive branch of government is made up of the following types of administrative organisations: (1) Executive Departments, ten in number, each headed, except the Departments of Post Office and Justice which are headed by the Post Master-General and Attorney-General respectively, by an officer with the title of Secretary; (2) executive agencies outside the ten regular Departments headed by single administrators; (3) boards and commissions, which may be further divided into regulatory, non-regulatory and advisory; and finally (4) the government corporations. Agencies outside the ten Departments are usually termed "independent," in the sense that they are not responsible to the head of any Department. Some of these enjoy a large degree of independence of the President, while others do not, but all are subject to legislative control by Congress.

The bureaux or the agencies directly associated with the President in an overall planning and control play a vital role in the administrative set-up of the country. There are between 200 and 400 bureaux in the Federal Government of which about 65 report directly to the President. Important out of these are the President's personal staff of Secretariat, personal advisers, and administrative assistants; and Bureau of the Budget; the Council of Economic Advisers; Science Adviser; the National Security Council; Civil and Defence Mobilization; and the Central Intelligence Agency.

The Independent Commissions are another type of agency and these



arose along with the growth of government regulation. Typically they are given regulatory powers over some sector of economy—rail and truck transport, trade practices, power, communication, aviation, tariffs. The Commission membership ranges from three to eleven. Commissions are appointed by the President with the approval of the Senate for a stated number of years. The power of the President to remove a commissioner during his tenure is usually limited.

Then, there are the 'government corporations.' Corporations in America, as in other countries, enjoy a degree of freedom and flexibility in the performance of their functions which is not open to the more orthodox type of agency. Usually but not always, the corporation is created to undertake some specific project or to conduct some business undertaking. The Tennessee Valley Authority is the best known of the examples of the Corporation.

**Organisation of the Departments.** At the head of each department, except the Justice and the Post Office, are the Secretaries. The Secretaries are essentially political appointees who express the policy of the party in power in the White House. They are also members of the President's Cabinet and are responsible to him for all intents and purposes. If any Secretary is selected by the President from the opposition party, he selects only those who are friendly to his cause. In most of the Departments the second ranking official is the Under-Secretary who is the Deputy of the department head and like his superior is a political appointee. There are no permanent Under-Secretaries comparable to those serving in the British Ministries. Each Department has Assistant Secretaries, in some one, in others to the maximum of four, who again are usually political appointees. Many of them may be career men.

Customarily, the Departments are divided and sub-divided into subordinate units such as "bureaus," "divisions," "offices" and "services." The basis of division may differ from one Department to the other, but the most common basis is functions and actually speaking there is often much less difference among them than the titles would imply. A bureau in one Department is very similar in form and functions to a division in another Department. An office, however, may differ only in minor details from a service.

**Powers and Duties of the Secretaries.** While commenting upon the powers and duties of a head of the Department, John Sherman, a former head of the Treasury Department, declared, "the President is entrusted by the Constitution and laws with important powers, and so by law are the heads of Departments. The President has no more right to control or exercise the powers conferred by law upon them than they have to control him in the discharge of his duties.... If he violates or neglects his duty, he is subject to the removal by the President or impeachment.... but the President cannot exercise or control the discretion reposed by law in.... any head or subordinate of a department of the government."<sup>13</sup> But this is not the real position. The President, as said earlier, is the Director of Administration. He is invested with the power

13. As quoted by Charles Beard in *American Government and Politics*, *op. cit.*, p. 233.

of removal and by virtue of vast discretionary powers conferred upon him by laws has a wide choice of ways and means to get his will dominate. Whatever be the theory, the practice is otherwise. Being a political appointee, the Secretary is expected to inject the policies of his party and the President in the conduct of the affairs of the Department he heads. When he does not belong to the Presidential Party, he must be friendly to the President's policy.

The head of a Department is a legislator too, for he enjoys to a certain extent freedom in issuing orders pertaining to matters over which he presides. By a general Act of Congress, he may prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property pertaining to it. This broad provision is very often supplemented by legislation giving him power to issue ordinances over particular matters.

The Secretary of a Department, also, brings circuitous influence on actual legislation. He must submit to Congress annually certain specified reports bearing on the activities of his Department. He must also appear before various Committees of Congress in order to explain, give information and answer to inquiries on legislation pending before Congress. Secretaries write letters to Senators and Representatives, having political affinities with them, urging or opposing measures for discussion. "Indeed they sometimes submit to Congress, on their own motion, elaborate draft of Bills which they wish to have enacted into law."<sup>14</sup>

Finally, several heads of Departments exercise powers which are judicial in character. With the multiplication in the functions of government and growth of subordinate legislation and power of making Rules and Regulations, it has been thought expedient to give to the heads of certain departments the authority to hear cases carried up from the lower administrative divisions under their control.

## FEDERAL PERSONNEL AND THE MERIT SYSTEM

**Two Types of Appointments.** Those entrusted with administrative duties may be divided into two categories: political appointees, and those who belong to the executive civil service. The Secretaries, Under-Secretaries and Assistant Secretaries, bureau chiefs, division heads, members of the boards and commissions form only a minor fraction of all over 2½ million men and women who carry on the civilian activities of the national government. Such a staggering number of Federal government employees present a difficult problem, for the greatness of any government and the quality of its administration depend in large measure on the ability, loyalty and devotion of the men and women who constitute its staff and carry on its activities. Selection and retention of capable employees, therefore, is a prime requirement of public administration.

**The Spoils System.** For a generation or more the selection and

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14. Beard, C.A., *American Government and Politics*, op. cit., p. 234.

appointment of administrative officers and other employees were based on competency, "fitness for office," a tradition set by President Washington. With the emergence of political parties more weight began to be given to political considerations when filling posts as they fell vacant or when new ones were created. John Adams who succeeded Washington, was a party man, but he maintained to a considerable extent the principles established by Washington. The advent of Jefferson marked the first change in American public personnel practice. Though he agreed in principle with Washington's concept of "fitness for office" and there were only limited removals during the first two years of his first administration, he found the Departments of government and other administrative agencies peopled with those who were his political and personal enemies. Being a shrewd politician he was also aware of the political significance of the power of appointment. He was, accordingly, moved to remark: "How are vacancies obtained? Those by death are few, by resignation none." He found it necessary to remove some officials who had been appointed by his Federalist predecessors. Here is the start of the system known as "spoils," the requirement of party loyalty rather than "fitness for office" became the prime criterion for public employment.

The real fillip to the spoils system was given by a Congressional Act of 1810. It provided that terms of district Attorneys, Collectors, surveyors of Customs, Navy Agents, Paymasters and certain other office-holders should henceforth be limited to four years. It paved the way for rotation in office with the change in administration. For twenty-eight years Jefferson's party remained in power, but Madison, Monroe, and John Quincy Adams did not follow the path of their great leader and made only a few removals. When Andrew Jackson occupied the White House, the concept of a public office as "spoils" had attained complete dominance in the governments of the States and vigorous pressure was being exerted for the extension of the principle to the operations of the federal government. Jackson welcomed the change as he believed that political parties need something besides intellectual cement to hold them together.

Andrew Jackson explained and defended his appointment programme which may be reduced to four propositions. First, since the administration of government is a simple process any person of normal intelligence and industry is capable of performing administrative duties; second, democratic principles support the idea of rotation in office; third, office-holders who remain over a great number of years are corrupted by a sense of power dangerous to the existence of democracy—more is lost by the long continuance of men than is generally to be gained by their experience; and fourth, democracy is "prompted by party appointments by newly elected officials." The new President did not make a clean sweep of "anti-Jacksonian office-holders," nevertheless he removed in the first year of office nearabout 700 employees in the executive Departments and filled all the new vacancies with his own party men.

The spoils system, therefore, is the practice, resorted to by political parties as well as factions, of filling appointive offices with their supporters when they come into power. "To the victor belong the spoils of the enemy," said Senator William L. Mercy in a debate in the Senate

in 1832, and since then the phrase gained wide currency. While Andrew Jackson did not inaugurate the spoils system, he religiously initiated it and all appointments for party reasons became part of the accepted order of things in the National, State and Municipal Administrations. It flourished unchecked between 1829 to the close of Civil War.

To job spoils were added other types of spoils—contracts, grafts, and the like. In the following years of Civil War public opinion began to question some of the extreme practices associated with the spoils and the assassination of President Garfield at the hand of a disappointed office-seeker served to arouse public opinion, as perhaps never before, on the evils inherent in the spoils system. While the spoils system has not been wholly eliminated even today,<sup>15</sup> important reforms were proposed and adopted in the two decades after the Civil War.

**The Movement for Civil Service Reform.** The price of the spoils system had been too high indeed. The spoils system and political patronage had always produced incompetent and inexperienced public servants, and sometimes grafting and corrupt ones. By the sixties the standard of the Federal Service was at such a low ebb that civil service reform had become the aim of a popular political crusade. The goal of the civil service reformers was to establish a merit system under which appointments to the public service would be based on ability, experience, knowledge and training rather than on party loyalty. In 1868, Democratic Party urged in its platform that corrupt men be expelled from office and the useless offices be abolished. In 1872, both major political parties advocated civil service reform. The death of President Garfield in 1881 by a disappointed office-seeker aroused the nation's demand for a change in the system by which Federal offices were filled. In 1883, Congress passed the Federal Service Act, better known as the Pendleton Act.

The Pendleton Act set the basic pattern of national civil service and it is still the fundamental law governing recruitment. It created a Civil Service Commission consisting of three members, no more than two of the same party, appointed by the President and the Senate. The Act divided the administrative employees of the national government into two categories: (1) those in the unclassified; and (2) those in the classified service. Power to determine under which service most administrative agencies of government were to operate were granted to the President. Admission to the classified service was made dependent upon merit as manifested through the process of competitive examination conducted by the Civil Service Commission. Although appointments were still to be made by the President or the heads of the Departments, but the choice was limited to those who ranked at the top on the eligible list prepared by the Civil Service Commission on the results of the examination conducted by it. Also, all classified employees were required to abstain from active participation in politics, and they were to be protected in their jobs against political activity.

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15. Some positions are actually under a merit plan, but still "they do not seem to receive adequately qualified incumbents." Others are exempted by Law from the competitive system.

At the onset, the reform did not extend far and the number of positions affected did not exceed 14,000. After the turn of the century, the number was greatly increased and in 1937 over 60 per cent of the total positions were subject to the Civil Service Commission. By the Ramspeck Act, which came into force on January 1, 1942, many New Deal positions that had been outside the merit system were brought within its scope—a number estimated at well over 100,000.<sup>16</sup> At that time the Chairman of the Civil Service Commission declared that more than eighty per cent of the regular employees of the national government belonged to the competitive class.

The Civil Service Reform League bluntly declared in 1937, that Congress was always the chief obstacle to progress. It had repeatedly failed, when enacting legislation calling for additional appointments, to name them as classified services. Such instances were glaring when party long out of power suddenly found, itself in control of Congress, e.g., when the Democrats took over in 1886, 1913, and 1933, and the Republicans in 1897 and 1921.<sup>17</sup> Roosevelt's accession to Presidency in 1933, followed by his policy of New Deal, gave a rude shock to the merit system. The Democrats were back to power after 12 years, and the rank and file were hungry for offices. Creation of new agencies connected with the recovery plan multiplied the number of new jobs and in great majority of cases Congress exempted from competitive system the new entrants, thus, leaving the way open for spoils. The President by his first executive order on record withdrew from the classified service positions in the Bureau of Foreign and Domestic Commerce, which his predecessors had placed therein. "As a result of wholesale exemptions by statute, and of spoil raids in a good many of the older establishments as well, the service as a whole so far slipped back" and the proportion on a merit basis sank to hardly 60 per cent in the middle of 1936.

There was renewed agitation for reforms. In 1937, the President's Committee on Administrative Management recommended an extension of the merit system not only "upward and outward," but also "downward" so as to embrace skilled workers and labourers. President Roosevelt, too, urged on Congress that all except policy-making positions be placed on a merit basis. In 1938, the President ordered into classified service all New Deal non-policy determining positions. The Ramspeck Act did the rest. It authorized the President to include in the service at Presidential discretion, all positions except those subject to Presidential appointments and subject to the confirmation of the Senate, and a few other limited groups of technical nature. In 1951, the proportion of the service operated under the merit plan was approximately 92 per cent. When President Eisenhower assumed office in 1953, he found only 17,382 jobs open for his patronage. The remaining, approximately 2,500,000 persons employed by the federal government at that date, were protected by the merit system. Of the 17,382 jobs not protected by civil service, practically all were either at very high or very low levels. Thus, the reform so modestly begun, today embraces a very large part of the federal civil personnel.

16. Ogg, F.A. and Ray, P.O., *Essentials of American Government*, op. cit., p. 325.

17. Ogg, F.A., and Ray, P.O., *Essentials of American Government*, op. cit., p. 325.



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## CHAPTER V

# CONGRESS : STRUCTURE AND COMPOSITION

**Role of Congress.** The first Article of the Constitution provides for the legislative branch of government, "the Congress of the United States" and vests all legislative powers in it. The Acts of Congress are the supreme laws of the land. But the framers of the Constitution had no intention of making it all-powerful. The demands of the doctrines of limited government and federalism are such as to deny unlimited powers to any governmental agency. Yet, the importance of Congress in the final analysis cannot be discounted. In fact Congress today exercises an almost incomprehensibly great authority to set the course of public policy. For, Congress has not only the powers given by the actual words of the Constitution, but also powers that may be reasonably implied from those delegated powers. So vast is the extent of the implied powers as also resultant powers that it embraces more or less the entire life of the nation. Unless Congress grants money, the Executive and Judicial departments of government cannot operate, new policies cannot be enforced and the entire machinery of the government comes to a dead stop. It was, accordingly, not out of reason that the framers would have devoted the first Article in the Constitution to the organisation and powers of Congress.

**Congress is Bicameral.** Regarding the desirability of creating a national legislature consisting of two Chambers there was little difference of opinion among the members of the Philadelphia Convention. The Congress which operated under the Articles of Confederation was a single Chamber assembly, but the framers of the Constitution did not consider it worthy of emulation. They were familiar with the successful functioning of bicameral State legislatures. They also knew that in Britain, too, bicameral Parliament existed. The reasons, however, which prompted bicameralism were the result of a "great compromise" without which perhaps the Union would not have come into being. Under the Articles of Confederation, all States stood on a footing of equality. They would not agree to the new administrative set-up unless their old status was preserved in one branch of the legislature and where they could be represented as constituent political units. On the other hand, the larger States, which had sponsored the movement to federate, would not agree to a plan unless they were given adequate representation in proportion to their superior numerical strength. There were economic reasons too. The North, the more populous part of the country, was commercial in interest whereas the South, the sparsely populated part, was agricultural. The division of the legislature into two Houses based on two different principles of representation was in part influenced by these considerations in order to balance and harmonise the two distinct economic interests in the national government. At the same time, the

Fathers of the Constitution entertained a fear of the majority rule and they desired to set up the Senate as a conservative check on the "turbulence of democracy." And if it was to be an effective check on the radicalism of the popular House, then, it ought not to be a mere duplication of the latter both in its composition and powers. Accordingly, Congress was based on States as political entities and on population, the Senate representing the former and the House of Representatives the latter. The Senate was to be smaller in size, its members chosen for a longer term of office and by a different method, higher age and residence qualifications were required. It was given certain specific powers, such as share in the appointing, treaty making and judicial powers, which were not conferred on the House of Representatives.

### THE HOUSE OF REPRESENTATIVES

**Composition and Organisation.** The Constitution does not specify the size of the House beyond stipulating that "representatives shall be apportioned among the several states according to their respective numbers," and that there shall not be more than one member for every thirty thousand people and that every State is entitled to, at least, one representative irrespective of its population.<sup>1</sup> The actual enumeration was to be made within three years after the first meeting of the Congress and within every subsequent period of ten years in such manner as determined by law.<sup>2</sup> Elections are to be held every second year by the people of the several States. "The times, places, and manner of holding elections shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations."<sup>3</sup>

Apportionment of seats has caused periodic controversies. The original 65 members of the House were allocated in the Constitution. Thereafter allocations were made by Congress after each census, ranging from the basis of one representative for each 30,000 in 1792 to one for 3,45,000 in 1951. After 1920 census Congress failed to carry out the constitutional mandate to reapportion seats after every ten years. The Reapportionment Act of 1929 set the "permanent" number of the House at 435. The admission of Alaska in 1958 and of Hawaii in 1959 brought the total membership to 437.

The formal qualifications which a member of the House of Representatives should possess are: that he must not be less than twenty-five years old, should be a citizen of the United States of, at least, seven years standing, and an inhabitant of the State from which he is elected. Custom has laid an important qualification regarding residence. The Constitution requires only legal residence in the State. It has also since been modified to mean residence of the Congressional district. Custom has been so insistent on the locality rule that no choice of the candidate is likely to be made unless he is resident of the locality from which he

1. Article I, Section 2, Clause 3.

2. *Ibid.*

3. Article I, Section 2, Clause 1.

4. Article I, Section 4.

seeks election. In fact, no candidate offers himself for election from a district in which he does not reside. Franklin D. Roosevelt Jr. after deciding to run for the New York Congressional seat vacated by the death of Sol Bloom, rented an apartment in the district and announced that address as his legal residence. Helen Graham Douglas rented a hotel room in the industrial-commercial district in Los Angeles which she represented, though she continued to live in fashionable Beverly Hills. In case of death or resignation of a member during his term, the Governor of his State may call a special election for the unexpired portion of the term.

**Disqualifications.** The Constitution provides certain disqualifications. It provides that no person holding any office under the United States shall be a member of either House of Congress during his continuance in office. This provision was adopted for purposes of keeping separate, as far as practicable, the Executive and Legislative departments. Secondly, no Senator or Representative may, during the time for which he or she is elected, be appointed to any civil office which shall have been created or the emoluments of which shall have been increased during such time. The purpose of this provision is to prevent Congress from creating new offices or increasing the salaries of existing offices for the benefit of members who might desire to be appointed to them.

**Salary, privileges and immunities.** The Constitution provides that Congressmen will be paid salary and other prerequisites of office as determined by law. The law fixes the salary of both the Senators and the Representatives at \$22,500 per year, subject to the national income-tax. In addition to it, travelling allowance of 20 cents per mile for one trip each session from the member's home to Washington is paid. Every member has a "franking privilege" too—of free postage on official correspondence and all other official mail matter such as pamphlets and reprints of speeches sent free to the constituents. Stationery and office supplies, telephone and telegraph service are provided. Free medical service is made available to all members. Allowances for clerks and secretarial service are also made: \$12,500 per year for a Representative and \$25,000 to \$60,000 per year for a Senator depending upon the population of his home State. Retirement annuities have been provided since 1946.

Congressmen are exempt from legal process in all civil actions while attending the sessions of the Congress and when going to or returning thereto. This immunity, however, does not cover indictable criminal offences. For they are legally immune from prosecution or suit, as for libel and slander, for anything they may say on the floor of the House.

**Sessions.** Before the adoption of the Twentieth Amendment in 1933, the term of the Representatives began on March 4, following their election, although they did not assemble till next December unless called in a special session.<sup>5</sup> The old Congress, therefore, remained in office and continued functioning for about four months after a new Congress had

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5. Article I, Section 6, Clause 2.

6. *Ibid.*

7. Article I, Section 4, Clause 2.

been elected. The members defeated at elections would continue to make laws for their constituents who had not approved their re-election. These defeated members were popularly known as "lame-ducks" and the session of the House so convened as "lame-duck" session. The Twentieth Amendment sought to remove the evils inherent therein by providing that Congress must assemble at noon on January 3, unless another date is provided by law. Under the Legislative Reorganization Act, 1946, the regular session adjourns on July 31 unless otherwise provided by Congress.

**Special Sessions.** The President may call either House or both in a special session. The Senate in particular is called to confirm appointments or ratify a treaty. As a rule, the President only summons the legislature in special session to deal with a matter of national urgency and usually announces his purpose well in advance so as to focus the attention of Congress and the country sharply to the business in hand.

The Constitution permits both the Houses to adjourn simultaneously. But what is to be done, if crisis happens during the adjournment and the members desire to assemble in a session? The need for a decision on this issue happened in 1939 after the outbreak of the Second World War. The opponents of Roosevelt feared that, by taking drastic actions during an adjournment he might involve the country in the war and consequently Congress remained almost in continuous session in 1939, 1940 and 1941. In 1941, it was in session for 365 days; in 1942, for 346 days, with a brief recess in December. In 1943, between January and July, it was in session for 184 days, and the need for a vacation was generally recognised. But many members were unwilling to adjourn even for a brief recess without making some specific provision for meeting earlier than the stipulated date in a resolution of adjournment. The resolution, accordingly, provided for adjournment on July 8 and reassembling on September 14, 1943, or until three days after they were notified to reassemble whichever event occurred first. The President of the Senate and the Speaker of the House were authorised to call the Houses "whenever in their opinion legislative expediency might warrant it." The resolution further provided that Congress was to be recalled "whenever the majority leader of the Senate and the majority leader of the House, acting jointly, or the minority leader of the Senate and the minority leader of the House, acting jointly, file a written request with the Secretary of the Senate and the Clerk of the House that Congress reassemble for the consideration of legislation." According to this precedent, Congress can now reassemble on the call of the majority or minority leaders and it has been freed from the pleasure of the President to call a special session.

**Power to compel attendance of Members.** The Rules of the House of Representatives provide for securing the attendance of members if the required quorum for the transaction of official business is not present. Fifteen members of the House may compel the attendance of absentees by instructing the Serjeant At Arms to arrest them and bring them in the House.

**The Speaker.** With regard to the internal organisation of the House of Representatives, the Constitution simply says that the members "shall



choose their Speaker and other officers." It does not say anything about his powers and functions. Nor does the Constitution require that the Speaker must be a member of the House, although every Speaker has been at the time of his selection a member of the House.

The election of the Speaker takes place at the beginning of each new Congress and the nominee of the majority party is invariably elected by the House. Here it differs from the office of the Speaker of the British House of Commons. Unlike Britain, the election of the Speaker of the House of Representatives is not unanimous. Nor the Speaker of the preceding House need always be elected, although the tradition is now well established that Speakers are re-elected in subsequent Congress if their party maintains a majority; Sam Rayburn remained in office for 16 years. With the coming in of the other party in majority, the Speaker must change. Seniority is, no doubt, an important consideration in choosing a Speaker, but personal popularity and political backing are the most important pre-requisites. The salary and expense allowance of the Speaker now is \$45,000 per year, subject to the national income tax, and the use of a government automobile.

Unlike the impartial and judicious Speaker of the British House of Commons, the Speaker of the House of Representatives acts as a leader of his Party and uses the powers of his office to promote his Party's programme. There are two important reasons for such a development. The Constitution did not provide the House with an official leadership. Apparently the statesmen of 1787 took it for granted that the House would lead itself. As the House grew in numbers and its legislative business expanded, the need for guidance and leadership developed and this devolved upon the Speaker as a leader of the majority Party. "Beginning with Henry, the Speaker gradually became the recognised leader of the majority party, and hence of the House as a whole. He became the man on whom the majority depended for getting its measures safely through the maze of rules. More and more authority was absorbed into his hands until he became a virtual dictator." During the decades around the turn of the present century Speaker Thomas B. Reed was frequently referred to as "Czar" Reed. Joseph G. Cannon, popularly known as "Uncle Joe," held the same position. "A simple Chairmanship," as Ogg puts it, "grew into a vital dictatorship carrying the power over life and death over almost everything that the House undertook to do."<sup>10</sup>

Before the "revolution of 1910-11" which was directed against the Speaker of the House, he appointed all standing as well as select committees and the committee appointments went to those who could be depended upon to follow his wishes. And as legislation in the United States is really the work of the Committees, he had the virtual power in the shaping of legislation. As a Chairman of the Rules Committee, he would give place on the order of the business only those measures which he desired to be enacted. Moreover, until 1910, his powers of "recog-

8. Article I, Section 2.

9. Munro, W.B., *The Government of the United States*, pp. 324-25.

10. *Essentials of American Government*, p. 212.

nition." that is, the power to grant or withhold the right of discussion, enabled the Speaker to a large degree to prevent consideration of measures to which he was opposed and to cut off debate by members of the minority Party.

The Speaker's denial of the right of debate in many cases, together with the necessity of going to his room in advance in order to secure a promise of recognition, led in 1910 to revolt against "Cannonism"<sup>11</sup> by a wing of the Republican Party, the "insurgents." They were joined by the Democrats. The coalition of Democratic minority leaders and progressive Republican insurgents brought about several amendments to the rules. The Speaker was removed from the Rules Committee and the power of selection of all Standing Committees was restored to the House itself. His power of recognition, the chief source of complaint, was also taken away. All told, the blow to the powers of the Speaker was so severe that the office has never been since then quite the same.

Nevertheless, the Speaker is still the "Commanding" figure in the House and many important duties belong to the office. He presides over the sittings of the House, arranges for the orderly conduct of the business of the House, preserves order and decorum. In case of disturbance or disorderly conduct he may either suspend business or instruct the Serjeant-At-Arms to quiet any disorder in the House. But the Speaker cannot censure or punish a member; only the House itself can do that. Then, he "recognises" members desiring the floor; the only power left out of the Speaker's three potentially great powers. The rules of the House provide that if two or more members rise, "the Speaker shall name the member who is first to speak." This in effect gives the Speaker wide discretion.

The Speaker has the right to interpret the rules of the House. Though he must follow the established precedents but it is within his power to disregard them and to create new ones, provided that the House agrees. A majority of the House of Representatives may overrule the interpretation placed on a rule by the Speaker, but it rarely exercises this prerogative. All the same, the ruling of the Speaker is not final as it is with the Speaker of the House of Commons in Britain. He puts questions to a vote, signs all acts, addresses joint resolutions, writs, warrants and subpoenas ordered by the House. The Speaker appoints select and conference committees and has the right to refer bills to committees, though the Bills now are automatically sent to committees by the Clerk of the House on the basis of their subject-matter. Occasionally, when the competency of a committee which is to receive the Bill is disputed, the Speaker decides.

As a member of the House the Speaker has the same right to speak and vote as other members, although he does not vote, except when the House is voting by ballot or when there is a tie. But the Speaker of the British House of Commons never participates in its deliberations and he votes only when there is a tie and that, too, he does according to the established customs of the House.

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11. Joseph G. Cannon was Speaker in 1903-10.

The Speaker of the British House of Commons becomes a non-party man immediately after his election to that office. But unlike his British counterpart the Speaker of the House of Representatives is actively and openly identified with his party's organisation in the House. As a leader of the majority party in the House, the Speaker is frequently called to the White House to go over legislative matters with the President.

Today, the Speaker is relatively weak, yet he still has many "weapons" which he can use to influence the course of legislation. He is by tradition and practice the active of the majority party in the House, the "elect of the elect"<sup>12</sup> and is second in succession to the Presidency. He, therefore, occupies an office of great prestige and importance in the Federal Government.

## THE SENATE

**Composition.** The Senate is a small body of only one hundred members, two from each State irrespective of population or area, elected for a term of six years, one-third retiring every two years. It is so arranged that the terms of both Senators from a particular State do not terminate at the same time. The Senate is, thus, a continuous body as only one-third of the Senators face re-election for any Congress. A long term of office, with frequent possibilities of re-election, puts Senators in more comfortable and advantageous position than Representatives. Unlike the latter with a two-year term, they have time even in a single term to acquire experience, master legislative procedure, and to attain a certain degree of leadership. It is not uncommon for a Senator to run 18 to 24 years of service. The continuous existence of the Senate is also highly beneficial. The Senate never finds itself in a position in which the House of Representatives is found every two years. The latter is entirely a new body with greatly altered membership, "obliged to organise from the ground up." The Senate is continuous and always organised. Two-thirds of its members are already in office. Precedents and traditions of the House are, therefore, "carried along on the current of a never-ending stream."

**Equality of Representation.** All States have an equal representation in the Senate and the Constitution recognises the sacredness of this political dogma when it prescribes that "no State, without its consent, shall be deprived of its equal suffrage in the Senate."<sup>13</sup> The concept of equality of representation was, in fact, a great compromise which resulted in the establishment of the United States Union and proved a great balancing factor in the North and the South. George Hamilton asserted that, once the new government was in operation, there never would be a conflict of interests between large and small States. This prediction has proved true and throughout the course of American history, whether the State is large or small, it has made little or no difference in its political attitudes and alignment. The Senators, too, do not now consider themselves as ambassadors of their States. They deem themselves as representatives of

12. Polsby, Nelson W., *Congress and Presidency*, p. 51.

13. Article V.

the nation and their interests are national rather than regional. It has been suggested, during recent times, that the anomalies of equal representation should be removed, because, it is a gross violation of the democratic theory that geographical units should be the basis of representation. Moreover, geographical representation gives to the States with only one-fifth of the population more than one half of the Senators and if these States with few people are "gauged up" against the thickly settled ones, there might be perpetual and intolerable conflict and hostility and inconceivable repercussions.

These complaints of "Senatorial tenderness towards farm and allied interests" are "frequently heard in industrial areas." To remedy the situation it has been suggested that a State be allowed an additional Senator for every million inhabitants in excess of some fixed number. "The proposal, however," as Ogg says, "is little short of fantastic, because to carry it out would require not only a constitutional amendment, but the express consent of every State whose representation would become less than that of some other State—a prerequisite which could not possibly be met."<sup>14</sup> Even if the proposal would have been practicable, the increased strength of the Senate would reduce its efficiency as a deliberative body. And the Senate and the House of Representatives would become both representative of the same people in the same proportions. It means duplication and the need for a second Chamber disappears. The whole question of change, therefore, remains an academic one.

**Qualifications.** The qualifications prescribed for eligibility to the Senate are the same in principle as those required of Representatives, though there is a little difference in degree. The Senator must be not less than thirty years old, an inhabitant of the State for which he is elected, and a citizen of the United States for nine years. The Framers of the Constitution thought that the longer term and higher qualifications would tend to give greater strength and dignity to the Senate than would be found in the House of Representatives and, at the same time, a higher average ability.

There is no constitutional provision that a Senator should be a resident of a particular part of the State. In some States, however custom came to be established that the two Senators shall be taken from two different parts. Sometimes when there is a large city in the State, the custom is to take one of the Senators from the city and the other from the country. For a long time Maryland had a statutory provision that one of the Senators should be an inhabitant of the eastern shore and the other of the western shore.

**Mode of Election.** In regard to the mode of election of the Senators there was a sharp difference of opinion among the members of the Philadelphia Convention. The method finally agreed to was that the Legislatures of the States should elect them. There were two main reasons for adopting this method. In the first place, the Founding Fathers thought that the choice by legislatures would be the best means of forming a connecting link between the State Governments and the National Gov-

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14. *Essentials of American Government*, op. cit., p. 201.



ernment thereby cementing the bonds of union. The jealousy of the State Governments towards the National Government was so manifest at that stage that all possible efforts were made by the Constitution-makers to bring about cohesion through the mechanism of the newly established government. Secondly, it was believed that choice by legislatures would enable the selection of Senators of greater ability as the legislators would be in a better position to evaluate the qualifications and merits of the candidates than the mass of the people.

But the working of this indirect method of election belied the expectations of the Fathers of the Constitution. With the development of the party machinery, the actual choice of the Senator was made in the State party convention or in the legislative caucus, and both were controlled by bosses. It frequently led to long and stubborn contests which very often ended in deadlock. Not infrequently the legislatures failed to elect a Senator and the State with vacancy in the Senate would go unrepresented. From 1890 to 1912 not less than eleven States at one time or another were represented in the Senate by one member only. In 1901 Delaware had no Senator at all at Washington to speak for the State. And, then, the breaking of deadlocks was sometimes accomplished by bribery and other corrupt influences. Indeed, charges of bribery and corruption came to be very common. "and there is little doubt that between 1895 to 1910 a number of wealthy men found their way into the Senate through the votes of legislators who were liberally paid for their support."<sup>15</sup> Finally, prolonged senatorial contests gravely interfered with the regular business of the State legislatures. The obvious result was a spirited movement to secure the amendment of the Constitution and after a tiring effort the Seventeenth Amendment was adopted in 1913. It provides that the two Senators from each State shall be "elected by the people thereof for six years...." They are elected by vote of such persons as are entitled to vote for members of the Lower House of the State legislature. It further provides that in case there occurs a vacancy in the Senate, the Governor of the State in which the vacancy occurs may fill vacancy by temporary appointment until the next general election, at which time a successor is elected for the balance of the former Senator's term.

**The Presiding Officer.** The Presiding Officer of the Senate is the Vice-President of the United States and despite his much exalted position, he is little more than a moderator. He is not a member of the Senate and, indeed, may belong to a different political party that controls the Chamber. He does not appoint the committees of the Senate and so has no power of predetermining the character of legislation, and he votes only in case of a tie. Moreover, he cannot control debate through the power of recognition. The President of the Senate must recognise the members seeking the floor in the order in which they rise. The tradition requires that he shall treat the members of both parties impartially in according recognition for purposes of debate. The Senate does not expect leadership from its Presiding Officer and would resent it most bitterly, as Vice-President Dawes learnt to his sorrow in 1925, when he attempted to solve the Senate rules.

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15. Garner, J.W., *Government of the United States*, p. 183.



The Senate also elects from among its own members a **President pro-tempore**, who presides in the absence of the Vice-President. The **President pro-tempore**, though nominally elected by the Senate itself, is really chosen by the majority of the caucus and is, like the Speaker of the House, the ranking member of the dominant party. As a member from a State, he can vote on all issues. He presides permanently if the Vice-President becomes President, as when Johnson succeeded to the Presidency on the assassination of President Kennedy.

**The Filibuster.** The principal point of difference between Senate and House procedure lies in the rules respecting debate. Limitation on debate in the House is a relatively simple matter and closure rules are rigid and strict. The Senate is extremely jealous of its freedom of debate and a member can speak as long as his physical capacity enables him to hold the floor. The advantage of this privilege is occasionally taken by the Senators near the close of the session for purposes of "filibustering" a measure to which they are opposed. Sometimes the Senators opposing a Bill "talk it to death" by refusing to yield the floor until the supporters of the measure agreed to drop it from discussion. Many important measures had actually been abandoned on a mere threat of the use of filibustering. Individual filibusters of note include those staged by Huey Long and Robert LaFollette, Sr., who held the floor continuously for 18 hours in 1908. The all-time record for continuously holding the floor was achieved in 1953 by Senator Wayne Morse of Oregon; he talked for 22 hours and 26 minutes. A filibuster against an atomic energy Bill produced a Senate impasse for twelve days in July 1954, including a four-day around the clock session.

More commonly, a filibuster is conducted by a group of Senators talking in relays, each yielding the floor to a colleague known to be friendly and bound to continue the delaying action. Southern Senators have used the filibuster relay to great advantage in preventing the consideration of civil rights legislation. Very often, they had gained their ends merely by threatening to take and hold the floor. In 1917, a small group of Senators filibustered to prevent the Senate from taking a vote on a Bill to give to President authority to arm American merchant vessels notwithstanding the fact that nearly all the other Senators desired to pass the Bill. President Woodrow Wilson expressed the general public resentment over the obstructionist tactics by declaring, "The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of wilful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible."

The Senate had long recognised the serious repercussions of filibustering, but the incident of 1917 resulted in a movement to limit the filibuster and adoption of a new rule by the Senate which made it possible, by a two-thirds vote, to limit the debate on any measure to one hour for each Senator. This rule was applied for the first time in 1919, to bring to an end the discussion on the Treaty of Versailles. Since then it had been successfully used for three times more. The closure rule of 1917 was amended in 1949, after a filibuster on civil rights legislation. A revised closure was made applicable on any matter under Senate pro-

ceedings, except change of rules. According to Rule XXII as amended in 1949, a vote of two-thirds members of the total membership of the Senate was required to carry closure. The old Rule of 1917 required two-thirds votes of the members present. The amendment of 1949 had, thus, made closure more difficult to use. A ceaseless effort was made to change the closure rules but it was always opposed by Southern Senators who were out to filibuster the Civil Rights Bill. In 1959, on the proposal of the majority leader Johnson, the pre-1949 formula permitting two-thirds of members present and voting to impose closure was adopted. But the controversy has not ended. Current proposals centre around a closure by a majority vote or, alternatively, by a three-fifths vote of those present and voting.

Filibuster is, thus, a device by which an insistent minority can, if it feels strongly, usually block action on a proposed Bill and frustrate the business of the Senate. But "fortunately resort to filibuster," remark Professors Swarthout and Bartley, "is infrequent. It is the ultimate weapon of the intransigent few." The fact is that even on most controversial matters the Senators are usually able to reach a unanimous agreement that the debate must end at a stipulated time on a given day. "This self-imposed curb on unlimited debate," add Swarthout and Bartley, "is the rule; the filibuster is the rare exception"

### SPECIAL FUNCTIONS OF THE SENATE

The Senate, as has already been said, was intended to be more than an Upper Chamber of Congress. The Founding Fathers designed it to be, in a way, the counterpart of the Privy Council in Britain and it was for this reason that they provided in the Constitution that the "advice and consent" of the Senate would be required in certain executive actions, for example, appointments and treaties. President Washington, during his first term of office, sought the advice of the Senate and expected this body to act as his advisory council. But the Senate refused to play that role and the President simply sought its consent in fulfilment of the constitutional provision and in this way "its prerogative became one of consent rather than advice."<sup>16</sup>

Even then, its power of consenting to certain actions of the executive together with co-equal legislative powers with the House of Representatives, and judicial powers relating to impeachment cases, gives to the Senate a unique position and it has eclipsed in prestige and authority the popular Chamber, the House of Representatives.

**Share in the Appointing Power.** The President shares with the Senate his power of appointing federal officers. The President nominates and the Senate confirms officers of the United States by simple majority. The underlying idea was to restrain the unlimited powers of the President by a system of checks and balances and thereby ensure the appointment of honest and capable men to office. The Constitution-makers never intended to give the Senate anything more than the negative power of

rejecting the nominations of the President.<sup>17</sup> But the practice of **senatorial courtesy** gives to the Senators of the State concerned, where an appointment is to be made, both a positive as well as a negative function.<sup>18</sup> According to law the President sends the nomination to the Senate, where it is referred to the appropriate Standing Committee. An appointment to the federal judiciary, for instance, is referred to the Senate Judiciary Committee; an appointment to the military establishment to the Armed Services Committee. If the nomination is contested, hearing may be held at which those actively favouring or opposing the nomination are heard. If a Committee majority is favourable, a report to that effect is made to the Senate itself. On rare occasions the Committee reports unfavourably. The Senate, then, votes and if it refuses to confirm a nominee, his appointment is not possible.

But the actual process of appointment has greatly altered the provisions of the Constitution. For a proper understanding of the procedure in vogue the principal officers of the United States may be divided into two groups: (1) those who serve the nation as a whole, as do Supreme Court Judges, 'Cabinet' members, officers of the military establishments, ambassadors, etc., and (2) those who serve as federal officers, within a particular State, as do federal district judges, certain classes of post-masters, district attorneys, marshals, etc. Presidential appointments of principal officers are rarely rejected by the Senate, though there have been a few outright rejections in recent years.

Appointees whose federal duties are confined within the boundaries of a single State, and referred to under category 2 above, come under the custom of senatorial courtesy. The custom demands that the President should consult the senior Senator of the State in which the appointment is to be made. If the senior Senator does not belong to the President's party, he must do so with the junior Senator. If neither Senator is of the President's party, the President is not bound to consult with either Senator, but he will often do so. Even if he does not consult, the President will rarely appoint a personal enemy of the Senators concerned. The Senate is jealous of its traditional prerogative and will rarely approve an appointment which is personally obnoxious to the Senator most concerned. In 1938, President Roosevelt tried to break this iron-clad tradition and nominated a federal Judge in Virginia without first clearing his choice with the senior Senator from Virginia, Carter Glass. The latter, though himself a Democrat, asked his colleagues to reject the nomination as he had been by-passed. The Senate refused the nomination by 72 to 6 votes. In 1951, President Truman was unable to secure confirmation of two nominations of federal district judges in Illinois, because of the opposition of Senator Paul Douglas, senior Senator from the State. The nomination of Justice Fortas by President Johnson in 1968 for Chief Justice of the Supreme Court raised a storm and was rejected. Within five months—November 1969—April 1970, the Senate rebuffed for the second time President Nixon in his attempt to appoint a Conservative Southerner as Supreme Court Judge.

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17. See ante, Chap. III. Also refer to Garner's *Government in the United States*, *op. cit.*, p. 191.

18. The role of the Senate in making appointments has already been discussed in connection with the powers of the President, Chap. III.

**Share in the Treaty-making Power.** The Senate also shares with the President the power of making treaties. All treaties negotiated by and on behalf of the President are laid before the Senate and a two-thirds vote of the Senators is necessary to the validity of the treaty. The Fathers of the Constitution probably wanted the President and Senators to sit down together and jointly work out a treaty. It is evident from the use of the words "advice and consent" of the Senate used in the Constitution. Washington, who thoroughly knew the mind and intentions of the Philadelphia Convention, visited the Senate to discuss a treaty which he desired to be concluded with the Southern Indians. Having received the rebuff from the Senate, Washington "started up in a violent fret," and said that "this defeats every purpose of my coming here."<sup>19</sup> And since then no President has conferred directly with the Senate. Nonetheless the Senate plays a significant role in making treaties and ratifying treaties. If the President entertains doubts on the repudiation of a treaty by the Senate, he consults the members of the Foreign Relations Committee in advance and solicits their views. In fact, the Secretary of State usually works closely with the Foreign Relations Committee of the Senate.

How important is the treaty-ratifying power of the Senate is given by John Hay, once the Secretary of State. He said, "A treaty entering the Senate is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive." This is rather too sweeping a statement and particularly when it comes from a former Secretary of State. It is true that the extraordinary two-thirds majority required for the approval of a treaty has frequently proved a great handicap and led to the defeat of a number of treaties. It is, also, true that a small majority can sometimes threaten to defeat a treaty and to reap political advantage thereby. Some of the rejected treaties such as Taft Knox arbitration treaties of 1911-12, the Treaty of Versailles, and the protocol for participating in the World Court, were of supreme importance. But the Senate, too, "has unconditionally approved about 900 of the approximately 1,100 or more submitted to it; many of the remainder were passed with amendment or reservation." There is, however, strong agitation to modify the Senate's treaty-ratifying power. It is demanded that this power should be given to a simple majority either of the Senate or of the two Houses. There is evidently no marked sentiment for change and the Senate is not likely to surrender the power given to it by the two-thirds majority requirement so long as the proposing of an amendment to mark the change requires a two-thirds vote of both Houses of Congress.

**The Senate as a Court of Impeachment.** Another special function of the Senate is that of acting as a Court for the trial of impeachment cases. The Constitution prescribes that the President, Vice-President, and all civil officers<sup>20</sup> shall be removed from office on impeachment for

19. As quoted in Burns and Peltason, *Government by the People*, op. cit., p. 422.

20. Military and Naval officers are tried by court martial. The members of Congress are not liable to impeachment. In the case of William Blount, a Senator from Tennessee in 1907, the Senate decided that it had no jurisdiction of the case.



and conviction of treason, bribery, or other crimes and misdemeanours. The House of Representatives prefers the charge and the Senate sits as a court of trial. On such an occasion the Senate is on a judicial mien and issues writs, sub-pœnas to witnesses and administers oaths. When a President is on trial, the Chief Justice of the Supreme Court presides. A Committee of Representatives appointed by the House appears at the bar of the Senate and prosecutes the impeached official.

A two-thirds vote of the Senate is required for conviction and the penalty which it can impose is removal from office and disqualification from holding office in the future. It cannot inflict punishment ranging to imprisonment or fine. But the person convicted and removed may be indicted and tried by courts under the ordinary procedure of law as any other criminal may.

The procedure of removing an officer by Impeachment is so cumbersome and unwieldy that it is very seldom resorted to. The Senate has sat as a Court of Impeachment on twelve occasions so far, and it has given the verdict of guilty only four times. The most notable trial was that of President Andrew Johnson, who in 1868 escaped conviction by only one vote after a three-month sitting of the Senate as a Court of Impeachment.

### SENATE: THE CAUSES OF ITS STRENGTH

**Not a Subordinate Branch of Congress.** In addition to the three special functions which the Fathers of the Constitution assigned to the Senate, it is also a legislative body. But it is a co-ordinate body and not a subordinate branch of Congress and exercises co-equal powers with the House of Representatives in making the national laws. There is no law in the United States, as it is in Britain,<sup>21</sup> which empowers the House of Representatives to veto the Senate. The only eminence which the House enjoys over the Senate is the one relating to raising of the revenues and the Constitution simply provides that such measures must "originate" in the House of Representatives. But it, also, prescribes that the Senate "may propose or concur with amendments as on other Bills." It means that the Senate can agree to, amend, modify or reject any measure relating to revenues and sometimes it so drastically mutilates it that it becomes beyond any possible recognition, as it did a few years back with the tariff Bill. The Senate can, thus, "virtually initiate new revenue proposals under the guise of amendments." The tariff Bill, referred to above, was so completely amended that it "struck out every thing in the Bill except the enacting clause."<sup>22</sup> and every Bill carries with it the introductory clause stipulating: "Be it enacted by the Senate and the House of Representatives of the United States in Congress assembled." According to the letter of the law, therefore, the revenue Bills must originate in the House of Representatives, but in practice the Senate can also do that and as Dr. Munro says, "it has found a way of doing what the Constitution did not intend it to do."<sup>23</sup>

21. Refer to the Parliament Act of 1911 as amended in 1949.

22. "On another occasion when a tariff measure originated and passed in the House, came back from the Senate, there were no fewer than 847 amendments clinging to it." Munro, W.B., *The Government of the United States*, op. cit., p. 302

23. *Ibid.*



With regard to the appropriation Bills, the Constitution is silent and the only logical inference is that in the absence of any constitutional prohibition, the Senate may originate appropriation Bills, including the national budget, if it wishes to do so. The custom, however, is and the House has guarded it "with great jealousy" that it has the exclusive right to originate appropriation Bills. Yet it cannot be denied that the Senate's fiscal role rivals that of the House of Representatives.

**The Investigation Committees.** The Senate has very often undertaken special investigations embracing varied matters. Among the Constitutional powers of Congress to which the investigating function is ancillary are those of legislation, impeachment, determining the qualifications and elections of its members, the consideration of treaties and agreements requiring Senate action, and the confirmation of Presidential nominees for public posts. Apart from this, as a result of the implied powers, which the Supreme Court has held as the valid jurisdiction of Congress, the investigation committees may exercise the power to delve deep from time to time into many aspects of the activities of the Executive. The Legislative Reorganisation Act of 1946 charges the Standing Committees of Congress with 'watchfulness' over the corresponding agencies on the administrative side. In this 'watchdog' capacity, the committees may be concerned with the handling of appropriations, the personal or official probity of executive appointees or with matters touching the national security.

The investigation committees may sit in Washington or they may go about the country to find facts, ideas, opinion and information, and seek advice that may be of utility in coming to a conclusion. It may summon witnesses, official and non-official, require them to produce papers and documents considered necessary for purposes of the investigation.

Bryce credits committees of the Senate with having more than once "unearthed dark doing" which needed to be brought to light. There is now increasing emphasis in the United States on the 'watchdog' function of the investigation committees. The only way Congress can check the administration is through the questioning of official witnesses in the committees when appropriation Bills are under consideration, or through interim investigations of its own into the way executive agencies are being run. The Committee can summon any official of the United States, from a member of the Cabinet to the routine clerk, to testify in public and private hearings. It is, indeed, an effective method of checking administration. But to say, as Dr. Munro observes, that "they are merely seeking data as a basis for legislation is to use the words with Pickwickian versatility. What they often are seeking is ammunition that can be used in the next election campaign."<sup>24</sup> The inquiries are, therefore, largely political in nature. The Senators dominate the politics of the country and Congress, and its investigation committees are always politically vigorous. Many famous investigations have since taken place and the most recent was the Truman Committee during World War I which "probed into waste and inefficiency, made many constructive suggestions and helped put its Chairman in the White House."

Special investigation committees have all the powers of standing committees, except that they normally may not introduce legislation.

There is a mortal terror of these senatorial investigations and many officials "dread the loaded questions of hostile Congressmen." Errors are likely to arise here and there in the conduct of administration which when discovered are widely publicized for political gains, and investigations thrive on publicity. But senatorial investigations operate "directly in the spotlight" and often the "proceedings are covered by newsreel and television cameras and reported by the host of newsmen." Recently some investigators have so fanatically sought publicity that "they have indulged in defamation of character bullying and mistreatment of witnesses, and outright partisanship."<sup>25</sup> Such a situation is viewed with alarm even by the members of Congress. Senator Scott W. Lucas has warned that "unless Congress reforms its methods of conducting investigations," unless it puts some limits of responsibility both upon the interrogation of witnesses and upon the type of testimony which witnesses are allowed to give—unless, indeed, it adopts a wholly new and more judicious attitude—one of the great and important instruments of legislative process will be destroyed.

But the intrinsic utility of the investigation committees cannot be denied if they conduct their investigations keeping in view the objects they are charged with. Brogan has correctly said that the investigation Committees are "one of the most important modifications of the separation of powers and consequently, one of the indispensable driving belts of the American system."<sup>26</sup> To put it in the words of Galloway, they are "the buckle that binds, the hyphen that joins the legislature to the executive."<sup>27</sup> The investigatory power is an essential adjunct of the law-making authority, for the investigatory function is used to seek information in matters in which legislation is contemplated, to ascertain the effectiveness with which laws are being executed, to uncover the wrongs and excesses of the government and thereby to put before the public problems essential to the country's welfare. Some of the investigations conducted by the Senate Committees, especially by the Foreign Relations Committees, have been marvellously revealing and advantageous in keeping the administration on its toes.

**Conference Committee.** In case of disagreement between the two Chambers the differences are resolved through a Conference Committee. The members called "managers" are equally drawn, generally three and in exceptional cases five, from each Chamber and they confer together. Each Chamber votes as a unit and the conferees may be given instructions by their respective Houses. It is natural that the Senators, who are seasoned statesmen and stalwart politicians with longer and maturer parliamentary experience, should have better of the gain. And considering the degree of solidarity often exhibited by the Senators the conferees are usually supported by the Senate. The Senate, in fact, usually gives a free hand to its representatives on Conference Committees where-

25. Burns and Peltason, *Government By the People*, p. 441.

26. Brogan, D.W., *The American Political System*, p. 170.

27. Galloway, G.B., "Investigative Functions of Congress," *The Political Science Review*, Vol. XXI, No. 3.

as the House binds its conferees more than often to instructions. That is done as the House feels that its managers are too easily out-talked by the Senators.

**Political Role of the Senators.** "Senators are somewhat a different breed," write the joint authors of *Government of the People*, "of political animal from the average representatives." The Senators represent, as compared with Representatives, more people and greater areas and thus, are not subject to the fluctuating public opinion and personal idiosyncrasies of the electors of a particular locality. A Representative must cater to local needs and remain susceptible to the influence of a few interest groups and handful of local party bosses. The Senators, and a majority of them, enjoy nation-wide reputation for their political sagacity. Their opinions are reckoned with and even Presidents at times have and to defer to the wishes of some veteran Senators, who are the prospective candidates for the Presidency. They also very often command important positions and dominating influences in the organization and policies of their party in the State which they represent." Their party position is essentially linked with their control of federal patronage. The power of the Senate to confirm Presidential appointments is important constitutionally as well as politically. The former is indicative as a part of the system of checks and balances whereas the latter emphasises that the individual Senator has virtually a veto power over major appointments in his State.

**Senate Solidarity.** Closely allied with it is the solidarity exhibited by the Senate. "In a sense the Senate is a mutual protection society." Each Senator jealously guards the rights and privileges of others irrespective of party ties and whenever an onslaught had been made to break its solidarity, as Roosevelt did to bypass the traditional method of senatorial courtesy in 1938, it has always stood together. "Washington correspondent's have frequently reported that two Senators may attack each other in vehement language on the floor, only to be seen a short time later strolling arm in arm in the corridors outside." They thrive on the principle of live and let live and their code of behaviour is to speak well of the Senate as an institution. Such a sense of solidarity enables them to ward off all encroachments from outside. "The Senate," remark Swarthout and Bartley, "is alert against any possible threat of pressure by either of these two (the President or the House of Representatives) sources, and it is quick to resent any action it considers to be a danger to its prerogative or its traditions." In its solidarity lies the independence and assertiveness and these qualities make the Senate one of the most powerful legislative assemblies in the world.

**Independent spirit of the Senate and Political Experience.** One of the most important factors which accounts for the authority and independence of the Senators is the continuity, stability and tradition of the Chamber which the House of Representatives has not been able to deve-

28. Burns and Peltason, *Government By the People*, p. 420.

29. As in the case of Huey Long of Louisiana, Joseph Guffey of Pennsylvania, Nelson Aldrich of Rhode Island, or, more recently, Robert A. Taft of Ohio, and Harry Byrd of Virginia.

lop. The entire membership of the House must stand for re-election every two years and every time it is faced with the laborious task of re-organising itself. The Senate, on the other hand, has been continuously organised since 1789, for only one-third of its members stand for re-election in each two-year period. Coupled with this fact is the six-year Senate term. There are many members who gain election for three terms and some even see six Presidential terms come and go. The continued long service gives to the Senators a standing and prestige and they carry with them the sense of senatorial pride. They regard themselves as senior lawmakers of the country and custodians of the balance of powers between the Legislative and Executive departments. Each Senator strives to become a specialist, working hard "at unglamorous legislative work."

Membership in the Senate is, in fact, greatly coveted. A high proportion of its members are former Representatives or former State Governors. The tendency of many of the most able House members to seek Senate seats has constituted a drain on the talent of the House of Representatives. The loss of the House is the advantage of the Senate. Similarly, the presence of around twenty-five former State Governors not only adds to the prestige and stature of the Senate but also imparts an active quality to Senate behaviour less evident among the House membership, where talent is depleted by the locality rule and some other factors.

**The Conservative character of the Senate.** The Framers of the Constitution had thought that the Senate would prove the bulwark of conservatism. They had, accordingly, designed it and given it special powers so that it might serve as a check on the more radical House of Representatives. The Senate has fulfilled the expectations of its designers and acted as a conservative obstacle to hot-headed action as was illustrated a few years ago when it opposed President Truman's proposal to draft railroad strikers into the army. "It is from Senators," writes Charles Beard, "rather than Representatives that the public may expect staunch defence of constitutional methods and powerful opposition to violent, high-handed and bigoted opinions and actions."

**Influence on the Foreign Policy.** The Senate has been the Congressional spokesman on foreign policy, and the House its junior partner. This is due to the Senate's treaty-ratifying authority and its veto power over Presidential appointments of ambassadors, ministers and other important officials. The Senate can, also, influence the foreign policy through investigations. The investigations of the Nye Committee paved the way for neutrality legislation in 1930. In 1951, the Senate investigation on the question of dismissal of General Douglas MacArthur brought Truman's foreign policy in the Far East under fire and the administration was, thus, obliged to clarify its position.

But the present trend is to undertake international obligations by legislation rather than by treaty. The notable examples of such a joint action by the Senate and the House are the Greek-Turkish Aid Programme, the European Recovery Programme, Point Four, the Indian Grain Programme, etc., etc. Some Senators have vehemently protested against such an encroachment as well as the President's frequent use of executive agree-

ments. They stress that no obligations be incurred except by formal treaty procedure.

**Conclusion.** The obvious result is that all through these times the Senate has kept its supremacy. Lord Bryce had aptly remarked that the Senate "has succeeded by effecting the chief object of the Fathers of the Constitution, viz., the creation of a centre of gravity in the government, an authority able to correct and check on the one hand the democratic recklessness of the House, on the other, the monarchical ambitions of the President. Placed between the two, the Senate is necessarily the rival and often the opponent of both. The House can accomplish nothing without its concurrence. The President can be checkmated by its resistance. There are, so to speak the negative success on its positive side, it has succeeded itself eminent and respected." There has been a good deal of overlapping of actions of the Senate and the House during recent times, but it either body has increased its powers relative to the other, it is the Senate. While Upper Chambers in other parts of the world have been declining in power and importance, the Senate has added to its strength and prestige. It is not only the most powerful Second Chamber in the world, but also one of the most powerful legislative assemblies in the world.

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## CHAPTER VI

# CONGRESS (Continued)

### FUNCTIONS AND POWERS OF CONGRESS

**Powers of Congress.** The Senate and the House of Representatives make the national Legislature or Congress of the United States. Article I of the Constitution vests all legislative powers in Congress and then enumerates the functions it shall have to perform and the powers it is authorised to exercise. If the Founding Fathers had strictly adhered to the application of the doctrine of Separation of Powers, Congress would have been only a law-making body. But the system of checks and balances gives it non-legislative functions as well, and these functions are in no way less important than its legislative functions. Broadly regarded Congress is the instrument by which the people frame, declare, and supervise the policies of the nation. Under the non-legislative functions, we may include: (1) constituent, (2) electoral, (3) executive, (4) judicial, (5) directive and supervisory, and (6) investigative. With regard to legislative functions, it must be observed that Congress is not the only law-making authority<sup>1</sup> notwithstanding what Article I of the Constitution says.

### NON-LEGISLATIVE FUNCTIONS

**Constituent Functions.** While dealing with the process of amending the Constitution, we said, that proposals to amend must be made by a two-thirds vote of Congress or by a national Convention which Congress calls at the request of the legislatures of two-thirds of States. Whatever method is adopted, and only the Congressional method has ever been invoked, not a syllable of that document can be changed without the intervention of Congress. In addition to the initiation of proposals for the alteration of the Constitution, Congress determines the manner to be used, ratification by the legislatures of three-fourths of the States or by conventions in three-fourths of the States, and may specify time limit for ratification. Moreover, Congress has important duties in expanding and interpreting the original Constitution and this, as we have discussed, is one of the most important factors to make the Constitution dynamic.

**Electoral Functions.** Congress has electoral functions too. As a matter of routine, it meets in joint session every fourth year to count the electoral votes cast for the President and Vice-President. If no candidate receives a majority of the electoral votes for President, then, the House of Representatives selects, each State voting as a unit, the President from among the candidates with three highest votes. When no

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1. See ante.

candidate secures a majority of the electoral votes cast for the Vice-President, the Senate makes the choice from among the two candidates with the highest number of votes. Only one Vice-President had been so far elected in this manner and that, too, in 1837, when the party system was not fully developed. Such a contingency cannot happen now. Congress by law determines who shall be the President in the event of the death or disability of the President and Vice-President. Congress, also, has authority to legislate on "the times, places, and manner of holding elections for Senators and Representatives," and that it judges the qualifications of its own members including the validity of their elections. It may disqualify persons whose conduct a majority of the members disapprove.<sup>4</sup> In 1926, for example, the Senate "refused to seat" William S. Vare because of his excessive campaign expenditure.

**Executive Functions.** Executive functions extend to appointments and treaty making. Administrative functions we take under the heading directive and supervisory. This bifurcation has been made for purposes of clarity. In relation to fifteen thousand or so officials who are nominated by the President and confirmed by the Senate, the Congressional role, as we discussed under the heading special functions of the Senate, is specially outstanding. The Senators and the Representatives, but especially Senators, actually determine the vast majority of these appointments. Senators who belong to the President's party do not wait to be asked which candidate they would like to favour. They immediately proceed on their own initiative to suggest names of the candidate whom they desire and, except in rare cases, they get their recommendations accepted. If no Senator from a State belongs to the President's party, Representatives claim their privilege to recommend such names. Some times, even when there are party Senators, an agreement may be worked out under which the Senators share the patronage with the Representatives.

The Senate has the important function of ratifying treaties.<sup>5</sup> In the negotiations of treaties, the President has the exclusive authority, but discreet and far-sighted chief executive heads consult the leading Senators and take their opinions in anticipation in order to facilitate its ratification.

Congress, as a whole, has intimate interest in the international relations of the United States. The President reviews the international situation in his message and Congress permits the expenditure to be incurred on international obligations. Declaration of war must be made by Congress. The present tendency to incur international obligations through legislation rather than treaty emphasises the need of a joint action by the Senate and the House.

**Judicial Functions.** Impeachment proceedings of the President, Vice-

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2. Article I, Section 4.

3. Article I, Section 5.

4. The constitutionality of this practice has been questioned, although there are many precedents to support it.

5. See *ante* under the heading Special Functions of the Senate.

President and other federal officials can be brought about by the House and the Senate sits as a Court of Trial.

Each Chamber exercises disciplinary powers over both its own members and to a limited extent over private persons. Members of Congress are not subject to impeachment as they are not, according to the decision of the Supreme Court, civil officers of the United States. Both the Chambers, therefore, determine how to discipline their members, and a two-thirds vote of his own House is sufficient to expel a Congressman, though it is a most uncommon proceeding.

Each House has also the inherent power to punish private persons whose conduct directly interferes with the due conduct of congressional business. If, for example, a witness before a Congressional Committee refuses to answer a question, the Chamber concerned to which the committee belongs can sit as a court and convict him of contempt. It may order the Serjeant-At-Arms to hold him in custody. But he cannot be held longer than the time Congress remains in session. Such a power, however, Congress normally does not exercise. The matter is referred to the United States Attorney for punishment under the law whenever there is a case of contempt.

**Directive and Supervisory Functions.** Another Congressional function is that of directing and supervising administration. The President and his principal subordinates, no doubt, actually direct and supervise administration, but it is Congress which creates all the administrative departments and agencies. The Constitution does not say anything about their organisation. Nor does it define their powers and functions. The form, the organisation, and the powers to be exercised by the administrative departments are all defined by the Acts of Congress. And, then, Congress provides money for carrying on their activities. All this "opens a way for watchfulness over the work performed, for requests for information and reports for assignment of tasks and duties, and, of course, for curtailment of activities, or even termination of them altogether (perchance of the agency itself), by denial of funds." The Legislative Reorganisation Act of 1946, stressed the importance of continuous vigilance over the execution of all laws by the Standing Committees of both the Houses. Then, Congress may from time to time see fit to pass laws directing the administrative departments to report to it. Thus, the Controller-General has been made responsible to Congress rather than President. Congress may sometimes pass a resolution directing the administration to follow a certain course of action in the event of a particular situation.

**Investigative.** We have referred to the investigation committees of the Senate and pointed out how these committees help to keep administration within its bounds. But appointment of such committees is not the peculiar function of the Senate alone. In fact, investigations by committees of Congress are as old as Congress itself. "Legislative oversight of administration is familiar and well-grounded assumption of responsible government," writes Arthur Macmahan, and Congress can look into any subject whenever it deems necessary in order

to carry out its law-making, amending, electoral directive and supervisory, or other duties. Alexander Hamilton and the Treasury Department were investigated into by the Second Congress: Presidential and Cabinet offices have been frequently investigated ever since.

Congressional investigations help to make administration accountable. A proper function of the Legislature, a body representative of the people, is to keep constant watch and control over the activities of the Government which they support and to make public its policies and acts. Under a Parliamentary system of government there are many devices available to do so. In the Presidential system of government there are no such means available and responsibility cannot be adequately enforced. Legislative investigations are, therefore, a major technique, even though it is sometimes cumbersome and has fearful implications for holding the executive and administrative agencies accountable. Still, the need for throwing adequate light of publicity on what the administration does has become really imminent during recent times. As Congress has been required to extend the area of governmental functions, it has also been compelled to delegate regulatory powers, to authorise wide increase in the number of administrative bureaus, and to support by "appropriation and sustain by law a great and complex government machine involving the expenditure over \$42,000,000,000 annually and the activities of over two million government employees."<sup>7</sup>

Many Americans have held investigatory powers of Congress as unconstitutional and have pleaded that they should be outlawed. Actually the Constitution does not provide for such investigations, but, at the same time, they are deeply rooted in American legislative procedure.<sup>8</sup> It is true that there has been extravagant abuse of the investigatory powers by the politically inspired members of these Committees, but "corruption and bribery have often been revealed only through Congressional investigations. The inadequacy of old laws and the necessity for new ones have been determined only by investigations. The abuse of offices, inefficiency, misapplication of powers have all been curtailed not only by investigation but by the constant possibility of an investigation."<sup>9</sup>

### LEGISLATIVE FUNCTIONS

**Congress is Primarily a Legislative Body.** In spite of the importance and immensity of its non-legislative functions, after all Congress is primarily a Legislature and to it the Constitution assigns "all legislative power herein granted." The words "herein granted" have two important meanings. In the first place, it means that consistent with the principle of limited government, the powers of Congress, too, are limited and they are enumerated in two lengthy sections of the Constitution.<sup>10</sup> There are some eighteen different categories on which it has been made competent

7. Tourtellot, A.B., *The Anatomy of American Politics* (1950), p. 98.

8. The colonial assemblies of America were authorised to conduct specific investigations. The Constitutions of some of the original thirteen States contained general authorization of this kind.

9. *The Anatomy of American Politics*, *op. cit.*, p. 99.

10. Article I, Sections 7 and 8.

to enact laws. Secondly, the subjects not enumerated are beyond the authority of Congress, but, at the same time, the Constitution expressly details what Congress cannot do. The general conclusion is that Congress may exercise those powers which are expressly granted and not definitely prohibited by the Constitution, and the rest remain within the jurisdiction of the States.

**Doctrine of Implied Powers.** After expressly enumerating in succession the various powers of Congress, the Constitution concludes with a sort of general grant, empowering Congress to make all laws which shall be necessary and proper for carrying into execution "the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."<sup>11</sup> Within a few years after the founding of the Constitution, Congress desired to pass laws relating to matters that the Constitution did not mention particularly in connection with the proposal of Hamilton to establish a United States bank. Hamilton contended that the authority to establish such an institution was clearly implied in the power to borrow money and pay the debts of the United States. A federal bank, he asserted, was a proper, if not necessary, means for carrying into effect these important powers of Congress, just as the establishment of mint was necessary to carry out the power relating to the coinage of money. Jefferson and his associates maintained that Congress had no right to exercise any power which was not expressly conferred. As a result of the liberal attitude which ultimately prevailed and the policy of liberal interpretation, which Chief Justice Marshall of the Supreme Court and his associates adopted, Congress has profusely relied upon the doctrine of implied powers for its authority to legislate on many important questions. "Let the end be legitimate," said Marshall speaking for the Court, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the spirit and letter of the Constitution, are constitutional."<sup>12</sup> But the Court in the case went even beyond the doctrine of implied power when it invoked the theory of the resultant power. The result has been to strengthen the National Government in order to enable it fulfilling the great purpose for which it was created.

**Resultant Powers.** The doctrine of implied powers has been further cemented by the express provisions in some of the Amendments that Congress shall have the power to enforce them by "appropriate legislation."<sup>13</sup> There is difference of opinion over what measures may and what measures may not, fairly be deemed "necessary and proper," or "appropriate" for carrying into effect the enumerated powers. The Supreme Court has held "that if it can be shown that Congress has been given authority the two Houses are free to select any means or instrumentalities whatsoever which are not prohibited by the Constitution," and all such means "are appropriate and consistent with the spirit as

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11. Article I, Section 9.

12. Article I, Section 8, Clause 18.

13. *McCulloch v. Maryland*.

14. Refer to Amendments XIII, XIV, XV, XIX and XX.



well as letter of the instrument." Moreover, whether a certain law is "necessary" within the meaning of the Constitution the Supreme Court has held that it is a "political question for Congress alone to answer and the Courts will not rule upon it." The obvious result is that Congressional authority has been considerably widened by the decisions of the Supreme Court. The "General Welfare Clause" has further helped the authority of Congress to expand. The Constitution provides that "Congress shall have the power . . . to provide for the common defence and general welfare of the United States." It means that federal government possesses powers, which are neither specifically enumerated nor implied, under the constitutional provision of the common defence and general welfare of the United States. For example, when States cannot adequately handle particular problems, which fall within their jurisdiction of residual authority, then, it devolves upon the National Government, under the General Welfare Clause, to assume the power in an attempt to relieve the situation. This opinion was supported by Mr. Justice Stone in his dissenting opinion to support the Agricultural Adjustment Act. A similar opinion was expressed in *Steward Machine Company v. Davis* and *Helvering v. Davis* in 1937. Mr. Justice Cardozo, delivering the majority judgment, used the "General Welfare Clause" to justify the Social Security Act. Since then Congress has legislated on many matters embracing diversified problems covered by this mystic constitutional provision.

**Emergency Powers.** Reliance has also been placed on the so-called "emergency powers." During the economic depression of the Thirties and the World War, Congress passed emergency legislation on subjects beyond its normal jurisdiction. Congress has no emergency powers and the Constitution does not prescribe any. Nevertheless Congress has enacted laws, when the country was in the midst of economic or international crisis, which it never would have passed under ordinary circumstances. The Supreme Court, however, held the "emergency does not create power," nor does it increase power already given in the Constitution.<sup>15</sup> The powers which Congress wields at such time are not special powers. It relies on powers which it already has, but for which there is little or no need to use ordinarily.

Thus, the powers expressly given to Congress do not convey the extent of the powers actually exercised today. Two of the eighteen express powers relate to levying taxes, spending public money, and borrowing on federal credit. The third brings in foreign and interstate commerce. "These three items alone have been expanded so amazingly that despite the six lines of type which they require in an ordinary printed copy of the Constitution, they now constitute the basis for hundreds and even thousands of far-reaching statutes which Congress has from time to time enacted. The commerce clause has been invoked during the past

15. Refer to Chief Justice Marshall's classic statement in *McCulloch v. Maryland* (1819).

16. See ante.

17. *United States v. Butler* (1936).

18. *Home Building and Loan Association v. Blaisdell* (1934).

decade or two to justify the regulation of business practices, the protection of organised labour, the regimentation of the coal-mining industry, and the stabilization of the stock and grain markets." The remaining gap was filled by the general welfare clause and the crowning extent was made under common defence. When the economic depression began there was some feeling that Congress lacked adequate powers to tide over the difficulties in which the country was placed at that time. Today, no such fear can be entertained even remotely. "Indeed, the chief apprehension in many minds at present seems to be that too much responsibility has been loaded on Congress, especially in those fields which were long left to private and State control."

### THE MAKING OF LAWS

The British and Americans, says Griffiths, are alike in their ideals as to how to legislate. "Both strive to provide thorough discussion and consideration. Both are determined that the minority shall have a fair opportunity to be heard, to criticize, to offer alternatives. Both offer opportunity to criticize the administration and call it to account." And he concludes that the differences as in two countries are chiefly differences in procedural methods rather than in objectives. Griffiths makes two important observations here. American procedure, he says, provides for much greater legislative specialization in substance and in detail and this suits well the enormity of legislation which Congress has before it. Much of it, which in part concerns details, in Britain is left to departmental orders or private Bills. Secondly, in comparison to the simple standing orders of the House of Commons and the precedents thereunder, Rules of Procedure and precedents in both House and Senate "present a maze, a mystery which even those of long-standing membership often find it difficult to master completely."

Each Congress in its two years of existence faces over 10,000 Bills and resolutions, of which less than 2,000 are private Bills, which follow a simplified procedure. The remaining Bills are public. A Bill introduced in the first session of a two-year Congress does not have to be re-introduced in the second session of the same Congress. With the election of the new Congress all previously introduced Bills which have not been enacted into laws, lapse and these must be reintroduced, if need is felt to do so, with the coming in of the new Congress. The principal reason for this huge number of Bills is the doctrine of equality among the membership. A backbencher and a Chairman of a committee rank equally. No distinction is also made between a minor Bill and an important measure, both are of equal importance. Each follows the same procedure. There is no such distinction, as it is in Britain, between a Government and a private member's Bill.

**Kinds of Bills.** Before we deal with the legislative procedure, it is necessary to distinguish between Bills and joint resolutions, and, then, to say something about variations among Bills. The greater part of the work of the Senate and the House of Representatives is transacted through the medium of Bills or joint resolutions. There is practically

no difference between the two, except that the latter are narrower in scope and more temporary in purpose. Otherwise they are similar to Bills, undergo the same procedure, and become effective under the same conditions. **Joint resolutions**, however, differ from **concurrent resolutions** and **simple House or Senate resolutions**. **Concurrent resolutions** are employed to express an attitude, opinion and objective of both the Houses. But they have no legal effect and are not submitted to the President for his assent. Simple House or Senate resolutions express the opinion, purpose, or intention of the Chamber concerned and they may not be endorsed by the other. Nor have they any legal effect and are, accordingly, not submitted to the President for his approval.

There is a good deal of variation among Bills themselves. Some of the Bills are of fundamental importance and embody major programmes of government policy and cover important details spreading to fifty, seventy-five or even more printed pages. Other Bills pertain to private affairs. On the other hand, there are Bills which deal with private affairs, for example, to provide pensions for widows of former Presidents, or appropriate money to pay for damages caused by post office or army trucks. The former are known as **public Bills** and the latter as **private Bills**, that is, they do not concern public matters. A private Bill is primarily of interest to some individual or group of individuals and aims at their benefit. But here, too, as in the case of Bills and joint resolutions the distinction is not always followed in practice.

**Introduction of Bills.** There are no government Bills in the United States as they are in Britain; public Bills introduced, sponsored and piloted by the government. The government has no place in Congress and all Bills, public or private, are introduced and defended by members of Congress. It does not, however, mean that all proposals to enact laws originate among the Senators or the representatives themselves. Some proposals do originate with them, but majority of the Bills come from the Executive, that is, from the President or from one of the executive departments or independent agencies. Some Bills originate with, or at least are inspired by, pressure groups or persons entirely outside of government circle. Anyway, whatever be the source of origin, a Bill must become a member's child and he should appear in the House as its sponsor. The Senators and representatives act as intermediaries rather than originators in the making of laws.

The member introducing a Bill endorses the copy with his name and drops it in the "hopper," a box on the Clerk's desk in the House and the Secretary's in the Senate. Any Bill may be introduced in either Chamber, except that Money Bills are required by the Constitution to originate in the House of Representatives. The Bill is immediately numbered and sent to the Government Printing Office and made available to members next morning at the document room. With this procedure the first stage in the career of a Bill is over.

**Committee Stage.** Reference to a Committee is the next step in the legislative procedure. In the great majority of cases the Bill goes to an appropriate Standing Committee of the House, into which it is introduced, automatically. The title of the Bill indicates what particular Standing Committee should receive it. Before 1910-11, the Speaker in

the House of Representatives determined the Committee to which a Bill was to go. But now the Speaker has been deprived of this power. Sometimes, however, a Bill is of such a nature that it might be referred with almost equal propriety to any one of two or more appropriate committees. In all such exceptional cases, the Speaker decides to which Committee a Bill shall be referred. But it is the accepted practice for Speakers to exercise this discretion freely and without party prejudices. In the Senate the reference to a Committee is even more automatic than in the House, because the presiding officer there has never had the discretionary authority to assign Bills to Committees.

In Committee, Bills are first given a preliminary examination and a decision is taken whether the proposal has any merit or not. The Bills which are deemed worthy of consideration are sorted and the rest are entrusted to the Committee files. It means, Bills meriting no consideration are "pigeon-holed." It is estimated that from 50 to 75 per cent of the Bills introduced in Congress come to final rest in Committee files and are never heard of again. The more important Bills which merit consideration are studied in details, and relevant information is gathered both from official and public sources. In fact, the Committee may seek to obtain all the light on the subject. Specified portions of the measure or even the whole of it may be assigned to a sub-committee. The sub-committees are very much like regular committees, "sorting the wheat from the chaff," deciding what changes should be recommended in a certain Bill, and otherwise preparing to dispose of the business entrusted to them. In 1946 Congress decided to provide a research staff for each committee.

Committees charged with the consideration of important Bills frequently hold public meetings at which interested parties may appear and present arguments for and against the measures under consideration. In addition to the prepared statements of witnesses, numerous questions are often put by members of the Committees for the purpose of elucidating certain points or eliciting further information. Apart from the testimony received in connection with public hearings, Standing Committees are very often subjected to outside influences. The President may himself talk personally or even write letters to top-ranking members of the Committees for their due consideration of important measures. Officials of administrative agencies may ask the Committees to be heard in person or they may submit detailed statements with their reasons for a favourable action by the Committee on a certain Bill. Representatives of pressure groups also manage to make their influences felt whether public hearings are held or not. Sometimes they manage to get themselves invited to the private hearings of Committees.

On the basis of its own investigations, the information gathered at public hearings, the opinion elicited from high Government officers and the influence exercised by pressure groups, the Committee meets in executive (closed) session to arrive at its verdict. Before the final meeting is held the sentiments of various members are canvassed. It may take by majority vote one of the following courses:

(1) it may recommend the Bill back to the Chamber concerned with recommendation that it be passed;

(2) it may amend the Bill and recommend that it be passed as amended;

(3) it may entirely change the original Bill except its title and report a new one in its place;

(4) it may report the Bill unfavourably and recommend that it need not be passed;

(5) it may "pigeon-hole" the Bill, that is, to take no action on the Bill at all, or report it so late in the session that it may not find an opportunity for consideration.

The Report to the House is usually made by the Chairman of the Committee or someone designated by him. On important matters Committee Report may be extensive and exhaustive; on minor matters it may convey a little more than a simple affirmative note. Hearings of the major Committees on important legislation are published, some in the 'documents' series of Congress. Minority reports may also be filed.

**The Caucus System.** Before describing the next stage in the legislative procedure, it is necessary to briefly refer to the caucus system. We have already referred to the absence of leadership in Congress and consequently the need for devising some other means to see the Bills through or to oppose them. The mechanism which has been developed to meet the situation is known as the "caucus" or "conference."

There are numerous Bills which are non-controversial and do not demand much political interest. Such Bills are left to find their own way in Congress and the individual members are permitted by their parties to take stands as they please. But the most important legislative proposals cannot be left to themselves and it is here that the caucus system intervenes. A caucus is a meeting of the members of a political party both belonging to the Senate and the House and all members are expected to attend unless they have a valid reason for absence. The caucus at its first meeting of the session elects its party leader, steering committee, floor leader, whips and party committees on Congressional Committee. The caucus of the majority party plans a positive programme for the particular session of Congress. The minority caucus has less an active role to play, although it may decide to oppose certain controversial Bills which, "are regarded especially dear to the majority party." In the caucus meetings members are free to express their opinions and persuade the caucus to accept their view. But once the decision has been taken and a particular stand determined, all members of the caucus are expected to abide by its decision no matter what their personal views on the measure may be.

It may be pointed out here that the caucus system is used distinctly more in the House rather in the Senate. The caucus of the Senate used to be as strong as that of the House of Representatives, but during the last decade or so the caucuses in the Senate "have limited themselves to setting up party machinery and arranging committee assignments, leaving Senators free to divide themselves as they like on pending Bills."<sup>2</sup>



It does not, however, mean that the party whip is not issued to the members to pass a Bill which is deemed in the best interests of the party, but no official caucus is taken which would bind the party Senators in voting.

**Procedure on the Floor.** Each Bill reported out of Committee to the floor of the House is placed on one of the three principal calendars. A Legislative Calendar is a docket or list of measures reported from Committees and ready for consideration. The House of Representatives maintains three of these for different types of measures: (1) A Calendar of the Committee of the Whole House on the State of the Union, to which are referred all public Bills raising revenues or involving a charge against the Government. It is also called the Union Calendar. (2) A House Calendar for all public Bills not raising revenue nor appropriating money or property. (3) A Calendar of the Committee of the Whole House for all private Bills. It is also called the Private Calendar. Bills are listed on these Calendars in the order in which they are received from the Committees and remain there until the final adjournment of Congress, unless they are removed for consideration.

Both Houses guard jealously the right of the minority to be heard. In the House it usually takes the form of apportioning an equal amount of time on a given measure to its opponents and proponents. In the Senate it appears in the facilities extended for almost unlimited debate.

**Committee Reporting.** When the time fixed for bringing a Bill to the floor of the House of Representatives has arrived, the House ordinarily meets as a Committee of the Whole. The Senate before 1930 used Committee of the Whole more frequently than the House, but it has now abandoned this practice for the consideration of ordinary Bills, except in debating treaties. The Committees of the Whole are of two kinds: a Committee of the Whole House for consideration of private Bills and a Committee of the Whole House on the State of the Union of considering public Bills. When the House goes into the Committee of the Whole, the Speaker leaves the chair and calls some one else to preside in his place. The presence of 100 members constitutes a quorum. Debate in the Committee of the Whole is conducted rather informally, and greater freedom of discussion is allowed. Divisions are taken only *viva voce*, by rising vote or by tellers and no record is kept how members vote. Motions to refer or to postpone are not permitted and when discussion is completed the Committee votes to rise, the Speaker resumes the chair and the mace is again placed on a marble pedestal on the right of the chair.

The device of the Committee of the Whole is really important, because it enables all Finance Bills and most other important Bills to be considered in such a way that ordinarily every member who desires to speak and offer amendments can do so. He is, in fact, given an opportunity for that. It, also, affords large number of amendments to be presented, explained and disposed of speedily. "It facilitates rapid fire, critical debate which commonly shows the House at its best. And, for better or worse, the absence of recorded ayes and nays enables members to register their sentiments without check or restraint such as published votes sometimes impose."

Three readings of each Bill are required by House rules. The first requirement is satisfied by printing the title of the Bills in the **Congressional Record and the Journal**. Then, the measure goes to the Committee and if reported back, is placed upon its Calendar for a second reading. The second reading occurs at the time the Bill is taken up for consideration in the House or in the Committee of the Whole. This is the actual reading in full with opportunity for debate and for amendments to be offered. Some amendments are general, "considered" amendments are seriously intended as alterations in the Bill. Others are **pro forma**, involving the striking out of the last word or two of a section. In the conduct of the Bill the top-ranking members of the Committee who had supported the Bill pilot it through in the House. The minority members of the Committee oppose it. Time for debate is generally predetermined and is equally divided between the supporters and opponents of the Bill.

At the conclusion of the consideration, the Speaker states: "The question is on the engrossment and third reading of the Bill." If adopted, the Bill is ordered engrossed and read a third time. After this "the question is on the final passage of the Bill." If it is passed, then it is sent, duly signed by the Speaker, to the Senate.

**Action by the Senate.** The engrossed Bill is sent to the Senate through a messenger where it is received with due dignity. The President of the Senate refers it to the appropriate Standing Committee in conformity with the rules. The Senate Committee gives the same kind of detailed consideration as it received in the House, and may report it with or without amendment. Then, it is placed on the Calendar.

The Rules of Procedure in the Senate differ from those in the House of Representatives. The Senator making the report may ask consent of the Chamber for the immediate consideration of the Bill. If there is no objection and the Bill is of a non-controversial nature, the Senate may pass the Bill even without a debate after a brief explanation of its purposes and effect. Any Senator may also move an amendment thereto. If there is any objection to its immediate consideration, the report must lie over one day and the Bill is placed on the Calendar. Unlike the House of Representatives, there is only one Calendar of Bills in the Senate.

At the conclusion of the morning business for each legislative day the Senate proceeds to the consideration of the Calendar of Bills. Bills that are not objected to are taken up in their serial order permitting each Senator to speak for five minutes only on any question. Objections may be raised at any stage. When the Bill has been objected and passed over on the call of the Calendar, it is not necessarily lost. The majority party of the Senate determines the time at which the debate takes place and a motion is made to consider the Bill. The motion may lead to filibuster. Closure may be applied if 16 Senators sign a motion to that effect and the motion is carried by two-thirds of the members voting. Amendments may be moved even at this stage, and these, including those proposed by the Committee that reported the Bill, are considered separately.

After final action on the amendments, the Bill is ready for engrossment and the third reading. The President then puts the question upon the passage and the vote is taken *viva voce*. A simple majority is necessary to pass the Bill. The original engrossed House Bill, together with the engrossed amendments, if any, is returned to the House with a message stating the action taken by the Senate.

On return to the House, it is placed, with all the relevant papers, on the table of the Speaker to await further action. If the amendments are minor these are accepted by the House, the Bill is ready for enrolment for presentation to the President. If the amendments are substantial or controversial and the House does not agree thereto, a member may request for a conference. At the conference only matters in disagreement are considered. In many instances the result of the conference is a compromise. If no agreement is reached the matter is reported by the conferees to their respective Chambers.

A Bill cannot become a law until it has been approved in identical terms by both Houses of Congress. When the Bill has finally been approved by both Houses it is sent to the President for his assent. If he approves the Bill he signs it and usually writes "approved" and it becomes law. If the President decides to veto it, he returns it with a message stating the objections to the Chamber in which the Bill originated. If the measure is repassed by both the Houses, with two-thirds votes in each, it becomes law without the signatures of the President. If two-thirds vote is not forthcoming, the veto stands. If the President keeps a Bill for ten days without signing it while Congress is in session, it becomes law without his signatures. But if Congress adjourns within ten days and the President does not sign the Bill, the Bill is killed. This has been called the "pocket veto."

**Committee system evaluated.** Law-making in the United States is a labyrinth, complicated and tortuous process wherein Committees play the key role. It is here that the Bills languish and die and the chairmen of the Committees play a strategic role in the process of selecting the Bills that the Committees will take up, in shaping the size and jurisdictions of the sub-committees, and in selecting members who may sponsor legislation. In countries with Parliamentary system of government the part which the Committees play is rudimentary. Their purpose is to give the Bill a final shape and it comes to them when the Chamber itself has already approved its general character. The Minister sponsoring the Bill holds its charge throughout; it is his child. It is just the other way in the United States.

The Committees are of two types in the United States, Standing or "Legislative" Committees and Special Committees. The House of Representatives has twenty Standing Committees, and the Senate sixteen. They are permanent Committees, each of which watches over a particular segment of legislative business. The number of Committees though slightly different, the division of responsibility among Committees is very similar in both Houses. Each of the Senators is assigned two of the Committees whereas one Representative gets only one. Many Committees constitute their sub-committees, some of which are permanent and are subject to little control by the parent Committee.

The House or the Senate may create a special or select committee to conduct some temporary investigation. When the investigation has been carried out the Committee automatically expires. In recent years, however, special Committees are seldom appointed and investigations are assigned instead to the relevant Standing Committees.

A House Committee, a phrase commonly referred to as a Standing Committee of the House of Representatives, consists of nine to fifty members and a Senate Committee usually has thirteen to fifteen members. All the Standing Committees in both Houses are bipartisan in character and the proportion is fixed by the Party in majority for the time being. There is a tendency to appoint members to Committees in the work of which they are interested. It is a forum of specialised interests, for example, ex-soldiers seek places on the Committee dealing with veterans, members from the farm States go to the Committee on Agriculture, and the industrial States of the North and East are represented on the Finance Committee. Special or Select Committees may be created at times to perform specific tasks. But such Select Committees are less used now.

Special Investigation Committees are sometimes set up to gather information or evidence on some subjects as an aid to law-making to check on the administration of laws, or to investigate in alleged undesirable practices or conditions. The House of Representatives frequently votes itself into Committee of the Whole for the purpose of expediting business and reaching agreements on detailed provisions of Bills. When the House meets as a Committee of the Whole all its members sit as a Committee with an appointed Chairman.

Joint Committees consisting of an equal number of Representatives and Senators have been created by law in a few well-demarcated fields, such as the Joint Committee on atomic energy, on the economic report, on the Library of Congress, on internal revenue taxation. Conference Committees are a special form of Joint Committee used to iron out differences on Bills as passed by the two Houses.

The real work of legislation, which averages 5,000 to 7,000 Bills in a session, is done through the Standing Committees. These Committees cull out those Bills which they regard important and recommend to Congress for enactment. In fact, most Bills are enacted in the form given them in the Committees. Some Bills are redrafted *de novo* in Committee rooms. The Standing Committees, therefore, play a vital role in the Congressional legislative process. The reduced number of Standing Committees, 61 prior to 1927, 47 from 1927 to 1946 and since then 20, has resulted in the greater use of sub-committees as the work-load of Committee work remained the same after 1946. Each Standing Committee member serves on several sub-Committees, especially in the Senate.

In theory chairmen of the Committees in each House are designated by the Committee on Committees of the majority party. But in practice each assignment goes to that Member of the majority party who has the longest unbroken service on the Committee. This seniority rule in the appointment of Chairmen is a subject of deep controversy as it ignores ability and puts premium on continuous service on the Committee itself. The American Political Science Association appointed,



in 1945, a Committee on Congress and it recommended the abandonment of the seniority rule. The Committee suggested two alternatives to the prevailing system. First, the Chairmen of Committees should be selected at the beginning of each Congress by a Committee on Committees of the majority party on the basis of merit, or, if seniority remains the dominant consideration, then an automatic limit of six years be placed on the term of all Chairmen, thereby forcing a reasonably regular rotation of office.

The role of the Chairman of a Committee in the legislative process is, indeed, extremely important. He has the power to arrange the meetings of the Committee; to select its professional staff; to appoint the members of the sub-committee; to determine the order in which it considers Bills; to decide if public hearings on a Bill are desirable; to arrange to have a Bill, favourably reported by the Committee, brought to the floor of the House; and to serve as a manager on the Conference Committee on a particular Bill, should one be necessary. "In theory the manner in which a Chairman exercises these powers is subject to review and even control by the Committee as a whole, but it is a rare committee that ever undertakes to check or rebuke its Chairman."

### FINANCIAL FUNCTIONS

The Constitution establishes the financial supremacy of Congress by specifying that "no money shall be drawn from the Treasury but in consequence of appropriation made by law. The Constitution also provides that all Bills for raising revenue shall originate in the House of Representatives. The usage adds to it that the appropriation Bills are also initiated there. The Senate possesses co-equal powers with the House of Representatives in accepting or rejecting Financial Bills, but in practice it "functions as a Court of Appeals in financial legislation often mending defects of such measures sent over from the House."

The budgetary powers of Congress are, indeed, great as both Congress and the President shape national policy-making. It is "a system of separated institutions sharing powers."<sup>21</sup> How Congress shares powers with the President is succinctly explained by David E. Bell, President Kennedy's first Director of the Bureau of the Budget. The Budget, he said, is "...a major means for unifying and setting forth an over-all executive programme...." It "reflects (the President's) judgment of the relative priority of different federal activities. Thus, the President's budget necessarily reflects his policy judgments and the Congress in acting on the President's budget necessarily reviews these policy judgments as to the relative importance of alternative uses of national resources.

....The essential idea of the budget process is to permit a systematic consideration of our Government's programme requirements in the light of available resources; to identify marginal choices and the judgment factors that bear on them; to balance competing requirements against each other; and, finally, to enable the President to decide upon priorities and present them to the Congress in the form of a coherent work programme

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21. Neustadt, Richard E., *Presidential Power*, p. 33.



and financial plan."<sup>22</sup>

## GENERAL APPRAISAL OF CONGRESS

The Founding Fathers, who drafted the Constitution of 1787, had great hopes for Congress. Congress was conceived as the dominant and most powerful of all three branches of government. It was given a place of precedence and it is the first and the longest article of the Constitution—longer than all other original articles combined which deals with Congress. The Constitution gives to Congress control of the laws of the nation, the finances of the nation, the strength of the armed forces of the country. By implication it possesses unlimited investigatory powers. It has the right to impeach the President, the Vice-President and other officers of the United States, exercises complete supervisory powers over administrative agencies and has the choice to select the President and Vice-President if no candidate receives an electoral majority. In brief, because of its supervisory and appropriation powers, Congress has stronger ultimate administrative powers than the Presidency, and because of its impeachment powers, including the impeachment of the judges themselves, it is a higher court of justice than any, including Supreme Court, in the land. The powers of Congress, except for certain exceptions, are clearly constitutional and detailed carefully to cover eighteen different phases of national life and emerging therefrom are the Implied powers and Resultant powers. Members of Congress are the only officials who are exempt from arrest while attending sessions, except for treason, felony or breach of peace, and from libel law.

Its working and achievements disclose that Congress stands out as one of the successful Legislatures of the democratic world. It has endured for more than one hundred and seventy-five years, and has never failed to serve the country loyally. Nevertheless, Congress has from the beginning not fulfilled the expectations of the Framers of the Constitution. It has "suffered declining prestige, weakened influence, and a more or less chronic inability to get its work done, as the Presidency has in general grown and as the Supreme Court has on the whole held its own."

**Not a really National Representative Body.** Primary among the reasons of its declining prestige and authority is the fact that Congress is not, in very real sense, a national representative body. It is an assemblage of State delegations. "Its historic development, unlike the Presidency, has been along generally regional lines; its major pre-occupation has been the resolution, usually by compromise, of conflicting regional interests; its ordinary approach to national legislation has been through the avenue of the effect of such legislation, not on the welfare or the opinion of the nation as a whole, but on the interests and the reaction of the area from which the Senators and Representatives come and to which they must return."<sup>23</sup> Congress, is, as Professor Laski points out, the legislature of a continent and a member of Congress

22. Statement of Hon. David E. Bell, *Hearings Before the Subcommittee on National Policy Machinery*, as quoted in Polsby's *Congress and the Presidency*, p. 83.

23. *An Anatomy of American Politics*, op. cit., p. 79.

is expected to think in terms of sectional interest. He must think about the effect of a measure upon the particular area for which he sits rather than its effect on the country as a whole. This regional attitude of the Congress has given it a position of backwardness, but to the advantage of Presidency which Americans regard as the pivot of national solidarity.

At the position of Congress and its members is the working of the "locality rule." The Constitution demands that the Senators and Representatives shall be residents of the States they represent and convention insists that Representatives shall, in addition, be residents of the congressional district that they wish to represent. A member of the House of Representatives is constantly aware that every two years he will be judged by his constituents and this awareness makes him far more responsive to his judgment of what will please them. The obvious result is that every Congressman keeps his ear to the ground and sacrifices national for local and sectional interests. Locality rule accounts in part of the comparative local-mindedness of the American Congress.

A member of Parliament in Britain cannot afford to disregard the party whip and go against the behest of the party even if the decision of the party may be antagonistic to the wishes of his constituents. In America, neither the Senator nor the Representative can afford to obey the party call against the wishes of the State or district. He knows that if he is defeated it will mean the end of his Congressional career. The President or the party can do nothing for him, "cannot procure for him a seat outside his own bailiwick, can only solace him with a job—and cannot always do that." The result is that the whims of the local party boss, if his fate depends upon his judgment, or that of an important section of his "home-folks" are more near and dearer to him than the national leaders of his party. Voters, too, feel that if they elect a man, he should be the local champion. All these factors combined together do not make Congress really a national representative body.

**Divorce between the Executive and Legislature.** The Presidential system of government envisages a distinct mechanism of government. Parliament, in Britain, is only formally a legislative body. Its real business is to endorse the decisions of the Cabinet and make them effective. Parliament may bring about minor amendments here and there in the measures before it, but fundamentally legislation is shaped in the Whitehall and not in Westminster. With Congress, it is just the reverse. Legislation is the main business of both the Chambers in the United States. The Senate and the House do not act under the instructions of the President. They, no doubt, co-operate with him, particularly during times of national emergencies, but Congress is a co-ordinate branch of government with the Executive. To put it still more explicitly, the Executive and the Legislature are co-equal partners in working the governmental machinery. There is, however, no cohesiveness and the party ties which bind the Executive and the Legislature are too flimsy for an integrated policy as obtainable in Britain and other countries with Parliamentary system of Government. To put it in the words of Laski, the party ties which bind the two wings of Government "never bind them into a unity." The interests of Congress are separable from those of the President.

From the very beginning of the establishment of the Union, Congress has always emphasised its independent existence and its independence will, except only during war, or an emergency like that of March 1933, where there had been unity of purpose and unity of will. This is for two reasons. First, the realisation of the fact that administration does not depend for its existence on Congress if it acts on its own way; and secondly, every individual Congressman endeavours to assert himself and his rights that Congress cannot be overshadowed by the President. To put alterations and modifications to the measures of the President "is to draw attention to itself that he is not the unqualified master of the nation." Sometimes the "very political survival of the Congressman, who is, after all, subject to renomination and re-election on the local level, demands that he break on one or more issues with the President of his own party."<sup>24</sup>

**Short-sighted Policy of Congress.** The net result is incoherency and irresponsibility. The Executive has no place in Congress to co-ordinate its activities and establish a hyphen between the Executive and Legislative Departments of Government. Legislation is every Congressman's concern, but it is no one's child. To impress upon his constituents his worth as a legislator and in order to cater to the local sentiments and to justify the trust reposed in him by his electors, every Congressman has a mania to rush in all kinds of measures. Congress is, accordingly, charged of wilful parochialism and neglect of national needs. It has consequently seldom succeeded in formulating and enacting long range and lasting policies unless they were imposed upon it by a strong President.

Polsby maintains that even the "efficient minority" of Congressmen, who stand eminent in the legislative sphere, determine the consequences of their behaviour from the point of their careers. "The questions he must continually pose to himself are: How will my behaviour today affect my standing in the House tomorrow, the next day, and in years to come? How may I act so as to enhance my esteem in the eyes of my colleagues? How may I lay up the treasures of my obligation and friendship against my day of need? Or, if he is oriented to public policy: How may I enhance the future chances of policies I favour."<sup>25</sup> Such a state of mind has made Congress "the butt of jokes among all the people, the subject of despair among the enlightened and the instrument of hope among the ruthless."<sup>26</sup> It has, therefore, been correctly observed: "If the law is regarded—as properly it should be—as a codification of the moral judgment of the community as a whole, which in this case is the nation, then the Congress has been strangely and unbelievably obtuse in determining that judgment."

The Congress, thus, speaks in a confusion of tongues and the long decline of Congress has contributed greatly to the rise of Presidency. It cannot operate successfully without leadership, which none but the President can offer. When Congress finally gave up primary responsibility for preparing the national Budget in 1921, it had no choice but to

24. Polsby, Nelson E., *Congress and the Presidency*, p. 114.

25. *Ibid.*, p. 102.

26. *The Anatomy of American Politics*, op. cit., p. 83.

call on the President to come to its rescue. By abdicating this ancient and primary function, it exercised the most short-sighted policy since it gave a tremendous boost to the power of the President, not only to control his administration, but to influence the legislative process too.

**Inefficient working of Congress.** Even a cursory observer of the working of Congress would regret the amount of legislative time wasted on relatively minor issues, and the haste, especially in the House, in which matters of great importance are dealt with. The rules of **filibuster** and the two-third votes required for ratifying treaties in the Senate are a great hindrance in the way of the majority and Congress carrying out its purpose. The Rules of Procedure followed in both the Houses encourage minorities to obstruct its business by making frequent points of order and time consuming notions, introducing irrelevant business, and repeatedly demanding quorum calls.

The Congressman is not only a legislator, but he is also expected to serve his constituents as an "errand-boy" in varied fields divorced from legislation. An active Congressman once said, "Nevertheless at least half of my time is taken up with matters that have nothing to do with my legislative duties. Answering letters from my constituents, trotting around to the Departments doing their errands, trying to represent them in one way or another as a broker, a factor, an attorney, an agent, an emissary, and whatever you will takes up about half the time of the average Congressman. And I don't have to do it if I don't want to. All I have to do is to neglect it; then I get licked at the next election...." Such kind of work seriously interferes with a Congressman's real usefulness as a national law-maker. The theory of representation as prevailing in the United States demands that the representative gives his attention, first to his constituents and secondly to national affairs. Local sentiment and pressure are, thus, intensified. Though neither residence in the district nor the element of short term of office are present in the Senate, "the attitude fostered by the relationship of constituents to their representative," write Professor Swarthout and Bartley, "is transferred over to the Senator in similar, though diminished, fashion."

**The Influence of Lobby.**<sup>27</sup> The Congressman is further bedevilled by the presence in the national capital of numerous individuals who press him at every turn to support or reject given legislation. There is no open bribery or graft, but the methods employed by the 'lobbyist' are frequently so subtle that the "unsuspecting legislator is under lobby influence before he is quite aware of what has happened." The 'lobbyists' are the representatives of the special groups economically or otherwise interested in the legislation before Congress. They are called 'lobbyists' because they buttonhole individual members of Congress in the lobbies and elsewhere too. The members succumb to the special interest groups. The existence of lobbies is a serious problem to Congress, because they place on the legislator a burden "from which he cannot always dissociate himself. The pleadings—and threats—of special interest groups

27. Also refer to Ferguson and McHenry, *The American System of Government*, pp. 281-82.

28. The term lobby arose from the use of lobbies, or corridors, in legislative halls as places to meet with and persuade legislators to vote a certain way.



are constantly in his ears. Even many of the church groups of the nation now maintain paid lobbyists in the nation's capital." Lobbying, no doubt, is good and it frequently performs necessary services, 'but it has outgrown its evil associations and more sordid ways' with shocking results on the reputation and integrity of Congress as a national legislative body. The Federal Regulation of Lobbying Act is an important section of the Legislative Reorganization Act of 1946, which amends to remedy some of the glaring defects in the "lobby." The Lobbying Act requires persons, corporations, and organized groups of all kinds seeking to influence the passage or defeat of legislation by Congress "to register, list contributions, and file quarterly statements of expenditures with the Clerk of the House of Representatives."

**Criticism of the Committee System.** The Committee System is also subjected to severe criticism and it centres to a considerable degree on the methods used in Committees of investigation. The seniority rule in choosing Committee chairmen, sometimes almost dictatorial power of Committee chairmen, and broad authority of the Committees to "pigeon-hole" legislation are matters which are disturbing and they have since long troubled some students of Congress. "Yet curtailing these powers," observe Swarthout and Bartley, "without generally overhauling the entire congressional machine and drastically altering philosophy of the members would result in an impossible volume of work for Congress." As regards purposes of Congressional investigations, other reasons aside, investigations are often motivated by the desire of a political party to advance its own interests or to embarrass its adversary. In 1920 and 1930, the Democratic Party did its best to discredit the Republican Party through investigations into the scandals of Harding Administration and the evils of bankers and businessmen. The Republican Party took its revenge in 1947-48 and 1953-54 to expose the shortcomings of Roosevelt and Truman Administration. Thus, instead of giving fair impartial information to Congress and to the public for constructive use, an investigating committee "usually starts out to prove something and hunts the evidence which will support this proof." The public can hardly expect Congress to function with wisdom under the circumstances.

**Judicial Review.** The process of judicial review also depresses the enthusiasm of the legislators. The Constitution leaves the last word with the Supreme Court and the legislators while initiating any legislative proposal have not only to think what their constituents want, or will stand, but also whether what Congress does decide will be acceptable to the Supreme Court in case its validity is challenged. No one can predict what the Supreme Court will do, but the apprehension is there. "When all legislation," observes Professor Brogan, "has to run this kind of gauntlet, the results are apt to depress the legislator and his supporters, to blunt the edge of zeal and hope to turn the minds of both parties to more practicable and tangible achievements, favours and jobs."<sup>29</sup>

**Unification of the Economic and Social Interests.** In the context of the present state of affairs in the country there has been the growing unification of the nation's economic and social interests. The great sectional economic issues are fast disappearing and all sections of the people



stand together for their common benefits. The last eight Presidential elections clearly indicate that, leaving aside "the blind emotional attitude of the South," the national politics of the country has now few sectional aspects and it is not easy to split the country geographically on economic issues. "Even socially the Midwest farmer, the Farwest rancher and the Eastern plant manager are becoming unified in their tastes and values; their children no longer go solely to their own sectional colleges and universities; their travel and vacations are no longer within sectional limits. But there is no change in the attitude of the Senators and the Representatives. The senior Senator from Tennessee is no more concerned with or closer to the residents of Oregon than he was two or three generations ago. In the halls of Congress sectional values, sectional attitude and sectional roots remain."

The result is that the people with their new national standards do not look favourably towards Congress. They are, indeed, unwilling to place great faith in a legislature which, while still protecting what local interests remain, frequently "by procrastination, indecision or opportunistic compromise endangers the nation interests." They look to the President as the embodiment of national unity and national solidarity. This really is dangerous to the prestige of Congress and a grave cause of its weakness.

### STRENGTHENING THE CONGRESS

**Relationship between the Executive and Legislative Departments.** It should, thus, be obvious that the problem of co-ordinating the Executive and Legislative branches has been aggravated by the fact that usage has intensified a separation that the Constitution only implied. This happened immediately after the inauguration of the Constitution when the first Congress required the Secretary of the Treasury, Alexander Hamilton, to make his reports in writing instead of orally, which he was ready and eager to do. Since then, this practice has been rigidly followed with the consequence that the Executive is entirely divorced from the legislature and as Judge Story described a century ago, "The Executive is compelled to resort to secret and unseen influences, to private interviews and private arrangements to accomplish his own appropriate purposes instead of proposing and sustaining his own duties and measures by a bold and manly appeal to the nation in the face of the representatives." But the nation cannot stand at ease when the President and Congress wrangle and deadlock over important issues. The President, being the representative of the nation, the generalissimo of administration, and the people's choice, is the leader of the nation. But his leadership can only be established and stabilised, if there is proper co-ordination and co-operation between the Executive and the Legislative departments. The co-ordination really means strengthening Congress itself and thereby aiming to remove the instinctive and inherent tendency of Congress to be anti-Presidential. Three-quarters of a century ago, James A. Garfield, after a long service in the House of Representatives, declared, "It would be far better for both departments if members of the Cabinet were permitted to sit in Congress and participate in the debates or measures relating to their several departments but, of course, without a vote. This would tend to secure

the ablest men for the chief executive offices; it would bring the policy of the administration into the fullest publicity by giving both parties ample opportunity for criticism and defence."

**Suggestion of Cabinet Government.** There are some students of Congress who have gone so far as to advocate the abolition of the entire concept of Presidential government and the substitution in its stead of the Cabinet system of government. If America is to remake her Constitution, it will most surely be a Parliamentary system of government. But this will not happen. Some discussion of the merits of the British Cabinet system took place before the Joint Committee on the Organization of Congress when that Committee was making plans for the Legislative Organization Act of 1946. Walton Hamilton, of the Yale Law School, expressed his alarm on the pace at which adoption of the British system was being advocated and observed that the situation in which Americans were placed and their needs had not been correctly analysed. The conviction that the British Cabinet system would not meet American needs is widely held and it is believed that the Presidential system "with all its operational groanings and creakings has afforded a different, but equally practical and probably better adopted solution to the problem of governmental power in the United States."

Even proposals to introduce Executive initiative in legislation and to make administration responsive and responsible within the existing framework of government have not been well received. Two years after Garfield's recommendation, referred to above, young Woodrow Wilson proposed giving "the members of the Cabinet seats in Congress with the privilege of the initiative in legislation." In 1893, he urged that President Cleveland "now assume the role of Prime Minister with the Cabinet as the agency of co-ordination to accomplish the popular will." And when he became President, he wanted in very truth to be a Prime Minister. He stressed his function as the leader of his party, addressed Congress in person, and promoted and carried out a programme of notable legislation.<sup>30</sup> When he faced possible defeat on the proposed repeal of the exemption of American vessels from payment of Panama Canal tolls he declared, "In case of failure of this matter I shall go to the country after my resignation is tendered." In 1918, he appealed to the country for the returning of a democratic majority to both the Senate and the House of Representatives. "I am your servant," he said in his appeal to the electorate, "and accept your judgment without cavil, but my power to administer the great trust assigned to me by the Constitution would be seriously impaired should your judgment be adverse, and I must frankly tell you so because so many critical issues depend upon your verdict." The American electorate appeared to resent the appeal and a Republican Congress was elected although many other factors doubtlessly contributed to that event. "President Wilson learned eventually," remark Professors Binkley and Moos, "that such a system does not conform to American traditions and apparently cannot be institutionalised in the American setting."<sup>31</sup>

30. *A Grammar of American Politics, op. cit.*, p. 355.

31. Binkley, W.E., and Moos, *President and Congress*, p. 382.

Another proposal of Congressional Executive relations has been suggested on somewhat different and less radical lines. It is suggested that ex-Presidents be given a lifetime seat in the Senate. But such an arrangement is not likely to cement the relations between the occupant of the White House and Congress, though it would provide to the Senate additional knowledge of the executive office and the understanding of the problems surrounding it which that body might not otherwise gain.

Another plan was advocated by the late Senator M. La Follette, Jr. This plan called for the creation of a permanent group consisting of important Congressional leaders—Vice-President, Speaker, majority party floor leaders of the two Houses, chairmen of major Committees—and key Cabinet members. They should regularly meet and plan in outlines the broad basis of national policy. Regular meetings between the Congressional leaders and the executive chiefs would enable them, it is claimed, to know one another well and, thus, build a team spirit. "The penalties for excluding Congress from the national council are high," says Roland Young. "Their exclusion means a continuance of the localism which are so often a predominant characteristic of Congressional behaviour. When Congress feels ignored it often retaliates irrationally, by sulking, by refusing to pass needed legislation, and by passing ill-advised legislation. When Congress is nettled, it is well to treat her like a desperate woman and walk the other way."<sup>32</sup>

There are cumbersome and awkward methods of obtaining information on administration by Congress. For example, Congress may pass resolutions of inquiry directed to heads of Departments. Hearings may be conducted by Congressional Committees and too often these investigations are not held jointly by both Houses. Departmental information may be obtained by personal interviews or by correspondence of Congressmen with administrative officials. Recent Presidents have held weekly press conferences at the White House with leaders of the Senate and the House. The substitution of the question hour, modelled after the British practice, taking the place of the prevailing American practices, has been proposed by Representative Kefauver and Senator Fullbright. According to this plan, it is suggested that during the question hour in both the Houses, "Cabinet" members and other key administrators should be present to answer to questions put by members. The reform, it has been maintained, would bring administrators, and Congressmen together thereby removing the element of indifference that now exists. But introduction of the question hour has been considered by many thoughtful men in the United States as a sheer waste of time of the already over-burdened Congress. Walton Hamilton observed in his testimony before the Joint Committee on the Organization of Congress that "we have a device here which is vastly superior to that (question hour), and that is the appearance of the administrative officer before the Congressional Committee where the matter is a great deal more informal and the questioning is a great deal more searching than it could ever be before the House."

The outcome is not clear, though the need for co-ordination and harmony between the Executive and Legislative departments is keenly felt

on all sides, but within the existing system of government. "Congress and the Presidency," observes Polsby, "are like two gears, each whirling at its own rate of speed. It is not surprising that, on coming together, they often clash. Remarkably, however, this is not always the case. Devices which harmonize their differences are present within the system, the effects of party loyalty and party leadership within Congress, presidential practices of consultation, the careful restriction of partisan opposition by both Congressional parties, and the readily evoked overriding patriotism of all participants within the system in periods which now-a-days, regrettably, come with some frequency—universally defined as crises."<sup>33</sup>

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## CHAPTER VII

# FEDERAL JUDICIARY

**Need for the Federal Judiciary.** The Articles of Confederation made no provision for a national judiciary. Hamilton declared this to be the crowning defect of the old Government, for laws, he correctly asserted, are a dead letter without courts to expound their true meaning and define their operations. During the period of Confederation all judicial controversies were left to the State Courts, and each State having its own legal system presented a variety of conflicting decisions which created conditions of uncertainty and innumerable complexities. The major task of the Founding Fathers was, therefore, to evolve out a judicial system which should preserve the integrity of the new Government to be established and remove the chaotic conditions which were existing then. They also realised that under the system of government that they were establishing, disputes between the States would become more frequent in the future and an impartial umpire, standing outside them all, would be needed to settle their controversies. Similarly, there would be questions bearing on the relations of the United States with foreign nations on matters covered by treaties which could not, even for reasons of political expediency, be left to the State Courts. To do them so, meant placing the peace and well-being of the country at the mercy of thirteen conflicting authorities. Then, disputes were certain to arise as to the meanings of various provisions of the new Constitution and with regard to the interpretation of laws passed by Congress. To leave such disputes to the courts of the different States would have meant invitation to chaos, for each State Court would give different decisions, one opposed to the other.

Finally, the framers of the Constitution were planning for a "more perfect union" and to "establish justice." If the new Constitution and the laws and treaties made under it could achieve the objects set, it was imperative, they concluded, that there should be a distinctive federal court, supreme, and independent of the States.

**Constitution provides for a Supreme Court.** Guided by these reasons, the Constitution makers made a provision, vide Article III, in the Constitution for the federal judiciary, and while doing so they made the judicial power co-ordinate with Executive and Legislative powers. It is a brief reference and the Constitution does not say much about its structure and organisation. Article III merely states that the judicial power will be vested in one court and such inferior courts as Congress may from time to time ordain and establish. Thus, Congress is given authority to determine the number of judges necessary for the proper functioning of the Supreme Court, and to create additional courts as and when it deemed necessary and expedient. But in order to maintain the independence and integrity of the judges of all such Courts, the Constitution provides for permanence of tenure during good behaviour



and a compensation for their services which cannot be diminished during their continuance in office.

**Power of Congress to control Federal Judiciary.** In spite of these constitutional provisions, Congress has still the means to control the federal judiciary. True, Congress cannot abolish the Supreme Court, or diminish the salaries of the Justices, or remove anyone of them from office except by due process of impeachment. But it can make significant changes in so many other ways. Congress can by law reduce the number of Justices by prescribing that on death or resignation of any of them the vacant post shall be abolished or accept a plan as one proposed by President Franklin Roosevelt, to appoint new Justices up to six to the Supreme Court when Justices after reaching the age of seventy fail to resign within six months, and thus to increase the number of Justices and secure the right kind of appointments. With regard to the interior courts, control by Congress has been real and more comprehensive. In 1802, during Jefferson's Presidency, it repealed the law of the preceding year creating sixteen posts of Circuit Judges which President Adams had filled with men strong in Federalist conviction, at the close of his term of office. Congress can also by law prevent certain classes of cases from coming before the Supreme Court by refusing to provide a system of appeals. But on the whole, it can be safely said that except in times of crisis the federal judiciary enjoys a high degree of independence from legislative interference.

**Appointment and Tenure of Judges.** The Constitution merely stipulates that the President and Senate are to appoint the Justices of the Supreme Court and authorises Congress to vest the appointment of such "inferior officers" as it thinks proper in the President alone in the courts of law, or in the heads of Departments. All Justices of the Supreme Court are, thus, nominated by the President and appointed by and with advice and consent of the Senate. With regard to the interior courts, it has been settled by uniform practice that judges of all lower federal tribunals are not "inferior officers" and their appointment should not, therefore, vest in any other authority than the President and the Senate.

The Constitution does not state what qualifications are demanded of Justices of the Supreme Court, either as to age, citizenship, and legal competence, or as to political views and background. From the time when President Washington submitted to the Senate his first list of Supreme Court appointments, the attempt has been made almost invariably to select men of high prestige and outstanding ability. Appointments have been made from time to time, it is true, "to pay political debts, to show deference to a particular section of the country, or even to provide representation for a political party, which would not otherwise be represented." But even then the calibre of the men selected has been exceptionally high. It is also true that Democratic Presidents have appointed Republicans to the Bench and Republican Presidents have selected Democrats. The men appointed to the Supreme Court are, usually, well advanced in age at the time of their appointment.<sup>1</sup>

1. Joseph Story became a member of the Supreme Court at the age of thirty-two and served from 1811 to 1845. Justices James Iredell, Bushrod, Washington and William Johnson were appointed before they were forty years old.

Since Justices do not readily give up office even with the approach of senility, the membership of the Court has often included men past the age when they could carry the share of their work.

One reason for the reluctance of aged Justices to resign from the Court is that they hold office during good behaviour and they can be removed only by impeachment. There has been much criticism of life appointments. By the Act of 1937, Justices of the Supreme Court may retire, without resigning, after 10 continuous years of service and upon reaching the age of 70. The membership of the Supreme Court has been fixed at nine. The Chief Justice receives \$25,500 and the Associate Justices \$25,000 annually. No Justice of the Supreme Court has been removed by impeachment. Samuel Chase is the only Supreme Court Justice to have been impeached, but he was not convicted.<sup>2</sup>

### FEDERAL JURISDICTION

**The jurisdiction of Federal Courts.** The powers of the national government being delegated, they are limited. The jurisdiction of the Federal Courts, as such, extends over only those classes of cases as enumerated or implied in the Constitution; the State Courts have jurisdiction over all others. The elaboration of federal jurisdiction may best be taken as contained in Article III of the Constitution.

1. **Cases arising under the Constitution, Laws and Treaties.** "The judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the law of the United States, and treaties made, or which shall be made, under their authority." It means that only cases of a justiciable character can come before the Federal Courts. It cannot decide questions executive or legislative in character unless such a question involves the interpretation of the Federal Constitution, or a federal law, or a treaty in which the United States is a party. Anyone who claims that an executive action or legislative Act encroaches upon his rights guaranteed to him by the Constitution, laws or treaties of the United States, he can bring an action against the appropriate authority for the restoration of his rights. Munro sums up this federal jurisdiction in the statement of the Supreme Court: "The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily inspired by and under the Constitution and laws of the United States. [But the right must be a substantial and not merely an incidental one in order to warrant its assertion in the Federal Courts]. It must appear on the record...that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained."

Congress and the President cannot, therefore, ask the Justices of the Supreme Court to express themselves on the constitutionality of a proposed legislation. The Court is not a advisory body and will not

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2. Chase was impeached in 1804 on charges of partisanship. The charges were not supported by the Senate and he was, therefore, acquitted. He remained on the Bench until his death.

give advisory opinions. It will render its decision only as a real dispute is presented to it for decision. Consequently there must be a party of interest to challenge the constitutionality of law in toto or in part. Nor has Congress powers to assign the Judiciary any duties other than judicial. This was definitely established in 1792 in the *Hayburn* case. Congress in this instance had instructed Circuit Judges to function as pension Commissioners. The Judges individually refused and the Supreme Court upheld their action.

## 2. Cases affecting Ambassadors, other Public Ministers and Consuls.

In the second place, federal jurisdiction extends to all cases affecting diplomats accredited to the United States. But according to the well accepted principle of International Law diplomatic agents of foreign States are immune from prosecution in the Courts of the country to which they are accredited. The provision in the Constitution extending federal jurisdiction to all cases affecting diplomats is intended to check the State Courts from the infringement of International Law. If a diplomatic agent commits an offence, his recall may be requested or he may be even expelled, but so long as he remains a duly accredited diplomat his immunity from legal process is guaranteed.

## 3. Admiralty Cases.

"Admiralty and maritime" cases relate to American vessels on the high seas or in the navigable waters of the United States and they embrace all cases arising from disputes on freight charges, wages of the seamen, damages due to collision and marine insurance. In time of war, it covers cases relating to prize vessels captured at sea. The reason for giving admiralty jurisdiction to Federal Courts was two-fold. In the first place, admiralty is a distinct branch of jurisprudence and it differs in substance and procedure from the common law and equity applied in ordinary courts of law. Secondly, foreign commerce is a national subject and the framers of the Constitution, accordingly, thought it best to vest admiralty and maritime jurisdiction in the Federal Courts.

## 4. Cases in which the United States or a State is a Party.

The jurisdiction of the Federal Courts extends over all disputes in which United States is one of the parties, or when the dispute is between two States of the Union or between a State and a citizen of another State. As originally adopted, the Constitution permitted suits to be brought in Federal Courts against a State by citizens of other States, or by citizens of foreign countries.

Soon after the Constitution went into effect a citizen of South Carolina, named *Chisholm*, sued the State of Georgia (1793) for the recovery of a debt. The Supreme Court entertained the suit and held that such suits can be maintained.<sup>3</sup> This decision caused a widespread popular indignation as it had been openly asserted, when the Constitution was before the States for ratification, that no State could be sued by an individual without its own consent. The Government of Georgia felt that it was derogatory to the dignity of a sovereign State and a demand was, accordingly, made that the Constitution be amended so as to prevent such "suits" in future. As a result of this demand, the Eleventh

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3. *Chisholm v. Georgia*.

Amendment was adopted in 1798, which expressly forbids the Federal Courts to take cognisance of any suit brought against a State by a citizen of another State, or by citizens or subjects of any foreign State. Such suits can only be brought in the courts of the State concerned as permitted by law. If there is no legal authorisation, the courts cannot entertain such suits. But a State can be sued in Federal Courts when the other party is the United States, or another State of the Union or a foreign State.

**5. Controversies between Citizens of different States.** Finally, the judicial power of the Federal Courts extends to all cases "between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects." It means that disputes between foreigners and citizens of the foreign States and between citizens of different States are amenable in Federal Courts. For purposes of this article corporation or company is a citizen of the State in which it was incorporated.

**Exclusive and Concurrent Jurisdiction.** Although the cases mentioned above may come before Federal Courts, the Constitution does not insist that Federal Courts must assume exclusive jurisdiction in all such cases. The Constitution gives the Federal Courts no exclusive jurisdiction whatsoever. Congress is free to distribute jurisdiction over them as it pleases and, indeed, it may completely divest Federal Courts of jurisdiction in some instances. As matters stand Federal Courts have exclusive jurisdiction over: (1) all cases involving crimes against laws of the United States; (2) all suits for penalties brought under laws of the United States, all suits under admiralty and maritime jurisdiction, or under patent and copyright laws; (3) all bankruptcy proceedings; (4) all civil actions in which the United States or a State is a party, except between a State and its own citizen; and (5) all suits and proceedings brought against ambassadors, others possessing diplomatic immunity, and foreign consuls.

Over practically all other kinds of cases to which the federal judicial power extends, Federal and State courts have concurrent jurisdiction. That is to say, in all such cases, which of necessity are always civil, and involve amounts of \$3,000 or more, the plaintiff has the choice to commence it in a Federal Court or, in the Court, of the State to which he belongs, or in the courts of a State where the defendant resides. The defendant is, however, given the privilege of having the case removed to a Federal Court if it has been instituted in a State Court, provided the request is made before the latter has reached a decision.

Federal Courts are denied jurisdiction over cases involving parties with diverse citizenship and are for amounts less than \$3,000. These cases must be tried in State Courts, if at all.

**Federal Court Writs.** In the exercise of national judicial power granted by the Constitution, the Federal Court has the authority to use the writs of *habeas corpus*, *mandamus*, *injunction* and *certiorari*.

## TYPES OF FEDERAL COURTS

There are two general types of courts: Constitutional and legislative.

**Constitutional Courts.** Courts created by Congress under the authority of Article III of the Constitution are called Constitutional Courts. They consist of the Supreme Court, Federal Courts of Appeal, and District Courts. They are created by law for the Supreme Court and for Courts of Appeal. They are created by statute for the District Courts. They are created by statute for the interior courts. The establishment of these courts is mandatory. They have been created in the past and will be created in the future. They have been created in the past and will be created in the future. The Congress can thus, at will, abolish the interior courts, but not the Supreme Court.

**Legislative Courts.** Legislative courts are created by Congress and their authority is outside of Article III referred to above. They do not exercise the judicial powers of the United States, but are special courts created to aid the administration of laws created by Congress in pursuance of powers delegated to it or implied in such powers. For example, Article I, Section 8, grants to Congress the power to impose and collect "taxes, duties, imposts and excises." In order to execute the laws about the valuation of goods and subject to import duties, Congress established the United States Customs Court composed of nine judges. Similarly, Congress is given power in Art. IV, Section 3 to govern territories and has accordingly created territorial courts and has created that authority. Congress can set rules in regard to courts and has created the United States Court of Customs and Patent Appeals which handles appeals from the decisions of the United States Patent Office, the Customs Court and the Patent Commissioner. There is also a Court of Military Appeals to hear appeals from military courts martial.

All these are courts and they follow a judicial procedure. But they have been created under the Congress and must not be confused with the Judicial Article of the Constitution. The difference between the Constitutional and Legislative Courts, thus lies in the source of their respective authority and the nature of the cases over which they have jurisdiction. Article II mentions the types of case and controversies to which the federal judicial power extends and these must all come before Constitutional Courts. Legislative Courts, on the other hand, are created to carry into execution such powers as those of regulating inter-State commerce, spending public funds, laying and collecting import duties and governing territories.

Yet another difference may be marked between the two. All Judges in the Constitutional Courts are appointed by the President with the advice and consent of the Senate and they hold office during good behaviour. They can be removed from office only by impeachment. Judges in Legislative Courts are similarly appointed, but almost always they serve for fixed terms and can be removed by methods other than impeachment.

In spite of these differences the Legislative Courts are tied into the regular Federal judicial machinery. Appeals may be taken from their decisions to specified courts of the regular system, usually to a Federal Court of Appeals.

In the District of Columbia, Congress has set up a complete system of local courts including a Municipal Court. The District has also a



U.S. District Court and a U.S. Court of Appeals. These are based partly on Article III and partly on Article 1 s.s. cl. 17, which authorises Congress to exercise exclusive jurisdiction over the seat of Government of the United States.

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## CONSTITUTIONAL COURTS

**Supreme Court.** At the apex is the Supreme Court and is ordained by the Constitution. It was first organised under the judiciary Act of 1789 with the Chief Justice and five associate Justices. Its membership has, however, varied and the present strength of a Chief Justice and eight associate Justices was fixed in 1869 where it has remained ever since.<sup>4</sup> The Court held its first two terms in Wall Street in New York City. Its next two terms were held at Philadelphia and thereafter it met at Washington.

Justices of the Supreme Court are appointed by the President with the advice and consent of the Senate. The Constitution does not prescribe any qualifications hence the President may appoint anyone for whom Senatorial confirmation can be obtained. Terms of Federal Judges are for life or during good behaviour and they are removable by impeachment only. After reaching the age of seventy they may retire or resign and receive full salary, provided they have served for ten years or more. If they retire, and not resign, they are still Federal Judges and can be given an assignment.<sup>5</sup> The Chief Justice's salary is \$25,500 and the associate Justices get \$25,000. Their salaries are fixed by an Act of Congress, and while they can be raised at any time no diminution can be made during the tenure of office of any judge.

The jurisdiction of the Supreme Court is both original and appellate. The original jurisdiction, however, is extremely limited and an average of only four or five cases come before the court each year for original trial. The Constitution opens the court to such trials when (1) a foreign ambassador, minister or consul, or (2) one of the states is a party. This jurisdiction of the Supreme Court is the grant of the Constitution itself and the Supreme Court has decided, in the famous **Marbury v. Madison** case, that Congress can neither increase nor reduce the jurisdiction of the court in this respect. Legislative action, however, has granted concurrent trial power to the District Courts in some of these cases. Under the present Judicial Code the following original cases must be brought to the Supreme Court: (1) cases against foreign ambassadors and ministers, and (2) cases between one of the States and the United States, a foreign State, or another one of the States.

In all other cases the Supreme Court has appellate jurisdiction, both

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4. President Roosevelt made an attempt in 1937 to have the membership of the court vary between nine and fifteen depending upon Justices who did not resign at the age of seventy. The plan did not succeed.

5. There has been only one instance of a Supreme Court Justice to have been reappointed after an interim of private life. Justice Charles Evans Hughes was appointed on May 2, 1910, by President Taft. He resigned in 1916 to be Republican candidate for Presidency. On February 13, 1930, he was appointed Chief Justice by President Hoover.

as to law and facts "with such exceptions and under such regulations as Congress shall make." In accordance with this provision, Congress has defined in detail the appellate jurisdiction of the Supreme Court. At present, cases come to it from State Courts, Federal Courts of Appeals, and, in a few instances, Federal District Courts. The expectation is that the Supreme Court should not devote its time upon mere settlement of law suits in the manner of an ordinary law court, but rather upon constitutional interpretation and policy, especially in economic and social fields, appeals lacking in this higher interest are likely to encounter no very warm reception."<sup>6</sup>

There are, thus, two general sources from which cases may reach the Supreme Court on appeal:

(a) Cases from the highest State Courts where a federal question is presented—namely, when the State Court has held that a federal law, treaty or executive action violates the Constitution of the United States or has held that the law enacted by the State or the State action is valid under the Constitution and when that finding of the State Court is challenged. The power of the Supreme Court to review State laws is based upon the constitutional provision that the laws made by Congress and treaties concluded by the Federal Government are supreme law of the land and consequently supersede State Constitutions and laws enacted by the State Legislatures. Some of the Court's greatest decisions have been rendered in such cases, where an appeal has been taken to it when a State Court has denied a claim based upon an alleged federal right.

(b) Cases from the lower Federal Courts, chiefly from the Courts of Appeals. But the cases coming to the Supreme Court on this count are insignificant, only one in thirty cases, since final determination has been vested by law in these courts in many types of cases between private individuals. But when a litigant claims that a constitutional right has been denied to him, it is a case for the Supreme Court.

Two special proceedings may also, be noted. The Supreme Court may require a Court of Appeal to transmit a case to it, either before or after decision, when, on a petition of a party to the suit, the Court concludes that the case is of such significance as to make decision by the highest court desirable. A Court of Appeals may also take the initiative of certifying to the Supreme Court questions or propositions of law involved in a case before it require instructions from a superior court to enable it to make a proper decision. The Supreme Court may, on such a reference, merely answer the question or it may require that the whole case be submitted to it for final decision.

Cases in a few instances may go directly from a District Court to the Supreme Court. If a District Court holds a Federal law to be unconstitutional in a case in which the United States is a party or in a case between two private parties in which the United States has been made a "party by intervention," direct appeal goes to the Supreme Court. The Judiciary Act of 1937 permits such direct appeals to the Supreme Court. An occasional case also goes up from one of the special courts.

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6. Ogg and Ray, *Essentials of American Government*, op. cit., p. 351.

The Supreme Court meets on the second Monday in October for a session which generally extends through to July. Special sessions may be called by the Chief Justice when the court is adjourned, but the occasion must be of unusual urgency and importance. Six Justices constitute a quorum no matter whether the Chief Justice is present or not. When a case has been argued, the court holds a conference where the Justices discuss their views and, then, vote. The Chief Justice usually states his opinion first and other Justices follow him in order of their seniority. The meeting culminates with a vote conducted by the Chief Justice who calls upon his associates in reverse order according to the dates of their commission and himself voting last. If the Chief Justice belongs to the majority opinion, he may request one of his associates to prepare the opinion of the court, or he may prepare it himself, after which it is scrutinised by the Court at a second conference and approved. Any member of the Court who disagrees with the majority may file a dissenting opinion, a right frequently taken advantage of. The concurrence of at least five of the nine Judges is necessary to the validity of a decision<sup>7</sup> and, as a matter of fact, many important decisions have been rendered by a bare majority of the Court.

**The Federal Courts of Appeals.** Next below the Supreme Court are Federal Courts of Appeals, known before 1948, as the Circuit Courts of Appeals, 11 in all, one for each of the ten judicial circuits in which the United States is divided and an additional one for the District of Columbia, created in 1948. These courts were created in 1891 to relieve the overburdened Supreme Court of a great deal of its appellate jurisdiction by making many decrees and judgments of the Circuit Courts final. The Chief Justice is assigned by law to the Federal Courts of Appeals of the District of Columbia. The eight associate Justices are distributed by assignment among the other ten circuits. Six of them are assigned to one district and each of the remaining two are assigned to two districts. The requirement of the original Judiciary Act that Justices of the Supreme Court travel on circuit has been repealed and they now only rarely if ever choose to do so. A Court of Appeal must have at least three Judges, two of whom are necessary for a quorum. The number of Judges in each circuit varies from three to nine.

The Federal Courts of Appeals have essentially appellate jurisdiction, that is, they hear and determine only cases appealed from the lower courts, and their decisions are final in most cases except where the law provides for a direct review by the Supreme Court. This relieves the Supreme Court of all but the most important cases and enables it to dispatch its business more promptly. Federal Courts also review and enforce orders of the Legislative Courts, and quasi-judicial boards and commissions. The Supreme Court may call up from a Federal Court any case on a writ of *certiorari* involving an important constitutional or legal point.

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7. In 1942 the court was called to a special session on July 29 to consider a petition for writ of *habeas corpus* of seven German "saboteurs."

8. There is a difference between opinion and decision. An opinion is the statement of the reasoning by which the Court fortifies a decision in a particular case. The decision is reached by secret vote of the Justices, and the Chief Justice then assigns a Justice the task of writing the opinion.

**District Courts.** The lowest grade of Federal Courts is the District Court, held in each district and the country is divided into some ninety districts. In some cases a State constitutes one district, in other cases a State is divided into two or three districts which may further be broken into divisions. In each district there must be at least one judge, though in many cases there are several judges for a single district, each holding court separately.

Excepting the few cases which originate in the Supreme Court, and those of a special character that commence in the Legislative Courts, most other cases, civil and criminal, under the laws of the United States, start in District Courts. Their jurisdiction is original and no case comes to them on appeal, although cases begun in State Courts are occasionally transferred to them. Ordinarily, cases are tried with one judge presiding. Since 1937, three judges must sit in most cases involving the constitutionality of federal statutes. Appeals in such cases may be taken directly to the Supreme Court and it was a part of President Roosevelt's proposal to reorganise the Federal Courts. Otherwise, appeals, as a rule, go first to the appropriate Court of Appeals.

The jurisdiction of the Federal Judiciary may, thus, be summed up:

**Supreme Court:**

**Original Jurisdiction:**

1. Actions by the United States against a State.
2. Action by a State against a State.
3. Cases involving ambassadors and other public ministers.
4. Action by a State against citizen of another State or aliens (jurisdiction is not exclusive).

**Appellate Jurisdiction:**

1. From lower District Courts.
2. From State Courts when a 'federal question' is involved.

**11 Courts of Appeals:**

**Appellate Jurisdiction only:**

1. From Federal District Courts.
2. From certain Legislative Courts.
3. From certain great commissions, such as Securities and Exchange Commission.

**90 District Courts:**

**Original Jurisdiction:**

1. Over cases of crimes against the United States.
2. Over civil actions by the United States against an individual.
3. Over cases involving citizens of different States.

4. Over actions by a State against an alien or citizen of another State.
5. Over cases of admiralty and maritime jurisdiction.
6. Over such other cases as Congress may validly prescribe.

### JUDICIAL REVIEW

**The Power of Judicial Review.** The Supreme Court is the most powerful judicial agency in the world. Alexis de Tocqueville, writing in 1848, observed, "If I were asked where I placed the American aristocracy, I should reply without hesitation...that it occupies the judicial bench and bar...scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question." Exactly a century later Professor Harold Laski wrote, "The respect in which the Federal Courts and, above all, the Supreme Court are held is hardly surpassed by the influence they exert on the life of the United States." What accounts for this great influence and prestige of the Supreme Court is its power to interpret the Constitution. Justice Frankfurter put it rather bluntly that "the Supreme Court is the constitution." When Justices interpret the Constitution, they make policy decisions and thereby have the final say over the determination of the social and economic issues that confront the country. They uphold or declare null and void and consequently of no effect the acts of Congress or State Legislature or Executive orders which are in conflict with the Constitution. By doing so the Supreme Court becomes the guardian of the constitutional system of the United States.

There is no direct authority in the Constitution which empowers the Supreme Court to declare the constitutionality or otherwise of State or Federal Acts. Some writers, however, hold that the framers of the Constitution did not intend to confer such a power, at least over Federal Acts, upon the courts of the United States and the exercise of authority of holding Federal Acts or orders unconstitutional is the usurpation of power. President Jefferson had unequivocally declared that the "design of the Fathers" was to establish three independent departments of Government and to give the Judiciary the right to review the acts of Congress and the President was not only the violation of the doctrines of the Separation of Powers and limited government, but it was also in violation of the intentions of the makers of the Constitution.

There are others who consider that judicial review is inherent in the nature of written Constitution. There are two important provisions of the Constitution, it is maintained, which are, indicative of the intentions of its framers. One is Article VI, Section 2, which reads, *inter alia*, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme



law of the land...." The second provision is found in Article III, Section 2, which says, "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under this authority ...." Both these provisions are sufficient to fill in the gap which the Constitution failed to expressly provide for. The thread of the intention of the framers of the Constitution can be connected with what Hamilton wrote in the *Federalist*: "The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is in fact, and must be, regarded by the judges as fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." And as Professor Beard remarks, here is good ground to think that a majority of the members of the Philadelphia Convention favoured judicial review. In fact, it was already in existence in the American States after their break with Britain in 1776. If it was not expressly provided in the Constitution, it was because the framers believed the power to be clearly enough implied in the language used in Articles III and VI referred to above.

Chief Justice Marshall makes the issue clear. Whatever may have been the intention of the framers of the Constitution, the issue was finally decided by Chief Justice Marshall in 1803, in the famous case of *Marbury v. Madison* and since then judicial review has become a part of the constitutional law, in fact, its very corner-stone. The facts of the case, briefly stated, were that Congress had provided in the Judiciary Act of 1789, that requests for **writs of mandamus** could be made to and granted by the Supreme Court. On the night of March 3, 1801, Marbury was appointed Justice of Peace for the District of Columbia by President Adams, whose term of office expired before the commission of his appointment could be delivered to Marbury. The new President Jefferson and his Secretary of State, Madison, refused to deliver the commission to Marbury who petitioned to the Supreme Court for a **writ of mandamus** ordering Madison to deliver the commission. Marshall, in writing the opinion of the Court, held that Marbury was entitled to his commission and that **mandamus** was a proper remedy in the situation, but the Supreme Court had no authority to issue the writ. The issuance of such a writ, declared Marshall, was in violation of the constitutional provision of Article III as it clearly does not include such writs. The Judiciary Act of 1789, which empowered the Supreme Court to issue writs enlarged the original jurisdiction of the Supreme Court and Congress was devoid of authority to enlarge its original jurisdiction. Marshall argued that the Justices were bound by oath to support the Constitution, and when they found that one of its provisions was in conflict with the law they must hold the latter repugnant and void.

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10. Judicial orders commanding government officials to perform duties required by law.

The argument of Chief Justice Marshall, in brief, was that the Constitution is the supreme law of the land and the Justices are bound to give effect to it. When the Court is called upon to give effect to a statute passed by Congress which is clearly in conflict with the supreme law of the Constitution, it must give preference to the latter, otherwise the declaration of the supremacy of the Constitution would have no meaning. The implications in Chief Justice Marshall's decision may, for purposes of clarity, be summarised as under:—

(1) that the Constitution is a written document that clearly defines and limits the powers of Government;

(2) that the Constitution is a fundamental law and is superior to the ordinary law passed by Congress;

(3) that the Act of Congress which is contrary to and in violation of the fundamental law is void and cannot bind the courts; and

(4) that the judicial power conferred by the Constitution together with the oath to uphold Constitution,<sup>11</sup> which the Justices take on the assumption of office, requires that the courts should declare, when they believe, that the Acts of Congress are in violation of the Constitution.

Since Marshall's decision in 1803, the power of the Supreme Court to declare Acts of Congress invalid has been resented, evaded, and attacked, but never overthrown. The principle of judicial review is now firmly embedded in the American System of government and **Marbury** case forms the basis of this important authority exercised by the Supreme Court. During the first eighty years only in the key case of **Marbury v. Madison** and in the **Dred Scott v. Sandford** (1857) a Federal Law was disallowed.<sup>12</sup> Since then about eighty Acts of Congress have been invalidated in part or in their entirety. In most of these cases only part of a statute has been declared void. Only eight or ten statutes have been held unconstitutional in their entirety. Statistically, the incidence of judicial review on Congressional legislation has been extremely slight. State laws have been more frequently the subject of Supreme Court disallowance: over 700 in number.

Laws passed by the State Legislatures, ordinances of municipal councils and even the provisions of the State Constitutions themselves may be declared null and void in case they are in conflict with the national Constitution or the laws and treaties made in pursuance thereof. In 1810 the Supreme Court invalidated a law enacted by the State of Georgia as there was constitutional prohibition on such legislation. In famous case of **McCulloch v. Maryland**, 1819, the Court upheld the power of the Congress to create a bank and held a Maryland law taxing the operations of the bank to be invalid as an encroachment upon the national jurisdiction. Soon thereafter, the Supreme Court established its national posi-

11. Without prescribing any specific form, the Constitution requires (Art. VI) all judicial as well as executive officers to take oath to support the Constitution. The wording of this oath were fixed by the Act of 1868.

12. In this case the Supreme Court held that negroes were not citizens of the United States. Chief Justice Taney ruled, such persons were considered as "subordinate and inferior class of beings." The fourteenth Amendment reversed this decision.

tion by its assertion of power to review the decisions of a highest State Court when it was challenged under the United States Constitution, *Cohens v. Virginia*, 1821. A great majority of cases reaching the Supreme Court now involve the constitutional validity of some State statute or a right, title or privilege under the national Constitution and the State Court having decided against the right or privilege claimed. For example, if a man is prosecuted or convicted under a State law or some provision of a State constitution, he may carry his appeal to the Supreme Court on the ground that his conviction is contrary to some provision in the Federal Constitution or Laws made thereunder. The Supreme Court, then, determines the constitutionality or otherwise of the State law or provision of the Constitution involved. Such a power with the Supreme Court is a necessary consequence of the supremacy of the Federal Constitution and Federal Laws.

**The Meaning of Judicial Review.** Judicial review is, therefore, the term to describe the power of courts to declare Acts of Legislature of no effect and consequently invalid if they are found to be in conflict with the Constitution. Although the discussion of judicial review concentrates upon the Supreme Court, actually all courts—State and Federal possess this power. A Federal District Court or Court of Appeals and any State courts of record may hold a State or Federal Law invalid under the national Constitution and refuse to enforce it. But an appeal can be carried against such a decision to the Supreme Court for final determination. In similar manner, appeals may be taken from executive or administrative actions on the ground that the agency has exceeded its constitutional authority. "In reality, then," writes Harold R. Bruce "Judicial review is a 'rights protecting service' rendered by the Courts—to protect personal rights against legislative and executive action, states' rights against national action, national rights against state action, and the respective rights of executive and legislative bodies—as these various rights are held to exist under the national Constitution. It is a virtual necessity in governments having a written Constitution, federal division of power, agencies of limited powers, and guaranteed personal rights."

Since Marshall's time, the Supreme Court has emphasised repeatedly that it is not concerned with the policy, wisdom or expediency of legislation but only with its constitutionality. In its own words, it "neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends." In another case the Court said, "Even should we consider the act unwise and unprejudicial to both public and private interests, if it be fairly within delegated power, our obligation is to sustain it."

Although the final judgment in cases of this kind is made by the Supreme Court of the United States, judicial review is a prerogative of all courts from the highest to the lowest. Even a Justice of the Peace may exercise this authority in proper cases, although his decision would certainly be appealed. When a court declares a legislative Act unconstitutional, it means that it cannot be enforced as its inconsistency with the Constitution deprives it of the character of law. But the courts have no power at their disposal to carry out their decrees. It is for the Executive

to enforce them and it may be possible for an executive officer to ignore them and this has actually happened in a few cases as, for example, in a famous case in connection with which President Andrew Jackson wrathfully remarked that "John Marshall has made his decision, now let him enforce it." Generally, however, "the prestige of the doctrine is so great that a pronouncement of the Courts is accepted as final even when the act declared unconstitutional is a popular one." As Bryce expressed it, the Supreme Court is "the living voice of the Constitution," and, as such, the country obeys, both by inclination and habit.

**Criticism of the power of Judicial Review.** Those who have critically studied the power of judicial review contend that as a result of it the Supreme Court has expanded its authority to such an extent that it has become a non-elective super-legislature. The judges while giving their decisions, and in whatever legal dress such decisions are clothed, are, it is maintained, political decisions. The judges do not confine themselves to such legal questions as the limits of Federal or State jurisdiction, or the carrying out of legal regulations which are essential to make due process of law, but they discuss the advisability of legislation, its essential justice, and its conformity to the law of reason. The law of reason and essential justice are what the temperaments, characteristic attitudes, and views of the Justices are. The Justices have their own political, economic and social predilections and to which they very often owe their appointments. The appointments of the Judges are customarily, but not exclusively, partisan. And in interpreting and applying phrases, like "regulate," "commerce," and "due process of law," they "hardly can fail to be swayed consciously or unconsciously by their social philosophies and general outlook on affairs."<sup>13</sup> Between the Civil War and the New Deal, Republicans were in White House for all but sixteen years. Regardless of party affiliations, most of the Presidents and Senators believed in the policy of complete *laissez-faire* and looked with suspicion any proposal which restricted the right to economic freedom regarding it "dangerous, socialistic, populistic, and anarchistic." And these were the men who appointed most of the Justices of the Supreme Court. With the appointment of Melville Fuller as Chief Justice in 1888 a new period began in the history of the Supreme Court. Between 1888 and 1937, it became "an aristocracy of the robe and twisted the due process clause into a moat around all forms of private property." It censured and invalidated all kinds of legislation which, in the opinion of the Justices, unreasonably interfered with the use of private property. The Court gave a narrow meaning to the inter-State commerce and, thus, in many ways clipped the powers of Congress. It did not even hesitate to veto all attempts by Congress to forbid child labour.

In 1895, the Supreme Court reversed an old and well-accepted and hitherto practised precedent and made it impossible for the Federal Government to levy income tax. It was a decision of five to four Justices and Justice Field made manifest the feelings of the majority opinion about such experiments. He regarded income-tax as a sheer assault on capital and contended that "it will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war

13. *Essentials of American Government*, op. cit., p. 252.



of the poor against the rich, a war constantly growing in intensity and bitterness."<sup>14</sup> When the Supreme Court retarded the manifestation of public opinion by imposing upon the nation its own construction what the social and economic order ought to be, it really assumed the power of a super-legislature but not in its representative capacity. The popular opinion took a political revenge by adopting the Sixteenth Amendment in order to reverse this decision. In the "notorious" *Adkins* case Justice Sutherland, speaking for the majority, "defined the role of the court," as Brogan says, "in a way that a radical critic could hardly have bettered."<sup>15</sup> And referring to this case Boundin remarked, "the announcement that the court has constituted itself in a super-legislature is perhaps plainer than in any other case."<sup>16</sup> Justice Sutherland had unequivocally asserted that "there are limits to power, and when these have been passed, it becomes the plain duty of the courts, in the proper exercise of their authority, to so declare." Such decisions are, indeed, political in nature, and are not impressive, impartial and worthy of any special respect as the decisions of a court should generally command.

It may be further said that all such decisions had come forth with five to four majority and if Justice Sutherland is to be relied upon that it was the plain duty of the courts, in the proper exercise of their authority, to declare invalid any exercise of authority which passed beyond the limit, it follows that the four dissenting Justices had always been oblivious of their plain duty. In the *Adkins* case particularly the minority included the very conservative Chief Justice Taft.

The Supreme Court's assumption of power as a super-legislature has always been contested by a minority of the Justices. Justice Oliver Wendell Holmes (1902-32), who spent well over thirty years on the Court, consistently and ceaselessly protested "against his colleague's habit of writing their own economic predilections into the Constitution." Holmes was a conservative with a little faith in social reform in legislation, but he never allowed his personal views become the measure of the constitutionality of legislation and he was, accordingly, in dissent. Louis D. Brandies, too, appointed in 1914, by President Wilson, joined with Holmes in protesting against "the major direction of the Supreme Court's opinions and exposing the reasons behind the reasons of the court's majority." With the coming in of Harlan Fisks Stone, in 1925, "Holmes, Brandies, and Stone dissenting" became a familiar phrase in the law review.

There is yet another aspect of the problem. While interpreting and applying the spirit and language of the Constitution the Justices also decide questions of public policy. When an Act of Congress comes before the Supreme Court, the Justices are, in fact, either accepting or rejecting a policy embodied therein. The policy once rejected by them has no chance of enforcement until a differently constituted Court at some later time takes a different attitude. The Supreme Court is the least responsive to public opinion. "If the Constitution is supreme because it

14. *Pollock v. Farmers Loan and Trust Co.*

15. *The American Political System*, op. cit., p. 22.

16. As quoted in Brogan's *American Political System*, p. 22 f.n.



is an expression of the people's ideas then those agents who most directly represent those ideas have the best right to interpret the Constitution." It is therefore, pertinently asked that why should five men, who constitute the majority of the court, holding office for life and brought to their posts for their strong political, social and economic predilections, have the power to tell Congress and the President, elected by the people, what they may or may not do? The undue partiality and excessive dependence on legal formulas shown by the Supreme Court has seriously retarded progress in the United States.

The claim of Chief Justice Hughes that "we are under a constitution but the Constitution is what the judges say it is" or to express the same what Justice Frankfurter tersely said "The Supreme Court is the Constitution" is difficult to accept so long as some, at least, of the Justices are keen politicians by training, and are keen enough "to jockey for the Presidency even after they have become Justices of the Supreme Court." It is not indeed, an exaggeration to say that at any given time, one or two of the Justices are potential candidates for Presidency. It would not also be out of place and unimportant to mention here that Chief Justice Taft did not "think it incompatible with his high office to act as a personal adviser to Mr. Coolidge throughout his Presidential terms." Chief Justice Hughes and some of his associates, it is alleged, played a considerable part in the defeat of President Roosevelt's Court plan in Congress. When Judges are politicians and become active politicians, the prestige of judiciary does not carry with it the esteem which it should carry as an impartial custodian of the Constitution.

**Suggestions for reform.** The system of judicial review has, thus, from time to time been violently assailed and many remedies have been suggested. One reform suggested is not to permit invalidation of statutes by mere majorities of the Court or even by the votes. The spectacle of important Congressional legislation being overthrown by votes of five to four does not add to the prestige of the Supreme Court. In fact, it adds to the scepticism of "judicial infallibility." It has, therefore, been proposed that an exercise of the power of judicial review should require the concurrence of seven of the nine Justices of the Supreme Court. Such a kind of reform, it is contended, can be accomplished by an Act of Congress. But it is doubtful if the Supreme Court would declare this kind of Act valid. Two other proposals have been suggested. One is to abolish the power of judicial review by constitutional amendment. But this is an impossible task. There has actually been little or no demand for abolishing judicial review, its continuance being assumed even by various schemes for altering the personnel and jurisdiction of the Courts. The second is that Congress may re-pass a law set aside by the Court as it may override a Presidential veto. But

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17. Laski, H.J., *The American Presidency*, p. 68. Justice Charles Evans Hughes was appointed on May 2, 1910, by President Taft. He resigned in 1916 to be a Republican candidate for Presidency. On February 13, 1930, he was appointed Chief Justice by President Hoover.

18. *Ibid.*

19. See below.

20. In the event of the tie the decision of the inferior court is affirmed.

this, too, would require a constitutional amendment.

The remedies which require a constitutional amendment are not deemed sufficiently efficacious, because of the difficulties of uncertain results and circuitous methods involved therein. It took nearly twenty years for the Sixteenth Amendment to come into effect and, thus, to undo the work of the Supreme Court. It must, however, be added that none of these proposals has evoked popular enthusiasm and most Americans continue to hold the system of judicial review a desirable feature of the governmental system obtainable in the United States. "Generally speaking," as Burns and Peltason put it, "Americans have never been willing to put full trust in the majority. An independent judiciary with the power of judicial review has been the major institutional sign of this fear of unchecked legislative and popular majorities. But how far independent are the judges? We have said much about it, but one more illustration will be instructive in this connection. Chief Justice Taft feared to resign lest the 'radical' Hoover be allowed to appoint some one in his place. In 1929 he wrote, 'I am older and slower and less acute and more confused.' However, as long as things continue as they are, and I am able to answer in my place, I must stay on the Court in order to prevent the Bolsheviki from getting control. . . ."

**Roosevelt's Proposals.** President Franklin Roosevelt's battle with the Supreme Court is a more recent and "more dramatic attempt by a political leader to influence the course of judicial decisions." President Hoover left office in March 1933, in the midst of the great economic depression. On the same date, President Roosevelt entered upon his duties promising a "New Deal" and steer the country out of the economic chaos. Under his leadership Congress passed in quick succession laws of far reaching importance in record breaking time. Haste was justified by the emergency.

By 1935, these measures began to come before the Supreme Court. The Supreme Court declared five of the New Deal statutes unconstitutional during the Court term beginning in October 1935. In all it invalidated, within three years of its battle with the President, twelve New Deal statutes or its provisions thereof. It will be interesting to know something about the composition of the Supreme Court at that stage. Between 1933 to 1937 the Supreme Court consisted of nine judges, all of whom had been appointed before 1933, and except two, McReynolds and Brandies, the rest were appointed by Republican Presidents. Their average age was seventy-two (in 1937), the highest in the Supreme Court history, and it so happened that four (McReynolds, Sutherland, Butler and VanDevanter) of the six, who were over seventy, were "conservatives," while the fifth (Hughes) was a "middle of the roader" and only the sixth (Brandies) a "liberal."<sup>21</sup> On most of the measures which came before the Supreme Court the Justices were divided into two definite blocs: "conservative" and "liberal."

Early in 1937, when the conflict between the President and the

21. *Government By the People*, op. cit., p. 582.

22. As quoted in above, pp. 583-84.

23. Ferguson and McHenry, *The American System of Government*, op. cit.

Supreme Court was moving towards its climax, Roosevelt presented to Congress his own programme to reorganise the federal judiciary. The President and the Democratic Party had given no indication of such a reorganisation during the Presidential election campaign. His message to Congress on February 4, 1937, embodying his reorganisation proposals had, therefore, a dramatic effect. The most significant proposal was to give the President the power to appoint an additional Justice for each member of the Court who had served for ten years and who remained in the bench after reaching the age of seventy, provided the maximum number should never exceed fifteen. The object of the proposal was to "rejuvenate" the Supreme Court and to make it more efficient so that it could keep up with its work.

The proposal was defeated in its entirety. The only redeeming feature which emerged out of it was that Congress permitted Supreme Court Justices with ten years of service to retire at seventy with full pay. Although it was a political defeat for Roosevelt, yet, it has been observed that the President "lost his battle but won his war." In 1938, Justice Roberts wrote another majority opinion, this time holding that the Agricultural Adjustment Act of 1938, which also aimed to regulate agriculture, was constitutional. It is true that by the fall of 1937, the "liberals" were clearly in majority in the Supreme Court and by September 1942, only Justices Roberts and Stone remained out of the old lot. But even before any changes could be made in the personnel of the Supreme Court, the Court manifested a change of mind by reversing its previous attitude towards State Minimum Wage Law for women, by re-defining the Commerce clause as to include 'manufacturing,' by upholding the Social Security Act and the Labour Railway Act.

**'Modernization' of the Court.** The Switching on of Chief Justice Hughes and Justice Roberts, who had up to that time voted with the 'conservative' Justices, indicated the truthfulness of the newly coined political terminology, "A switch in time saved the Nine." Within four years most of that which President Roosevelt had sought to achieve by his proposal to liberalise the court had achieved without changing its structure. Since 1936, only two minor sections of two Federal Laws had been declared unconstitutional. The Court now interprets the Constitution in the light of the social and economic conditions prevailing in the country. It treats the Constitution as a body of living principles and consequently has validated a large expansion in the authority of the centre under the commerce clause and in a new interpretation of the welfare clause. The result is the emerging legislation in the context of a welfare state.

Another significant feature of the Supreme Court's 'modernization' is a substantial change in its regard to precedents. Justices of the old school had adhered to precedents to the point of religious devotion which robbed the Constitution of its adaptability to changing conditions. The new court attitude has freed constitutional interpretation from the restrictions of *stare decisis*. In 1941 and 1957 the court reversed its previous decisions in child labour and women's minimum wages respectively. The new court attitude is best expressed by Justice Reed. He declared in *Eire Railroad Company v. Tompkins* (1938), "In this court *stare decisis*, in statutory construction, is a useful rule. not an inexorable command."

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## CHAPTER VIII

# POLITICAL PARTIES

**Importance of Political Parties.** Political parties are indispensable for the working of a democratic government. Without them, says MacIver, "there can be no unified statement of principle, no orderly evolution of policy, no regular resort to the constitutional device of parliamentary elections nor of course any of the recognised institutions by means of which a party seeks to gain or to maintain power." If there were no parties, politics would be a sheer babel of tongues and the power of the people, termed as popular sovereignty, would dissipate itself into numberless channels and become quite ineffective and futile. A disorganised mass of people can neither formulate principles nor can they agree on policy and the obvious result is complete chaos. Political parties provide necessary leadership and direct reservoir of popular sovereignty. They bring order out of chaos by putting before the people for what they stand and educate them with their programmes. The people approve the programme of a party which they deem best and return it to power. The party returned in majority forms the Government and pursues its programme vigorously. The primary business of a political party is, in brief, to educate the electorate and mould the public opinion, to win elections and to form the government.

**Opposition of the Fathers to the Party System.** But the men who framed the American Constitution shared the common opinion that political parties were highly detrimental to national solidarity as they encouraged strife, division, chicanery, and personal manipulation. Planning as the Fathers were for the United States as a whole, they sought to provide a mechanism of Government which would be free from all "violence of the faction," as Madison called it. They apprehended that their young republic, too, might meet the fate of the republics of the ancient world and of medieval Italy, if the system of Government they were establishing permitted the growth of factitious spirit. That Philadelphia Convention had, therefore, to transcend party and the device of division of powers and the system of checks and balances were designed, among other objects, to prevent party domination, no matter how noble its purpose be.

Yet, within a few years of the career of the Union Party divisions and party spirit were sufficiently evident. In fact, hardly had Washington taken the oath of office that he noticed the signs of an emerging party split. To give "the fledgling government" a sense of unity and to rise above faction and party, Washington included both Alexander Hamilton, the leading Federalist, and Thomas Jefferson, the most influential Anti-federalist, in his Cabinet. But Jefferson resigned as Secretary of State in Washington's second administration to devote full time to the job of welding together a great party following. Washington deplored the em-



erging state of affairs and in his Farewell Address he warned his countrymen against "the common and continuous mischief of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it. It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms, kindles the animosity of one part against another...." But Washington was no political philosopher and he did not see the inevitability of partisanship. In the Presidential election of 1796 the third under the Union and the first in which Washington was not a candidate, there were two national parties, one supporting John Adams and the other supporting Thomas Jefferson. By 1800 the party system had settled itself quite firmly in the government, even to the extent of necessitating the addition of the Twelfth Amendment so as to make the electoral college method workable.

It scarcely need be added that since that time political parties have played a very vigorous role in the United States. Sometimes they have been more vigorous than others. National emergency may cause their temporary eclipse or an independent President may be able to transcend them for a time, but the party system has never received a setback. It has grown from generation to generation, and today this extra-constitutional growth forms the hub of the political life of the nation. "But for the appearance of a national party system," as Professor Brogan realistically points out, "the election of a President really enough of a national figure to carry out his duties, might have been impossible. And it is certain that the greatest breakdown of the American constitutional system, the Civil War, came only when the party system collapsed."

**The basis of American Party System.** It is important to remember that the basis of the American party system is not the same with which we traditionally associate political parties. "American parties have never been bodies of men united on some general principles of government and united to put these principles into concrete form by legislation and administration." The line of division in the Philadelphia Convention was between large and small States with the slavery issue looming large in the background. It was in interests and reactions of an economic and sectional nature that the parties started on their career in the early years of the republic. The Federalist party relied upon the commercial, financial and industrial elements of the New England and the Middle States, whereas the backbone of Jefferson's Republican Party were agrarian interests, planters and farmers, of the South and rural North.

Both Hamilton and Jefferson were genuinely prompted by their keen desire to build a strong, vigorous and free nation and they concentrated their best energies in achieving that virtuous purpose. But "each had a distinctive road to strength, vigour and freedom." Hamilton believed in a strong Federal Government and he attempted to build it, enjoying an advantageous position as Washington's Secretary of the Treasury, on real and sound financial basis. He caused the national bank to be founded, passed excise taxes and extended in general the authority of the national government within the framework of the Con-

stitution in order to make the people of the United States feel that they really made a nation, and the national government represented the nation; it was no confederation of States.

Thomas Jefferson took a serious objection to Hamilton's methods and there was a rift in the Cabinet. Jefferson resigned and devoted his political talents to building a party to combat "Hamiltonians," as Hamilton and his followers came to be nicknamed. Jefferson's irritation was that all the measures of the government were directed to strengthen the mercantile class without any consideration of the interests of the yeomanry. Devoted as he was to the ideal of an agrarian democracy, he concluded that the whole Federalist programme would result into the creation of an oligarchy, the rule of the propertied few in the interests of a propertied few. He could think, of no other means to remedy it except to plead for State rights and a narrow construction of the constitutional powers of the Central Government.

It may appear rather confusing that Jackson, Polk, Cleveland, Wilson and Franklin Roosevelt differed from the founder of their party and depended on the extension of the authority of the national government and a broad interpretation of the Constitution. But Jefferson's attitude of mind cannot be divorced from the context of the "extra-political conditions of the early days. The lack of communications, the provincial values, the absence of a national spirit and of an identity of the people with the new nation, all these factors retarded the growth of national sentiments and the Central Government being regarded as the custodian of the interests of the nation. Jefferson consequently felt that only by reserving a great body of rights solely to the States could mean protection of the interests of the people. "There was, therefore, no essential contradiction in his historic position as the founder of the Democratic Party and his overt defence of State rights against national encroachment."<sup>2</sup>

The two great American parties were and are combination of interests and their strength is local. Roughly speaking, United States may today be divided into four groups. The manufacturing North-Eastern group is in the main Republican; the agricultural south is overwhelmingly Democratic. The support of the central farming States is sought by both the parties. Another development of the present century is the political importance of the still mainly agricultural and grazing but rapidly industrialising West. It is the constant endeavour of both the parties to go beyond their citadels of strength and secure the support of either of the two uncertain groups, or preferably both. These two groups are, in fact, the determining factors of Presidential and Congressional majorities and to enable the Republicans and the Democrats to bank upon their support means a high degree of political organization. But so long as North remains Republican and South Democratic, locality will continue to embrace the party politics of the country.

**The two-party system.** Throughout its history, the United States had, barring a few minor parties, two major political parties. Various explanations for such a development have been offered. First, it is

2. Tourtellot, A.B., *An Anatomy of American Politics*, op. cit., p. 168.

maintained that the people belonging to the English speaking countries are less doctrinaire and more inclined to compromise. Second, the problems of race, nationality and religion are not so prominent to divide them into different factions as compared with Continental countries of Europe. Third, the two-party system is a legacy of the colonial regime and it has since then perpetuated. Fourth, the two-party system is the consequence of the American voting system, especially the electoral college and the single member district plan of electing legislative representatives. It is, no doubt, true that the electoral method of electing the President would be very undemocratic if a strong third party should emerge. If no majority is won in the electoral colleges, the House of Representatives elects the Chief Executive head of the State from the highest three, each State casting one vote. The single member district scheme of electing representatives also discourages the development of minor parties.

Two-party system has certain important results. Under the parliamentary system of government, one party which carries the mandate of the electorate forms the government and with its legislative majority has the power to carry out that mandate. But under the Presidential system of government, the separation of powers, upon which hinges the framework of government, may occasionally create conditions of deadlock between the executive and legislative departments though normally it results in a situation where the President has a Congressional majority of his own party. In the event of joint congressional majority being of one party and the President of another, the nation suffers because of the friction and critical role which both play. During the last two years of Truman's first administration, the Republican Congress enacted legislation not liked by the President and President Truman spent a good deal of time criticising it. At the same time, the President was conducting the government through the execution of his constitutional and statutory functions and Congress spent a good deal of time criticising him. A more piquant situation arises when the Senate is of one party and the House of Representatives of another and the President necessarily divided in his attitude towards Congress.

Under the two-party system the parties become moderate and compromising bodies highly sensitive of their responsibility. Each party endeavours to rally round as many interests as it possibly can to win power. And as each party is at all times either the government or the opposition it remains in touch with realities and can ill-afford to make wild and irresponsible statements of policy. Finally, multiple party system would make continued functioning of the electoral college virtually impossible.

**Third parties.** It does not, however, mean that minor parties have never existed in the United States. From early times, dissatisfied elements have launched "third" parties; totalling at least a score. But the one redeeming feature is that third parties have come and gone and during the last 150 years none except the Republican Party has ever gained sufficient strength to displace an existing major party. Several times minor party candidates for the Presidency "have polled sufficient votes to hold the balance of power between the two majors, but they have been unable to keep their separate identity or strength for long." On six

different occasions since Civil War, third parties have played respectable results and the most recent one was that of Robert M. La Follette, the progressive candidate for Presidency in 1924, who polled  $4\frac{1}{2}$  million votes.

The role of the minor parties in American politics cannot be discounted. They are generally the innovators of policy, if not holders of office. "The old parties have not hesitated to take plank after plank from Populists, Greenbackers, Socialists, and Progressives and instal them in their own platforms." Minor parties are almost invariably radical than the old line organisations and much of what these left-wing parties advocated two or three decades ago may be found in the Democratic and Republican platforms of today. There may not be a future for the third parties in the United States, but those who promote them have the satisfaction to see their programmes for which they worked become the law of the land under the auspices of old parties.

## HISTORY OF AMERICAN PARTIES

(1) **The Democratic Party.** The Democratic Party is now a century and a half old and was established under the leadership of Thomas Jefferson during Washington's administration. Known under various names, including Anti-federalists, Republicans, Democratic Republicans, and Democratic, the party has survived under the most difficult circumstances. Early in history it took a stand against protected tariffs, ship subsidies, imperialism, and the extension of the powers of the national government through "constructions" of the constitution. Its historic centre of gravity was long in the agricultural interests of the country although a large proportion of importing merchants and urban mechanics were soon brought into its fold. After the extinction of the Federalist Party around 1816, the Democratic Party enjoyed a period of virtual political supremacy. During the Jacksonian era, however, considerable split appeared and the party now known as Democratic soon faced a formidable Whig opponent. It receded to opposition after the Civil War and continued a minority for decades together, but at intervals spirited up with vigour in Congress and captured the Presidency twice with Cleveland, twice with Woodrow Wilson, and four times with Franklin D. Roosevelt. Kennedy occupied the White House with a comfortable Congressional majority of his Party and Lyndon Johnson in the 1964 elections secured the biggest popular majority in United States history. A noticeable trend is that a greater proportion of young and new votes support democratic candidates than support Republican candidates. It is also apparent that the more education a person has the more likely he is to support Republican candidates.

(2) **The Republican Party.** The Republican Party of today is in essence the successor of two earlier major parties. The Federalist Party led by Hamilton, which had championed strong national government and a liberal construction of the Constitution, had expired after making tactical errors during the War of 1812. It appeared first as National Republican and then Whig during Jackson's time. The Republican Party was founded in 1854 and nominated John C. Fremont as Presidential candidate in 1856, and took a strong stand on slavery. Fremont lost to



a Democratic coalition still strong enough to win. Four years later Lincoln gained victory on a Republican platform that proposed abolition of slavery and favoured internal improvements including a "satisfactory homestead measure for farmers," and "liberal wages for working men and mechanics." From 1860 down to 1913, it controlled the executive department of government continuously with exception of eight years when Grover Cleveland was President (1885—1889; 1893—1897). It was, however, not a smooth sailing for the party. It suffered from the exposure of the corruption during Grant's administration. It was also shaken by internal divisions "between East and West, between conservative businessmen and not-so-conservative farmers and workers, between reform-minded Liberal Republicans and stand-patters, between party regulars (Stalwarts) and party independents (Half breeds), and between many different combinations of these." In spite of these divisions and shakings, the party could stand abreast and succeed, "because by design or by chance" its leaders "could assuage the different elements." William McKinley saved the party from collapse when important labour and rural elements were on the verge of deserting the party towards the end of the century. When in the following years reformists against the conservatism of the party policy, Theodore Roosevelt, a progressive Republican, reoriented the party's appeal.

The Party has stood for a liberal interpretation of the Constitution, especially those parts relating to the powers of the national government, it has shown less sympathy than the Democratic Party for the rights of the States. It is the champion of the protective tariffs, of internal improvements under federal auspices, of colonial expansion, liberal pensions for veterans, subventions for the merchant marine, Negro suffrage, and gold monetary standard.

**Party decentralization.** One of the most significant features of the American political parties is their decentralization. Although the Republican and the Democratic parties are two national parties, much of the power in the party system is concentrated in the State capitals and rooted organizationally in the county and municipal levels. Apart from the selection of Presidential and Vice-Presidential nominees and the preparation of national platform, the party's central agencies are virtually powerless. Control remains with the State and local leadership in conducting the campaign and in deciding upon candidates for office. "A sense of discipline to higher authority is almost unknown, and, if pressed, doubtless would be met by indignation and resistance on the part of the local units concerned."<sup>3</sup> Professor Key says that the national party is little more than a "gathering of sovereign (or their emissaries) to negotiate and treat with each other."<sup>4</sup>

There is, however, evidence of a counter trend in the direction of a greater concentration of power and this is essentially due to the centripetal tendencies of modern government. This is a universal phenomenon and American party system cannot escape therefrom. For example, the Pre-

3. Barkar, Benjamin and Fiedelbaum, Stanley, H., *Government in the United States*, p. 147.

4. Key, V.O., *Politics, Parties and Pressure Groups*, p. 363.



sidential party increasingly has come to be identified as national in outlook no matter whether the occupant of the White House is a Republican or a Democrat. On the other hand, localism still remains strong in the Congressional party. The result is a wide gap between the President and Congress in the formulation of policy. But the reality is otherwise. The two wings of the party are not so sharply divided due to the "nationalisation" of politics and if this process continues the sectionalism is sure to disappear from the American party system.

**Party divisions no longer clear cut.** Another important characteristic of the American parties is their reluctance to become tied to any rigid ideological doctrine. The party division is rather blurred and no distinct line of demarcation can be drawn to separate their programmes. Agriculture is not now the predominant occupation of the Americans, and the greater part of the annual wealth does not come from the soil. Large sections of the Middle West and the South, once the strongholds of agrarian democracy, have become industrialised and, accordingly, there is a corresponding change in the attitude of the people. Their needs have also changed and so they look towards government with changed spectacles. Then, the interests of industry, trade and agriculture overlap and dovetail in many ways. There can be no divorce between them. Within industry itself there is a sharp difference and different points of views are put forward to remedy their disabilities. For example, automobile and allied industries are not inclined to protective tariffs; investors of capital abroad and bankers favour low tariffs.

These complexities in the economic life of the country have made the Democrats to shift to new grounds. They have abandoned their old slogan of "tariff for revenue only" and stand for protection, if somewhat modified by reciprocal trade agreements. The Republicans, too, extend considerable support to this programme. The result is, as Professor Beard says, "that the cleavage between the right and left wings of each is greater than the gulf between the parties themselves, especially in the Senate where agrarian States have a disproportionate weight."

Lord Bryce after a deep study of the American party system maintained, "the great parties were like two bottles. Each bore a label denoting the kind of liquor it contained, but both were empty." It is not true, according to Beard, "that the two parties are exactly identical except as to their labels."<sup>5</sup> There are two important facts to be observed in this connection. The first is, loyalty to tradition which makes the strongholds of both the parties to continue in their support to the parties concerned. Secondly, the old sentiments and opinions still determine the attitude of different interests and, as such, characterise the divisions among the voters. This can be illustrated by a sample poll taken by the American Institute of Public Opinion in December 1940 and cited by Professor Charles Beard. According to this sample poll the Democratic candidate, President Roosevelt, "received 28 per cent of the votes in the upper income group of citizens, 53 per cent in the middle income group, and 69 per cent in the lower income group; while his Republican

5. *American Government and Politics, op. cit.*, p. 67.

6. *Ibid.*, p. 68.

opponent, Wendell Wilkie, received 72 per cent of the votes in the upper group, 47 per cent in the middle group, and 31 per cent in the lower group." A similar poll was again taken in 1943 and identical results were obtained except for some minor changes in the percentages.

To sum up, both the major parties in the United States are deep rooted in capitalism. The only difference between the two is that the Republicans think that the more government leaves capitalism alone the more it flourishes. The Democrats maintain that unless capitalism is constantly adjusted to social, technological and economic changes, it may perish of its own inflexibility. In international politics the Democrats play the "strange role of the party of nationalism, strong armies and navies, international intervention and war, leaving to the Republicans—at any rate for the time being—the less glamorous and rather unfamiliar role of advocating caution, restraint and even isolationism."

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## CHAPTER I

# NATURE AND CONTENT OF THE CONSTITUTION

**Historical background.** Canada, which today has an area of 3,845,000 square miles and a population of about 15 millions out of which more than 3 millions are French originally, was founded in 1608 by the French Colonists. The Seven Years' War between the French and the English had its repercussions in Canada too. General Wolfe, Commander of the British Forces in North America, conquered Quebec in September of 1759, and Montreal a year later. As a result of the Treaty of Paris, 1763, France recognized the cessation of Canada to Britain. The Treaty, however, provided that "His Britannic Majesty, on his part, agrees to grant the liberty of the Catholic religion to the inhabitants of Canada."

The King of Britain thereafter appointed a Governor to rule Canada on his behalf. He was assisted by a Council and an assembly. But complications soon arose because of the heavy influx of British immigrants. Parliament passed an Act in 1774 which aimed to remove the grievances and disabilities of the Roman Catholics. But the situation again worsened when a large number of loyalists from America, immediately after the declaration of Independence by the thirteen Colonies, entered and settled in Canada. Parliament thereupon passed the Constitution Act, 1791, which divided Canada into two Provinces, the Upper Canada with a British majority, and the Lower Canada with a French majority. Each Province had its own Council and Assembly, the former nominated and hereditary and the latter was elective. The Governor was independent of the legislature and he received instructions from the Colonial Office in London. But even this system of administration did not remedy the situation. In Lower Canada the British dominated in the Council whereas the French were in majority in the Assembly. This resulted into unceasing deadlocks between the two Chambers and the irresponsible executive and the representative Assembly. The racial and religious controversy, French versus English became unmanageable. Papineau, the leader of the French, declared an open revolt against the King of England. The rebellion was suppressed and Papineau fled, "but the smouldering embers of discontent were not finally extinguished." In Upper Canada, too, things were not running smooth. The British majority there could not reconcile itself with an irresponsible and irresponsible executive and clamoured for popular control over the administration.

The British Government suspended the Constitutional Act and sent Lord Durham to Canada with full administrative authority. Lord Durham went deep into the problems of Canada and after two years of his stay submitted to the British Government his report which is eminently known as the Durham Report. The Durham Report constituted a land-

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The two main responsibilities of the leading nations are to ensure that the United Nations system is able to respond to the needs of the world, and to ensure that the system is able to respond to the needs of the world. The two main responsibilities of the leading nations are to ensure that the United Nations system is able to respond to the needs of the world, and to ensure that the system is able to respond to the needs of the world.





proposed Charlottetown conference was considered propitious by the Canadian Government and at the request of his Cabinet, Lord Monck entered into communication with the Lieutenant-Governors of the Maritime Colonies and asked if a Canadian delegation might join the conference and participate in its deliberations. The request was granted and eight Canadian Ministers, including MacDonald Brown Carter, and Galt, joined the conference. Nova Scotia, New Brunswick and Prince Edward Island sent five delegates each, making a total of twenty-three delegates in all.

The conference met as scheduled. The Canadian representatives put forward their proposals for a comprehensive union of all the Colonies. The delegates from the Maritime colonies proceeded to the separate consideration of the proposals to which their respective legislatures had agreed and authorised them to confer. But it became soon apparent that the union among themselves could not hope for success. Federation was the only feasible plan and the delegates reached a decision that a formal conference of all the delegations, including New Foundland, should re-assemble at Quebec in October.

On October 10, 1864, there assembled at Quebec one of the most epoch-making conferences in the Canadian history. Canada had its twelve delegates. New Brunswick and Prince Edward Island seven each. Nova Scotia five, and New Foundland two in all thirty-three. The fundamental principle accepted at Charlottetown was endorsed unreservedly at Quebec, that is, that the new government should be a federation. In less than eighteen days seventy-two resolutions were agreed on, which practically became the subsequent North America Act of 1867. These resolutions were approved by the Parliament of Canada, but met with considerable opposition in the Maritime Provinces. This led to the convening of a conference by the British Government in London consisting of the representatives of Nova Scotia, New Brunswick and Canada. The outcome was the passage of the British North America Act of 1867, which received royal assent on March 29, and was proclaimed on May 22, and came into effect on July 1.

Thus, on July 1, 1867, came into being the Dominion of Canada consisting of four Provinces—Ontario, Quebec (United Canada redivided), New Brunswick, and Nova Scotia. The Queen was given power, on the advice of the Privy Council and on the addresses from the Parliament of Canada and the respective legislatures of New Foundland, Prince Edward Island and British Columbia, to admit the remaining colonies or any of them into the Dominion, and with the same advice she was given power to admit Rupert's Land and North-Western territory on address from Parliament of Canada. Rupert's Land and North-western territory were, accordingly, admitted in 1870. The Province of Manitoba was admitted at the same time, and in the following year came in British Columbia. Prince Edward Island was admitted two years later in 1873. In 1905 two Dominion statutes transferred a large block of the western territory into the Provinces of Alberta and Saskatchewan. Finally, in 1949, New Foundland became the tenth Province of the Dominion of Canada.

**Nature of the Canadian Federalism.** Canada is now made up of

ten constituent units, called the Provinces: the two Canadas (now Ontario and Quebec), the three Maritime Provinces (New Brunswick, Nova Scotia, and Prince Edward Island), the four Western Provinces (Manitoba, Alberta, Saskatchewan, and British Columbia) and New Foundland and several territories, known as the Yukon Territory and the North-west Territories, which are not included in any of the Provinces.

The Canadian Constitution—the British North America Act, 1867, and certain subsequent amending Acts—present certain definite federal characteristics. First, it divides the powers between the Dominion and Provincial Governments by giving the latter exclusive legislative control over a list of enumerated subjects. The Dominion has exclusive legislative control over the rest, which “for greater clarity,” as the British North America Act states, have also been enumerated, though not exhaustively. Secondly, Governments of the Dominion and the Provinces are distinct in personnel from each other and neither has the power to alter the Constitution so far as the distribution of subjects is concerned. The Constitution-changing power rests with the British Parliament. Finally, the Canadian Courts can declare Dominion or Provincial laws void on the ground that they transgress the jurisdiction assigned to the respective governments by the Constitution. This establishes the supremacy of the Constitution.

But the Fathers of the Canadian Constitution were not wedded to the narrow ideas of federalism and they did not follow the path carved out by the framers of the American Constitution. The United States had been engaged from the days of Jefferson in the long and bitter controversy over rights and powers of the States which culminated in the tragic Civil War. Canadian leaders had the opportunity to become wiser from the experience of their neighbours. The majority of the delegates assembled at the Quebec conference had the abiding conviction that the outstanding lesson to be learnt from the menacing circumstances of the American Republic was the necessity of strengthening the centripetal forces in a federation, which they proposed to set up. The best way, they decided, was to give a few enumerated subjects of jurisdiction to the constituent units and leave the residue for the Central Government. “The true principle of confederation,” asserted Sir John MacDonald, “lay in giving to the Central Government all the principles and powers of sovereignty, and that the subordinate or individual states should have no powers but those expressly bestowed on them. We should, thus, have a powerful Central Government, a powerful Central Legislature, and a decentralised system of minor legislatures for local purposes.” At another occasion MacDonald confidently claimed that, “Here, we have adopted a different system. We have strengthened the Central Government. We have given the Central Legislature all the great subjects of legislation. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States.” The distribution of powers in the Canadian Constitution was, thus, in vast contrast to that of the American Constitution and it was directly the result of the events that followed the inauguration of the federation culminating into the Civil War. The Canadians strived to be wiser from the experience gained from the neighbouring country and avoided all possibilities to plague their own.

Being determined to possess a strong central government, the Canadian Fathers built up the authority of the Dominion in a number of other ways:

(1) The enumerated powers given to the Provinces constituted a moderate list containing subjects essentially of a local nature. Some powers which in the United States had been left with the States, such as criminal law, marriage and divorce, were given in the Canadian Constitution to the Dominion.

(2) All powers not explicitly given to the Provinces were granted to the Dominion. The United States Constitution allotted certain enumerated powers to the national government and reserved the rest for the States. The Tenth Amendment clearly stated that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." The Quebec Conference decided to follow the other course and passed on the residue to the Dominion. And to make the matter quite clear, after enumerating a long list of powers which were explicitly placed under the Dominion jurisdiction, Section 91 of the British North America Act empowered the national Parliament "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." This is an all-embracing clause which enables the Dominion Parliament to make laws even on subjects which are within competence of the Provinces on the plea that they effected the peace, order and good government of Canada.

(3) The Dominion Government was given the power to disallow any law passed by a Provincial legislature within a year of its passage.

(4) The Dominion Government possessed the power of appointing and removing the Lieutenant-Governor in each Province. It could also instruct the Lieutenant-Governor to withhold his assent to Provincial Bills or reserve them for the consideration by the Governor-General. The Governor-General might refuse assent to such reserved Bills if he thought fit.

(5) All important judicial appointments in the Provinces were vested in the Dominion Government.

(6) The members of the Senate were nominated by the Dominion Government and the Chamber did not provide equal representation to the Provinces, big and small. The Senate was not, accordingly, like its namesake in the United States, wholly or mainly protective of Provincial interests.

The Canadian federation was, thus, intended by its architects to depart radically from the federal principle which divides and distributes powers between a Central Government and Governments of the units, and accepts both sets of governments within their respective spheres of jurisdiction as co-ordinate and independent. The most essential characteristic of a Federal Government is that neither the Central Government nor the regional governments can render the one helplessly dependent

upon the other for its existence or proper functioning. But the Canadian Provinces were desired to be inferior bodies "possessing little more prestige and authority" as Dawson says, "than inflated municipalities." In the discussions at the Quebec Conference Provincial legislatures were repeatedly described as "subordinate," "minor" and "inferior" bodies. Speaking on the Quebec Resolution in Parliament of Canada on February 6, 1865, MacDonald said "We...strengthen the Central Parliament and make the confederation one people and one government, instead of five peoples and five governments, with merely a point of authority connecting us to a limited and insufficient extent...this is to be one United Province with the local governments and legislatures subordinate to the general government and legislature." The amplification of this point by Dr. Charles Tupper is yet more blunt. He said "we propose to preserve the Local Governments in the Lower Provinces because we have not municipal institutions." But he was also careful to state that "while we should diminish the powers of Local Governments we must not stock too largely the prejudices of the people in that respect." Thus, it was the definite intention of the Constitution-makers to make the Provincial Governments in Canada subordinate to the Central Government and not co-ordinate with it. Their purpose was not to repeat the events that had happened in the United States of America. Whatever the intentions of the Founding fathers, it must be admitted that they defeated the purpose of a federal polity.

The powers of disallowance and veto further rendered the Provinces helplessly dependent upon the Central Government. The British North America Act empowered the Dominion Government to prevent the Provincial legislature from making laws upon its own allotted subject, if the Dominion Government happened to disapprove the policy involved in such laws. In **Re-Disallowance and Reservation** (1938) the Supreme Court of Canada held that the Dominion Government's powers of disallowance and veto are unrestricted in law and extend to all kinds of legislation, financial and ordinary. This is tantamount to placing the Provincial Governments entirely on the mercy of the Dominion Government.

All these are unitary elements and Professor Wheare, a renowned authority on federalism, tersely puts it, "Could there be a more powerful weapon for centralising and unifying the government than this?" Prof. Wheare then, examines the controversial question whether Canada has a unitary or federal type of government. His conclusion is that in spite of these unitary elements, "the federal principle is not completely ousted" from the Canadian Constitution; it does find a place there and an important place. "Yet if we confer ourselves to the strict law of the constitution," he adds, "it is hard to know whether we should call it a Federal Constitution with considerable unitary modifications, or a unitary constitution, with considerable federal modifications. It would be straining the federal principle too far. I think, to describe it as a Federal Constitution, without adding any qualifying phrase. For this reason I prefer to say that Canada has a quasi-federal Constitution."

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1. Wheare, K.C., *Federal Government*, p. 20.

2. *Ibid.*



But Professor Kennedy, another renowned scholar, categorically says that "Canada is a federation in essence." His conclusions are based upon a series of legal decisions, and he reduces them into four:

(1) The Dominion Parliament is not a delegation from the British Parliament or from the Provinces. It has full and complete powers over its sphere of jurisdiction;

(2) The Provincial Legislatures are not delegation from the British Parliament. Their authority is plenary within the limits prescribed by the Constitution and, as held in **Hodge v. The Queen** within the sphere so prescribed "the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion;

(3) The Provincial Legislatures are not delegations from the Dominion Parliament and their status is in no way analogous to municipal bodies. In the liquidators of the **Maritime Bank of Canada v. The Receiver-General of New Brunswick**, Lord Watson declared that "The Act of 1867...nowhere professes to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy....As regards those matters which by Section 92 are specially reserved for provincial legislation of each province continues....as supreme as it was before the passing of the Act."

(4) The Provinces remain independent and autonomous. Professor Kennedy summing up the position and status of the Dominion Government and Provinces says that both governments "exercise co-ordinate authority and are severally Sovereign within the sphere specifically or generically or by implication constitutionally granted to them."<sup>3</sup> This construction, he holds, agrees with the preamble of the British North America Act which reads, "whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united."

A Federal Constitution is really what the Judges declare it to be. In interpreting the Constitution of the United States the Supreme Court adopted a definite theory of federalism. It had been assumed that the States retained their 'sovereignty' in all matters which were not expressly taken away from them and as such no legislation of Congress must interfere with powers which remained with the States, and no legislation of the States must be allowed to interfere with the exercise of powers specifically assigned to the Federal Government. The Supreme Court has the power to declare unconstitutional federal or state legislation which, in its opinion, offended against the limitations imposed by the Constitution. Moreover, in interpreting the Constitution, the Supreme Court has always remembered that a Constitution is not an ordinary law. It is a fundamental law providing the machinery of government and it has to be interpreted according to the conditions which it has to meet and solve. Mere

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3. *The Constitution of Canada*, p. 408.



reliance on the letter of the law and the intentions of its framers would make the Constitution static thereby preventing the organs of government adapting themselves to changing social and economic conditions.

But the Supreme Court of Canada and the Judicial Committee of the Privy Council has not followed the practice of the American Supreme Court. They have regarded the British North America Act as a statute to be interpreted like other statutes. And faithful to the traditional rules of statutory interpretation, the Judges have been concerned with the literal meaning of the words in the British North America Act without reference to historical facts, or the intentions of the framers of the constitution, or the changing social and economic conditions of the country to which the machinery of the government must fit in. The result is that there has not been a straight line interpreting the British North America Act. Lord Haldane, in *the Attorney-General of Australia v. Colonial Sugar Refining Co.*, held that the Constitution of Canada could not be described as federal except in a loose sense. But in spite of the conflicting interpretation of the British North America Act, history has proved otherwise. The American federation began its career with a theory of state rights. Today, we find there the ever-increasing growth of central power and the process of centralization is in full swing, that is, the national government assuming influence or control over functions which formerly were considered under state jurisdiction. Canada began its political existence with the scales highly tilted in favour of the central authority. Today, the Canadian Provinces enjoy powers almost greater than those in the states in the American federation.

Many factors are responsible for this development, but it has been essentially determined by the attitudes of mind prevalent among those vested with political authority. Sir John MacDonald, the most outstanding statesman of the early period and, in fact, the architect of the Canadian federation, had convincingly viewed the Provincial Legislatures subordinate bodies and regarded the Lieutenant-Governors as nominees of the Dominion government whose interests he expected them to safeguard as dutiful servants. MacDonald also set the precedent of disallowing provincial legislation and twenty-nine Acts were victims in the first decade of the career of the federation. But the Liberal Party, particularly as represented in the person of Oliver Mowat, Prime Minister of Ontario (1872-1896), had strongly protested and fought against MacDonald's wide use of Dominion authority and essentially its power of disallowance. The Liberals urged the view that within their sphere of jurisdiction, the Provinces were as supreme as the Dominion within its own. By 1887, the dissatisfaction against the centralist policies of the Dominion Government had reached a pitch. In a conference held at Quebec the representatives of the five Provinces met to vindicate the plenary nature of provincial authority, and agreed to agitate for: (1) curtailment of the federal jurisdiction; (2) abolition of the power of disallowance; (3) recognition of the Lieutenant-Governors as the representatives of the King rather than servants of the Dominion Government; and (4) each Province should nominate some members to the Senate.

When the Liberal Party assumed office, at the Centre, in 1896, it adopted a responsive attitude and tried to lessen a fear of centralisation

prevalent in the new growing nation. It did not repudiate any of the powers which the British North America Act conferred upon the Dominion Government. Nor did it set to make those powers become obsolete. But since then the power of disallowance has been more cautiously used, an exceptional rather than a normal expedient or as Brady says, "an extreme medicine of the Constitution." The present position is well explained by Dawson. He says, "Sporadic revivals of disallowance have occurred during the past thirty-five years, but it is a far from being the active agent in assuring to the Dominion that oversight which was contemplated in 1864. It is now generally recognised by the Canadians that the true judge of the mistakes and injustices of the provincial legislature is the electorate and not the Dominion Government. Since the Dominion Government has now definitely assumed a federal aspect, it balances divergent interests, thus, subordinating the legal powers to the federal principle in practice."

The conventions of the parliamentary system of government go still further. The British North America Act empowers the Dominion Government to appoint a Lieutenant-Governor, and by law the Lieutenant-Governor appoints his ministers who hold office at his pleasure. But the parliamentary system of government demands that the Lieutenant-Governor must appoint his ministers only those persons who belong to the majority party in the provincial legislature and command its confidence. The real functionaries are, thus, the choice of the people who returned them in majority at elections and the Dominion Government must accept their choice and endorse their policies for which they hold a mandate. In fact, the Dominion Government cannot afford to do otherwise as it is itself the choice of the people and it has to appeal to the people at periodic intervals for return to power. This custom of the Constitution renders almost nugatory the intention of the Quebec Conference that the Dominion influence over the Province would be effectively exercised through the agency of the Lieutenant-Governors. Similarly, although the Dominion Government has the power to make all the important provincial judicial appointments, yet it exercises this authority with due discretion and has not attempted to pack the courts with partisans opposed to provincial powers. Professor Wheare, accordingly, comes to the conclusion that "Canada is politically federal and that no Dominion Government which attempted to stress the unitary elements in the Canadian Constitution at the expense of the federal elements would survive."<sup>4</sup>

Professor Wheare does not entirely rely upon the law of the Constitution for determining whether it is federal or not. The practice of the Constitution, he says, "is more important almost than the law of the Constitution," for a country "may have a federal Constitution, but in practice it may work that Constitution in such a way that its government is not federal. Or a country with a non-federal Constitution may work in such a way that it provides the example of a federal government." Professor Wheare's conclusion is obviously clear. "It seems justifiable to conclude," he says, "that although the Canadian Constitution is quasi-

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4. Wheare, K.C., *Federal Government*, p. 21.

federal in law, it is predominantly federal in practice. Or to put it in another way, although Canada has not a federal Constitution, it has a federal government."<sup>5</sup>

Canada has really a Federal Government. The unitary elements are being so worked that they do not conflict with the federal principle. The Provinces now enjoy wide political and legislative authority. Within the sphere of powers granted to them, they are practically autonomous. The power of disallowing Provincial legislation is sparingly used and confined only to acts which infringe the principle of legislative power and contravene the interests of the Commonwealth. A Lieutenant-Governor is no longer an instrument of the Central Government. His appointment by the Dominion Government is, in fact, an evidence of the federal link and does not mean subordination once he is legally appointed.

**Nature of the Constitution.** According to Paul Gerin Lajoie, Canada does not possess any constitutional document called the "Constitution" or "the Constitution Act."<sup>6</sup> But this is not a true appreciation of the nature of the Canadian Constitution. The British North America Act is the written part of the Constitution and constitutes its original and basic written document. It is the instrument that created the Dominion of Canada by uniting the four original Provinces and binds together in perpetual common ties the ten Provinces which today make the federation of Canada. As the British North America Act was designed to bring unity into the diversity of the new nation, it contains the scheme of distribution of powers between the Dominion and the Provinces, and the organisation of governments at both the levels.

The British North America Act is, thus, the pivot on which hinges the constitutional framework of Canada. It is written and fundamental, though the document is not comprehensive. At many places it is silent on vital matters, such as the exercise of executive power, and its relation to the legislature, and at others when it goes into details, they are given in such a way that they become ambiguous if not sometimes misleading. The explanation of this peculiarity is due to the contents of the Preamble which states that it was the desire of the original Provinces to be united "with a constitution similar in principle to that of the United Kingdom." It means that all those principles which are basic to the cabinet system of government in Britain and find their origin and continuance on the conventions of the Constitution would be observed in all their essentials in Canada too. The North America Act itself does not contain any of these conventions. The Preamble is not a part of the Act, but the direction it contains for the fulfilment of the objective makes a vital difference in theory and practice. All this, however, does not mean that Canada has no Constitution.

The Constitution also contains the statutes other than the British North America Act, of the British Parliament, as also the statutes of Canada which comprise the written part of the Constitution. In the Statutes of the United Kingdom are included British North America Acts amending from time to time the various provisions of the British

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5. *Ibid.*

6. *Constitutional Amendment in Canada*, p. 5.

North America Act, 1867, the Statute of Westminster 1931, and Parliament of Canada Act, 1875. The Statutes of the Parliament of Canada include such enactments as the succession to the Throne Act, the Senate and House of Commons Act, the Speaker of the Senate Act, the Speaker of the House of Commons Act, the House of Commons Act and the Salaries Act. Then, there is the Canadian Bill of Rights passed in 1960. Provincial statutes relate to Executive Councils, Legislatures, representation, etc. The Letters Patent constituting the office of the Governor-General of Canada and the Instructions issued to the Governor-General also constitute the "written material" of the Constitution.

From this analysis, E.A. Dreidger, Deputy Minister of Justice and Deputy Attorney-General of Canada, concluded that "In Canada there is no document that purports to set out the complete laws pertaining to the country's government. The Constitution, as in the case of the United Kingdom, consists in part of written material and in part in conventions or customs." He categorises the Constitution of Canada, "in its broadest sense", to include:

- (a) Statutes of the United Kingdom, e.g., British North America Acts, Statute of Westminster, 1931, Parliament of Canada Act, 1875.
- (b) Statutes of Canada, e.g., Senate and the House of Commons Act, Canada Elections Act, Representation Act, North-West Territories Act, Yukon Act, Saskatchewan Act, Alberta Act, Manitoba Act, Bill of Rights of 1960.
- (c) Statutes of the Provinces, e.g., Acts relating to the Executive Council, the Legislature, Representation and Election.
- (d) Other Documents, e.g., Instructions to Governor-General and Lieutenant-Governors and Letter Patent.
- (e) Conventions.

In spite of the scattered sources of the Canadian Constitution, it is not correct to say that there is no "Constitution Act" or any constitutional document called the "Constitution." The British North America Act is the fundamental law of the country and it provides the machinery of government both for the Centre and Provinces. Even the Constitution of the United States as it emerged out of the Philadelphia Convention was a brief document and its framers left sufficient room for it to grow. Bryce has correctly said that "the American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and, therefore, in its own spirit." The American Constitution is, accordingly, not the written fundamental instrument framed at Philadelphia together with its amendments. It also includes statutes enacted by Congress, executive orders and actions which enable the government to function efficiently, the judicial decisions and the innumerable usages and customs. This is the process of development in every country and Canada is no exception to it.



**Amendment of the Constitution.** The British North America Act, unlike the Commonwealth of Australia Constitution Act, contains no amending clause whatever. The reason for this omission from the Act is not clear, "although it may be supposed that a British statute appeared to be normal instrument through which another British statute might be changed."<sup>8</sup> But this procedure of amending the British North America Act by an act of the British Parliament gives to Canada, in the opinion of the vast majority of the Canadians a humiliating position. "for after many years of insistence on her independent status, she is compelled to admit that she is dependent on an outside legislative body for the exercise of one of the most basic powers of self-government"

But the British Parliament does not amend the Act as and when it desires. From 1871, it has become the accepted practice that the demand for amendment proceeds from the Canadian Parliament, the Senate and the House of Commons, in the form of an address to Her Majesty requesting the passage through the British Parliament of an amending Act. The British Parliament has always acted a little more than an automation and quietly and quickly passes the required amendment. The British Parliament is, thus, simply an agent in the realization of the wishes of the Dominion Parliament and that, too, with regard to those constitutional amendments which cannot now be made by any legislative authority in Canada.

The British North America Act, 1867, gave to the Canadian Provinces the power to amend their Constitutions, except as regards the office of the Lieutenant-Governor,<sup>9</sup> but the same power was not conferred on the federal Parliament. Amendment to the federal Constitution thus could be made only by the British Parliament and this was done on address to the sovereign from both Houses of Canadian Parliament. In 1949, the British North America Act was passed in accordance with a request made by the Canadian Senate and the House of Commons, so as largely to remove this disability. Section 91 now empowers the Parliament of Canada to legislate with respect to constitutional matters and amend the Constitution of Canada, except as regards the legislative authority of the Provinces, the rights and privileges of the Provincial Legislatures and Governments, schools, the use of the English and French language and the duration of the House of Commons.

At present time, therefore, the constitutional laws for Canada may be made by the Parliament of Canada, by the Provincial Legislatures or by the Parliament of the United Kingdom. There has, however, been an earnest effort in Canada to find out a suitable method of amending the Constitution of Canada in Canada and thereby to remove the stigma that it is the only country among the independent nations of the world that does not possess the complete legal power to amend its own Constitution. This issue had been discussed in various conferences. In December 1961, the conference of the Attorneys-General worked out a draft amending formula

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8. *Ibid.*, p. 138. For an instructive study reference may be made to Paul Gerin Lajoie's *Constitutional Amendment in Canada*.

9. Article 92(1).



which was transmitted to the Provincial Governments for their consideration. No firm decision has yet been taken thereupon.<sup>1</sup>

**Basic freedoms.** Every Canadian citizen enjoys certain Rights or basic freedoms and these rights are the foundation of the Canadian way of life. These rights include freedom of speech, freedom of worship, freedom of movement, freedom of enterprise, freedom from arrest, freedom of private property, freedom of the press and freedom of choice respecting political parties. Until the Canadian Bill of Rights in 1960 few of these freedoms or rights had been set down in the form of laws. They have grown steadily and have been handed down from one generation to another.

Although these rights or basic freedoms are greatly treasured and guarded by the Canadians, yet in times of danger when the security of the nation is threatened, some of these rights may be temporarily withdrawn. Even under such circumstances, however, the consent of the people must be given through their representatives in Parliament.

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10. For details refer to the Reference Papers No. 112, *op. cit.*

## CHAPTER II

# THE EXECUTIVE

**The Crown.** Government in Canada proceeds from the Crown as it does in Britain. The Preamble of the British North America Act states that "the Provinces of.... have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom....with a Constitution similar in principle to that of the United Kingdom." The Constitution of the United Kingdom is a body of rules indicating the structure and functions of political institutions and the principles governing their operation. These rules and principles of political governance lie scattered in the various Charters, Statutes, Judicial decisions, usages and traditions, and all mark a steady transference of power from the King as a person to a complicated impersonal organisation called the Crown. The King is still there and legally all government radiates from the person of the Monarch. But in actual practice the King reigns and does not govern. The King has become the Crown. The King does not exercise the powers which belong to the Crown on his own initiative and authority. He does so at the behest of those who exercise the will of the people, that is, Ministers responsible to Parliament. The King, Ministers and Parliament make a synthesis of supreme authority and it is called the Crown. The principles governing the operation of all the three political institutions essentially embody the British Constitution. The nature of the British Constitution has been beautifully summed up in a fairy tale and it runs, "once upon a time there was a King who was very important and who did very big and very important things. He owned a nice shiny crown, which he would wear on especially grand occasion, but most of the time he kept it on a red velvet cushion. Then somebody made a Magic. The Crown was carefully stored in the Tower; the King moved over to the cushion and was transformed into a special kind of Crown with a capital letter; and this new Crown became in the process something else; no one knows exactly what, for it is one thing today, another thing tomorrow, and two or three things the day after that. The name given to the Magic is the Constitutional Development."

Her Majesty, Elizabeth the Second, is the Queen of Canada, Australia and other Dominion countries, and the reigning Monarch of Britain. In fact, she is several monarchs wrapped up in one person, but each is completely divorced from all the rest. She is the Queen of Canada not because she is the Queen of the United Kingdom, but because she is the Queen of Canada separately. At each step of the evolutionary process of constitutional development in Canada, the relationship of the Crown to Canada was altered to meet the aspirations of the growing nation until the present association emerged in which Elizabeth the Second is the Queen of Canada as distinct from her status as Monarch of the United

Kingdom. Her Majesty is simply a symbol, the symbol of Canada's free association with Britain and the other Commonwealth nations, and a symbol of the history and traditions which a majority of the Canadian people revere.

In fact, Britain had herself consistently encouraged this gradual advance to partnership, "possibly because she had learned her lesson the hard way in the days of the third George, and that this attitude, more than any other factor, is responsible for Canada's retention of the symbol of the Crown as the tie which binds the partnership." When the Canadians desired a constitution similar in principle to that of the United Kingdom what they had in mind were the Monarchy, a Cabinet to advise it, a Parliament consisting of two Houses and the Cabinet responsible to its representative Chamber, the law courts and the common law.

The functions of the Canadian Crown, which are substantially the same as those of the Queen in relation to the Government of Britain, are generally discharged by the Governor-General. A few Canadian prerogative powers, such as the granting of honours and awards and the appointment of ambassadors and ministers plenipotentiary, are dealt with by the Queen personally; most are, however, performed on her behalf by the Governor-General, and in either case the prerogative is exercised on the advice of the Government of Canada.

### GOVERNOR-GENERAL

**Appointment and term of office.** The Monarch of Canada occupies the Canadian throne, but the permanent home of the occupant is not Canada but Britain. As the Monarch cannot reign herself from a distant land which is her permanent home, she appoints a personal representative to act on her behalf and he is the Governor-General of Canada. Formerly, the Governor-General was appointed by the Sovereign on the advice of the Colonial Secretary, a British Minister of the King. In 1890, the old practice was altered. The Dominion Government was consulted before making the appointment, though this procedure had not invariably been followed, as in 1916 when the Duke of Devonshire was appointed without any preliminary consultation. The Imperial Conference of 1926 made a revolutionary change. It was decided at the Conference that if the Governor-General "is not the representative or agent of His Majesty's Government in Britain or of any Department of that Government," the British Government must not have to do with anything in making the selection. Since then the appointment of the Governor-General is made by the Dominion Government. The Prime Minister of Canada recommends the appointment to the King or the Queen and the advice so tendered is invariably accepted. Britain simply checks up the availability of the person so advised to be appointed if he happens to be her national. In 1936, Prime Minister Bennet devised another method. When Lord Tweedsmuir's name was being considered, Mr. Bennet first discussed the matter with the Leader of the Opposition, Mr. Mackenzie King. His object was to make the appointment non-partisan in character by carrying the approval of the leaders of both major political parties. This procedure was hoped to become a practice, but the appointment in 1952 of the first Canadian Governor-General, Mr. Vincent Massey was widely criti-

esied. Massey was prominently identified with the Liberal Party and he was once a Cabinet member when the Party was in office. Many people in Canada do not view it a healthy practice of appointing a Governor-General from among the Canadians themselves. They fear, remarks Leslie Robert "that once the appointment of one of their own has become accepted practice, little time will elapse before the Governor-Generalship becomes a political plum—the ripest in the gift of government."<sup>1</sup> But with the appointment of Roland Michener, it appears that this objection does not carry much significance now. Michener succeeded General George P. Vainer who died on March 5, 1967 and is the third Canadian to become his country's head of the State.

The term of office of the Governor-General, writes Dawson, "may be simply, if somewhat ambiguously, stated as being officially recognised as six years, customarily treated as five years, while on occasion it has been seven years."<sup>2</sup> Therefore, the Governor-General traditionally serves for a term of five years.<sup>3</sup> He may be removed from office by the Queen acting on the advice tendered by the Canadian Cabinet. His salary is \$10,000 a year plus various allowances, other amenities consistent with his high office, and general upkeep of Rideau Hall, a part of the Quebec citadel, his official residence.

**Powers of the Governor-General.** The powers of the Governor-General are, indeed, extensive and he exercises his authority under the Letters Patent constituting the office of the Governor-General, and the provisions of the British North America Act. But, like his master, the Monarch, the Governor-General has ceased to rule now and he has personally nothing to do with the affairs of government. The actual exercise of powers and rights associated with the office of the representative of the Monarch belong to Her Majesty's responsible ministers in Canada. "The Governor," writes Dawson, "has tended to follow the same path which had been marked out a few generations earlier by his august principal and he now shares substantially the same disabilities. He is a legal survivor who has contrived to remain a political necessity—the once supreme chief whose powers have largely passed into other hands, yet who has nevertheless retained a substantial residue of his former ascendancy and importance."<sup>4</sup>

The British North America Act vests the executive government and authority in the Crown<sup>5</sup> to be exercised by the Governor-General with the aid and advice of a Council chosen and summoned by him and liable to be removed by him at his pleasure.<sup>6</sup> But law is not practice and the executive power is actually exercised in the Queen's name by ministers who derive their authority from the Dominion Parliament and are responsible to it for the use they make of their powers. As a

1. *Canada, the Golden Hinge*, p. 58.

2. *The Government of Canada*, p. 176.

3. Reference Papers No. 70. Information Division, Department of External Affairs, Ottawa, Canada.

4. *Ibid.*, p. 165.

5. Article 9.

6. Article 11.

constitutional head the way is carved out for the Governor-General by the established practices of the parliamentary system of government, which the British North America Act established in Canada similar in principle to that of the United Kingdom. He follows the usual course of summoning the leader of the majority party in the House of Commons and entrusts him with the duty of forming the Council of Ministers and the ministers remain in office so long as they command the confidence of the House of Commons. The constitutional position of the Governor-General was explained in a formal statement by the Imperial Conference in 1926. The statement affirmed that the Governor-General of a Dominion was the "representative of the Crown and not of any department of the British Government, and that his position in relation to the administration of public affairs in the Dominion was essentially the same as that of His Majesty the King in Great Britain." The Governor-General has nothing to do with the determination and execution of the policy, and he does not take part in the deliberations of the ministers. Duke of Argyll (1878-83) discontinued attending meetings of the Cabinet and since then this practice has been invariably followed.

The Governor-General is the Commander-in-Chief of the land, naval and air forces of the Dominion. He appoints representatives of Canada to the United Nations and signs treaties of minor importance which are not signed by the Crown directly. He also appoints and receives those ordinary agents and ministers who are not appointed and received by the Government directly. Till 1926, the Governor-General performed certain ambassadorial functions on behalf of the British Government and was charged with the duty of guarding the wider interests of the Empire. But the Imperial Conference of 1926 not only clarified the position of the Governor-General with relation to the government of a Dominion, but it also declared his complete separation from the British Government. In 1928, all such functions of the Governor-General were transferred to the High Commissioner stationed in Canada as representative of the Government in London.

The Governor-General appoints, according to law, the Lieutenant-Governors of the Provinces and can remove them from office as well. In practice, all such appointments and dismissals are made by the Dominion Ministry. The Governor-General also appoints the Speaker of the Senate, the Judges of the Supreme Court, Provincial Courts, Commissioners, justices of the peace and officers of various other categories. And like his various other acts, these appointing functions are really those of his duly constituted ministers responsible to the House of Commons.

The Governor-General summons, prorogues and dissolves Parliament. But like the various other powers of the Governor-General, these are also his nominal powers. The Bying episode of 1926, finally decided that the right to ask for dissolution belongs to the Prime Minister and the Governor-General cannot refuse it. The power of the Governor-General to veto a Bill or to reserve it for the assent of Her Majesty is an obsolete practice now. The Imperial Conference of 1926, and the Conference on the Operation of Dominion Legislation, and Merchant Shipping Legislation (1929) definitely decided that the disallowance of Dominion legislation by British authorities and reservation by the



Governor General did not conform to the equal status of the autonomous communities within the British Empire. The explicit obligation placed by the British North America Act to keep the British Government informed of the Acts passed by the Canadian Parliament was faithfully observed until 1942, when it was quietly discontinued. This was followed in 1947 by the passage of an Act amending the Canadian statute which had provided for transmission of copies of current Acts to the Governor-General and to the British Government.

Such are, then, the powers of the Governor-General. According to law there is no sphere of administration where the authority of the Governor-General does not intervene. But in practical politics Lord Bying's episode finished once for all the controversy and conflict of opinion as to the exercise of powers by the Governor-General, and the Imperial Conference of 1926 vindicated his constitutional position. There are, however certain functions which the Governor-General does not exercise on ministerial advice. The most important of them is the appointment of a Prime Minister. No one else except the Governor-General can commission a new Premier in the form required by the established custom of the parliamentary system of government. The task of the Governor-General is simple, if the party commanding parliamentary majority has an accredited leader. But if the office becomes vacant, because of a sudden death or resignation of the incumbent or when party dissension may make the office of Prime Minister to fall vacant and there is no obvious leader, the Governor-General has, then, the discretion to select a person who may command the confidence of a stable majority in the House of Commons and be in a position to form government. He may even seek the advice of those whom the Governor-General feels can give some advice, as Lord Aberdeen did in 1897, in his search for successor to Sir John Thompson. The Governor-General may adopt another procedure and he may tap the potential Prime Ministers and discover for himself who can form a Cabinet. In 1896, Lord Aberdeen, after first sounding out Sir Donald Smith, eventually commissioned Sir Charles Tupper to succeed Sir Mackenzie Bowell. Aside these two occasions, the Governor-General had not the opportunity to exercise his judgment in selecting the Prime Minister, but the contingency is still there and it may happen as it did in 1916 and 1923 in Britain or as it occurred in Australia in July, 1945.

The second function of the Governor-General is that he acts as a mediator and uses his influence to settle political disputes between political leaders whenever occasion may demand it. As the Governor-General wields no political power his advice is deemed valuable and generally accepted. The Duke of Devonshire in 1917, summoned Sir Robert Borden, Sir Wilfrid Laurier, and four others to a meeting at Government House to discuss and amicably decide the conflicting issues regarding conscription, postponement of elections during War, and the possibilities of forming a Coalition Government. This is how the King intervened in Britain in 1914 in his efforts to secure agreement on the Home Rule Bill. The Governors-General have sometimes intervened to settle quarrels between the Dominion and a Province, as Lord Dufferin endeavoured to remove the bitterness between British Columbia and the

Dominion immediately after the latter's membership of the federation. Twenty years later Lord Aberdeen held a series of interviews with the Premier and Attorney-General of Manitoba.

Governors-General have also been expected at times to act as quasi-diplomatic agents. In early days, Governors-General paid official visits to the United States with a definite diplomatic purpose and under instructions from the government in London. Today, their visits are neither diplomatic nor are undertaken on the instructions of the British Government. They are goodwill visits to strengthen the ties of friendliness between the two neighbouring countries undertaken with the approval of the Canadian Government. All the same, as Dawson points out, "It is, indeed, probable that these social calls are still occasionally used to review unofficially and tentatively matters which are of common interest to the two nations, although their usefulness for purposes of diplomatic intercourse is obviously restricted."

The Governor-General, like the King of Britain, is also an important part of the social structure and he wields a great social influence. His patronage is an enormous asset to any cause and ensures for popular support. His name is always associated with multifarious activities and various fields of art, music, literature, theatre, social service, youth movement, etc., which are organised and function under his patronage. These "dignified" functions, as Bagehot describes them, are more important than the government functions.

Closely connected with the social activities are the Governor-General's ceremonial duties as the Chief Executive Head. He opens Parliament, receives foreign diplomatic agents, and he is Canada's busiest host. He is also Canada's most travelled VIP and goes on tours throughout the Dominion once or twice a year. The ceremonial functions of the Governor-General have been graphically described by Leslie Roberts. He writes, "the Governor-General receives, dines and wines foreign and domestic celebrities at Government House, his official residence and Ottawa. He pins medals on heroes and welcomes visiting celebrities. He travels the country from end to end unveiling monuments, opening hospitals, launching charity drives, and taking his ease with the war veterans in their sanctuaries. He is primarily a goodwill ambassador, but it is not goodwill for Britain that the Governor-General works to create, but goodwill between Canadians and goodwill towards Canada on the part of the nation's distinguished and official guests."

The Cabinet government, in short, pre-supposes the presence of some titular head of the States, some central and impartial figure, and the Governor-General fulfils that purpose. His position is very often compared and made analogous to that of the King in Britain. The influence of the Governor-General is, indeed, not negligible. But there is a subtle distinction between the role of the King and his representative. The Governor-General is the nominee of the Canadian Government, and since he comes and goes within a relatively short period of time, he cannot enjoy the national prestige of the Monarch himself. The King is the chief of the nation, he is everybody's King and provides a useful focus for patriotism. People live and die for the Monarch. He personifies the State. "We condemn the government," says Jennings,

"and cheer the king." The Governor-General is, as Sir Robert Borden not inaptly described him, "a nominated President" who can seldom appeal to popular sentiment in the same magnetic way as the Monarch. "However much he may graciously act as the king himself would act, he is still a substitute. Consequently he loses much as a potent symbol and mirror of the nation. For such a symbol Canadians must look beyond him to the king in person." The Governor-General may offer informal council to his ministers and like the King he has the right to be consulted, the right to encourage and the right to warn, but he has not the same continued and ripe experience of life-time as that of the King. The King acquires political knowledge and experience which makes him a mentor and a wise minister is not only obliged but positively desires to consult him.

### THE CABINET

**The Privy Council and the Cabinet.** The cabinet is the motive power of all political action. It is the magnet of policy and the supreme directing authority which co-ordinates and controls the whole of executive government, and integrates and guides the work of the legislature. Yet, as in Britain, it has no legal status in Canada. It is an extra-constitutional body, a committee of Queen's Privy Council, whose acts are formally made the actions of the Privy Council which body has existence in law.<sup>7</sup> The whole machinery of the cabinet system is based upon conventions, unwritten but always recognised and stated with almost precision as the rules of law. It is by convention, that the members of the Cabinet are members of either House of Parliament and the Cabinet resigns office when it no longer holds the confidence of the House of Commons.

The British North America Act provides for the Privy Council. Section II states that "there shall be a council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be Members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may from time to time be removed by the Governor-General." The legal body, therefore, to be constituted for aid and advice in the Government of Canada is the Privy Council. It is chosen and summoned by the Governor-General and is subject to removal by him. But in practice, the Privy Council as a whole does not aid and advise the Governor-General. Nor is it removed by him as a whole. The real advisers of the Governor-General are the members of the Cabinet, the active part of the Privy Council, and they aid and advise him in the Government of Canada only by custom. All members of the Cabinet are no doubt, members of the Privy Council, but all members of the Privy Council are not members of the Cabinet. The Privy Council consists of about 113 members. Members of the Cabinet aside, about twenty in number, it may contain other persons of distinction, such as the Prince of Wales, the British Prime Minister, former Ministers, the Canadian High Commissioner in

7. Articles 11 and 12.

London. In 1953 the Chief Justice of Canada, the Speaker of the House of Commons and the Senate, and the Leader of the Opposition were all made members of the Privy Council before they left for coronation of Queen Elizabeth to form a part of Canada's official delegation.

The Privy Council as a whole holds no meeting and this practice has been followed even since 1867, except only for two occasions. It met for the first time in 1947, to receive the formal announcement by the King of his consent to the marriage of Princess Elizabeth, and for the second time in 1952, to hear the proclamation of the accession of Queen Elizabeth on the death of her father. The Privy Council does not meet as a functioning body, and its constitutional responsibilities as adviser to the Crown are performed exclusively by the Ministers who constitute the Cabinet of the day.

**The Ministry and the Cabinet.** The Cabinet and the Ministry in Canada are usually treated as if they are synonymous, and the fact is that during the large part of the Canadian history there had been no difference between the two. But there does exist a difference between them, as it is in Britain, because not all the members of the government formed by the Prime Minister make the Cabinet. A Cabinet consists of a select circle of colleagues of the Prime Minister who meet together from time to time to decide matters of high policy. The number of ministers not in the Cabinet has remained till recently absolutely insignificant and it is only since the Second World War that this "penumbral group" has become fairly large. Before the War there used to be one or more members, in 1943 out of a total of twenty-seven members of the government twenty were in the Cabinet and seven not in the Cabinet, and in 1954 the number of the members not in the Cabinet increased to eleven. Since then this level has been maintained.

It means that Ministers in Canada, too, are not alike in status and they differ in importance. The first group comprises the great bulk of the personnel of the Cabinet, usually fourteen or fifteen in number, who "head up the government" and are also the immediate associates of the Prime Minister. Then, come the Ministers without portfolio, three or four, who are surely the members of the Cabinet, but are not the political heads of the departments of administration. Britain, on the other hand, has not liked such a category of ministers, though from 1915 to 1921 ten cases occurred of Ministers in the Cabinet without Portfolio. It ended in 1921 after a ruthless criticism in the House of Commons. Baldwin revived it in 1935, but just for a brief period. In Canada it is a usual practice to have ministers without portfolios. The leader and spokesman of the Government in the Senate is usually a Minister without Portfolio and there are one or two others who "may for a wide variety of reasons be similarly honoured."

Finally, is "the penumbral group" which has recently become fairly large. "The most numerous of this quasi-ministerial group are the recently created parliamentary assistants, who are members of the Commons appointed to relieve the Cabinet Ministers of some of their less important duties." They are members of Parliament and they come and go out of office as the Cabinet Ministers do, but they have no place in the meetings of the Cabinet and have nothing to do with the determina-



tion of policy. Nor do they head up the departments of administration. They may be considered analogous to "Junior Ministers," in Britain.

**Composition of the Cabinet.** A Canadian Cabinet differs from the British in its composition, but it is strikingly like the British in the thorough manner in which it accepts the pre-eminence of the Prime Minister along with the rules of homogeneity, collective responsibility and secrecy. The Cabinet government means party government and solidarity of the government demands its political homogeneity so that as a team all should play the game of politics under the captaincy of the Prime Minister. Like Britain, Canada hates coalition government and since 1867 there had been only one instance of a Coalition Government when a Union Government was formed during the First World War to enforce the terms of the Conscription Act of 1917. The principle of homogeneity in government had such an impress on the minds of the Canadians that they have carried it through with unflinching conviction. "There is something more required to make a strong administration," wrote Joseph Howe over a hundred years ago, "than nine men treating each other courteously at a round table. There is the assurance of good faith—towards each other—of common sentiments, and kindly feelings, propagated through the friends of each, in Society, in the Legislature and in the Press, until a great party is formed...which secures a steady working majority to sustain their policy and carry their measures."

But in the selection of his colleagues, the Canadian Prime Minister does not exercise an unrestricted choice as the British Prime Minister does. The Canadian Cabinet is always designed to represent the principal races, religions and regions of the country. The representativeness of a member is sometimes much more evident than his ability. "The inevitable consequence is," as Dawson remarks, "that the choice of the Prime Minister is seriously restricted and he is often compelled to push merit to one side in making some of his selections." The first requisite of Cabinet composition is that every Province must have, if at all possible, at least one representative in the Cabinet. It makes the Cabinet federalised. This practice was begun while constituting the first Dominion Cabinet and since then it has hardened into a rigid convention.

The convention that each Province, if at all possible, must have at least one representative in the Cabinet makes another convention almost mandatory, namely, that the two large Provinces must each be given more than one representative. An effort is usually made to obtain at least one Protestant English-speaking representative from Quebec and three or even four French. This gives to Quebec the minimum of four members. Ontario must also have four, and possibly five members and one of them should be a Roman Catholic of Irish extraction. "Provincial representation," remarks Dawson, "has frequently been further elaborated in that a few portfolios have been commonly recognised as the special preserve of certain areas." The kind of conscious and planned representativeness is deemed imperative in order to strengthen the executive in a country having diverse religious, linguistic and economic interests. It helps to ensure that in reaching decisions the Cabinet will hear and discuss all the major interests and harmonise them in such a



way as to satisfy all without jeopardising the national interests. "I feel," remarked Mackenzie King in 1922, "that the whole purpose of confederation itself would be menaced if any great body of opinion, any considerable section of this Dominion of Canada, should have reason to think that it was without due representation in the shaping of national policies."

### THE PRIME MINISTER

**Informal basis.** Jennings describes the Prime Minister of Britain "as the keystone of the Constitution." The position of the Canadian Prime Minister is exactly the same, for like his prototype in Britain, he is the most powerful man in the country. He forms the Cabinet; he can alter it or destroy it. "The Government" to put it in the words of Greaves, "is the master of the country and he is the master of the government." And yet the office of the Prime Minister, like various other institutions in Canada, is not known to law. The Cabinet system of government pre-supposes the pre-eminence and leadership of one single person and he is the Prime Minister. There are no legal powers which may determine the extent of his powers, but constitutional conventions, upon which is firmly erected the mechanism of government, give him the whole weight of government. Abolish the institution of the Prime Minister or diminish any part of his powers, the entire political structure would be destroyed.

**The Choice of the Prime Minister.** The choice of the Prime Minister, as stated before, is obvious. The Governor-General summons a recognised leader of the political party having a clear majority in the House of Commons and that leader becomes the Prime Minister. But on occasions when the choice is neither obvious nor simple, as in the event of a sudden death or resignation of the Prime Minister or party dissension, the Governor-General has some discretion in the selection of the Prime Minister. But such occasions do not occur frequently and since 1896, the Governor-General has not been called upon to use his own judgment in selecting a Prime Minister. It does not, however, mean that the power of the Governor-General has become obsolete. Dawson points out that "the conscription crisis in Canada in 1944 might easily have resulted in the Governor-General being compelled to choose a successor to Mr. Mackenzie King."

**Powers of the Prime Minister.** "The Powers of the Prime Minister," said Arthur Maighen, "are very great. The functions and duties of a Prime Minister in Parliament are not only important, they are supreme in their importance." Talking about the powers of the British Prime Minister Lord Oxford and Asquith, himself the occupant of that office in the first decade and a half of the present century, said, "the office is what its holder chooses to make it," and only a few holders exhibit any marked desire to lightly view their responsibilities and duties as heads of government.

The Prime Minister is the corner-stone of the Constitution and in his hand is the key of government. The Prime Minister makes the government, allocates offices, and his unabridged power of reshuffling or dismissing his colleagues. In the selection of his colleagues, the choice

of the Prime Minister, as said before, is seriously limited, but once the Ministry has been formed the control of the Prime Minister over its members is unchallengeable. It is purely the personal authority of the Prime Minister to ask a colleague to resign or to accept another office. While referring to the question of ministerial responsibility Professor Dawson writes, "The members of the Canadian Cabinet acknowledge three separate and distinct responsibilities: a responsibility to the Governor-General, which is now rarely invoked in any aggressive sense a responsibility to the Prime Minister and to one another, which produces what is called the 'solidarity' of the Cabinet; and a responsibility, both individual and collective, to the House of Commons."<sup>8</sup>

It is from Lord Argyll's time that the Prime Minister presides over the meetings of the Cabinet and as the Chairman of the Cabinet he attracts, like the British Prime Minister, a special kind of loyalty. He exercises a casting vote and it is inherent in the Chairman. If there arises difference of opinion in Cabinet discussions, the Prime Minister is the major influence in helping to arrive at decisions. Then, he determines the Cabinet agenda and thereby accepts or rejects proposals for discussion put forward by Cabinet Ministers. In this way, the Prime Minister leads the Cabinet. As the leader and guide of the Cabinet, the Prime Minister is always consulted by every Minister before an important proposal is put forward. In fact, he is the chief co-ordinator of the policies of the several Ministers and Ministries.

The Prime Minister, as the leader of the parliamentary majority, guides the deliberations of Parliament. He leads the House of Commons, makes all principal announcements of policy and business, answers all questions on departmental affairs and upon critical issues, initiates or intervenes in debates of general importance, and corrects the errors of omission and commission of his colleagues. He apportions the time of the House of Commons and submits the measures of his Government for its approval.

The Prime Minister, as the leader of the parliamentary majority, and, like the British Prime Minister, he may on special occasions man the entire policy. He is the link between the Governor-General and the Cabinet on matters of public concern and is in a special sense the chief adviser of the former. He also has the primary responsibility for the Council advising the Governor-General when Parliament should be convened and when it should be dissolved.

The patronage exercised by the Prime Minister is enormous. He recommends all important appointments, including the Lieutenant-Governors, to the Cabinet. He may, also, attend and participate in international conferences or meetings and conducts relations in matters of Cabinet rank with the Commonwealth countries.

**Prime Minister's Position.** The most apt description of the British Prime Minister's position is the one given by Dr. Jennings, although Lord Morley's that he is *primus inter pares*, has now become classical. Dawson remarks that the Canadian Prime Minister "cannot be first among

equals for the very excellent reason that he has no equals." The actual authority of the Prime Minister is, indeed, great and his powers potentially enormous. One who appoints and can dismiss his colleagues and is, in fact, though not in law, the working head of the State, he can have no peers. The Prime Minister, therefore, "is, rather, a sun around which planets revolve."

But the Prime Minister's position is bound up with the party. So long as he remains the hold of his party, he is able, within limits, to dictate his policy. But a hold on the party has also an important reference to the relationship of the Prime Minister with his colleagues in the Cabinet. Dawson remarks that the quotation *primus inter pares* "contains, however, some truth: it calls attention to one very important aspect of this relationship, namely, that the other ministers are the colleagues of their chief and not his obedient and unquestioning servants." A Prime Minister who treats his colleagues as his subordinates and issues orders to his Ministers or interferes persistently in their departmental work heads towards his downfall. Prime Minister Bowell attempted such an attitude and unnecessarily began interfering in the departmental work of their ministries with the result that seven members of his Ministry chose to rebel and he was compelled to agree to the terms dictated by them. Commenting on this outstanding Cabinet rebellion in Canadian history, Dawson remarks, "All members of the Cabinet are responsible to the House; and while they gladly acknowledge the leadership of the Prime Minister and will, in fact, usually bow to his decisions, they can never completely surrender their individual judgment or responsibility." The office of the Prime Minister is, as Jennings says, necessarily what the holder chooses to make it and what other ministers allow him to make of it. His power and prestige essentially depends upon his personality and his personality significantly counts in leading the Cabinet, Parliament and the nation.

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9. *The Government of Canada*, p. 221.

10. *Ibid.*

11. *Ibid.*, p. 222.

## CHAPTER III

# THE DOMINION PARLIAMENT

**Canadian Parliament.** The federal legislative authority is vested in the Parliament of Canada, consisting of the Queen, an Upper House, styled the Senate, and a Lower House, known as the House of Commons. The Queen is represented by the Governor-General. The part of the Governor-General in the process of legislation has become little more than formal, for he must follow the advice of his Cabinet. This is the way of the parliamentary system of government. The Senate and the House of Commons are two different institutions having different functions and different characteristics. The Senate is in theory an independent legislative body and the British North America Act, 1867 endows it with co-equal powers, but in practice it usually surrenders before a potent and consistent pressure of public opinion reflected in the votes of the Commons. Democracy demands that the Upper Chamber must not persist, though it should resist, and in strict obedience to this democratic principle the Canadian Senate has cautiously avoided a clash with the popular Chamber. It has, in fact, always submitted to the wishes of the House of Commons. It is really a recording Chamber and Parliament is surely the House of Commons. Yet it is the joint action of the Governor-General, the Senate, and the House of Commons, which law requires, to make legislation possible.

**Legislative authority of Parliament.** Under Section 91 of the British North America Acts, 1867—1960, the legislative authority of Parliament of Canada extends to the following matters: The amendment of the Constitution of Canada, subject to certain exceptions; the public debt and property; the regulation of trade and commerce; unemployment; insurance; the raising of money by any mode or taxation; the borrowing of money on the public credit; postal service; the census and statistics; militia, military and naval service, and defence; the fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada; beacons, buoys, lighthouses, and Sable Island; navigation and shipping; quarantine and the establishment and maintenance of marine hospitals; sea coast and inland fisheries; ferries between a Province and any British or foreign country or between two Provinces; currency and coinage; banking, incorporation of banks and the issue of paper money; savings banks; weights and measures; bills of exchange and promissory notes; interest; legal tenders; bankruptcy and insolvency; patents of invention and discovery; copyright; Indians and lands reserved for the Indians; naturalization and aliens; marriage and divorce; the criminal law, except the Constitution of courts of criminal jurisdiction, but including the procedure in criminal matters; the establishment, maintenance and management of penitentiaries. The Dominion Government also exercises all

powers which are not specifically granted to the Provinces by the Act of 1867, that is, residuary powers.

In addition, under Section 95 the Parliament of Canada may make laws in relation to agriculture and immigration concurrently with Provincial Legislatures, although in the event of conflict, federal legislation is paramount. By the British North America Act, 1951, it was declared that Parliament may make laws in relation to old age pensions in Canada, but that no such law should affect the operation of any Provincial laws in relation to old pensions.

## THE SENATE

**Need for bicameralism.** The democratic demand for bicameral legislature and more so in a federal policy was fully recognized and the British North America Act recognizably provided for one. But the Senate in Canada, unlike its namesakes in the United States and Australia, was not planned to perform a strict federal function. Curiously enough, there was only one suggestion, from the delegates of Prince Edward Island, at the Quebec Conference, that representation in the Upper Chamber should be on the strictly federal basis of equal representation of all the constituent units, big or small. Even this proposal was substantially modified by its proposer almost as soon as it was put forward and today Provinces large and small, are much less concerned with representation in the Senate than representation in the Cabinet: "The most likely explanation of this lack of assertiveness on the part of the small provinces," observes Dawson, "is that the conference (Quebec) regarded this feature of the American Constitution as one of the grave dangers implicit in the doctrine of State rights."

Another departure from the federal principle was the mode of appointment of the members of the Senate. The American experience with an elected Chamber had not impressed the delegates of the Quebec conference. They were convinced that inasmuch as responsible government was identified with the Lower Chamber, it was not desirable to create a possible rival by making the Upper Chamber as an elected body. The conference, therefore, decided to have the members of the Senate appointed for life by the Governor-General.

And, then, the Senate was intended to be "the minor legislative partner," a revising and restraining body. Sir John MacDonald affirmed at the Quebec Conference that the Senate "must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people." The Senate was, also, intended to represent property and conservatism. In the sixties when the Constitution for the Union was being discussed, there existed much distrust of "pure democracy." MacDonald and his associates were anxious to preserve minority rights and to erect bulwarks against the unheeded democratic tide. They desired to establish a constitutional system wherein "naked popular majorities" would not solely dominate and "the



sudden gusts of popular passion" would be controlled. "The right of minority," remarked Sir John, "must be protected, and the rich are always fewer in number than the less rich."

The Fathers of the Canadian Constitution, therefore, sought to establish a Second Chamber which should reflect the will, not of more numbers, but of those with special position. Sir John MacDonald claimed that all colonial leaders at the Quebec conference believed that the basic principles of the British Constitution should be conserved, "namely that classes and property should be represented as well as numbers." And in accepting an appointed Chamber with distinct property qualification, the Senate was brought closer to the House of Lords and ensured as Brady remarks, "the nineteenth century Whig ideal of a balanced representation of social interests."<sup>2</sup>

**Composition and term.** From an original membership of 72, the Senate, through the new addition of new provinces, now has 102 members, the latest change in representation having been made on the admission of New Foundland in 1949. The break-up is 24 members from each of the four regions and six from New Foundland appointed for life. The division into four regions is: (1) Ontario; (2) Quebec; (3) the Maritime Provinces (10 Senators are allotted to Nova Scotia, 10 to New Brunswick and 4 to Prince Edward Island); and (4) the Western Provinces (6 Senators being allotted to each of the four provinces of Manitoba, British Columbia, Alberta and Saskatchewan). If at any time on the recommendation of the Governor-General the Queen thinks fit that four or eight members be added to the Senate, the Governor-General may appoint them, but the number of Senators must not at any time exceed 110. That is the legal maximum limit.

Section 23 of the British North America Act provides that a Senator must be at least thirty years of age, a natural-born or naturalised subject of the Queen, resident within the Province in which he is appointed and possesses property, real or personal, to the value of four thousand dollars. In the case of Quebec, he must be a resident of the electoral district for which he is appointed. A Senator, though appointed for life, loses his seat for any of the following reasons: (i) if for two consecutive sessions of Parliament, he fails to attend the Senate; (ii) if he takes an oath of allegiance or makes a declaration of allegiance to a foreign power or does an act whereby he becomes a subject or a citizen of a foreign power; (iii) if he becomes bankrupt or insolvent or a public defaulter; (iv) if he is attainted of treason or convicted of felony or of any infamous crime; (v) if he ceases to be a resident of that Province by shifting to some other; and (vi) if he resigns his seat in the Senate.

The salary of the Senator now is \$8,000 with \$2,000 allowance. The Speaker of the Senate is appointed by the Governor-General and he receives a salary of \$23,000. 15 members constitute a quorum. The Speaker always has a vote. In case of equality of votes the decision is considered to be in the negative. The Speaker, accordingly, does not have a casting vote to decide the issue.

1. Refer to Alexander Brady's *Democracy in the Dominions*, p. 71.

2. *Ibid.*, p. 72.

"Senatorship has been invariably regarded," writes Dawson, "as the choicest plums in the patronage basket, and they have been used without compunction as rewards for faithful party service." Appointments are made, as a rule, purely on party lines, although every Prime Minister admits that the system is unsatisfactory as it promotes narrow party interests. And yet every Prime Minister continues with it. There is only one solitary example when Sir John A. Macdonald appointed an opponent, John Macdonald, a Liberal. Party appointments undermine the efficiency of the Senate. Summing up the system of appointments, Dawson says, "There is no doubt that many of those appointed are a credit to the Senate; there is no doubt that the system is most useful as an instrument of party discipline and service; but there is equally no doubt that the chief purpose underlying these appointments is not the public good, but party patronage and advantage, and that this is reflected in the general low regard in which the Senate is popularly held."

**Powers of the Senate.** The British North America Act, 1867, does not define or limit the powers of the Senate excepting that the House of Commons has the sole power to originate all Bills for the raising or spending of money. The absence of any specific provision gives to the Senate co-equal legislative powers with the Commons. But taking into consideration the intentions of the Fathers of the Constitution that the Senate was to act as a revising and restraining body to deal with possible errors or impulses of the Commons, and the fact that the Ministry is responsible to the Lower House as the prime guardian of expenditure, and survives only as long as it commands support from that House, the Ministry introduces all important legislation and defends its policies in the House of Commons. There is another important reason for the exclusion of the Senate. Since the twenties of the present century and as a result of the precedents set by Mr. Mackenzie King, only one Minister and that too without Portfolio sits in the Senate. This fact reduces the significance of the Senate in the enactment of laws and in the control of policy. Ministers introduce all important legislation in the Commons where they sit as members and are able to defend such legislation.

The tendency of Ministers to introduce all their measures in the House of Commons has, thus, deprived the Senate of any major part in the initiation of legislation. During recent years there has been an extraordinary change and between 1946-53, 138 Bills were introduced in the Senate as compared with 36 between 1924-45. The explanation of this increase lies in the fact that between 1946-53, "Parliament has been overhauling and consolidating the bulk of the Canadian Statutes, and the Cabinet has generously allowed the Senate to participate in this very arduous labour." But this practice, Prof. Dawson observes, "cannot be extended indefinitely, if for no other reason than that the really able, energetic, and willing Senators are relatively few." Private Bills usually originate in the Senate.

But once Bills reach the Senate, after they have passed the Commons, its effective participation ensues by proposing amendments or rejecting the entire Bill if the Senators desire. The Senate has never taken

the position that its powers of rejection and amendment are absolute and independent of public opinion. "but it has ventured to oppose the Commons on the ground that the measure was not only inadvisable but that the Lower House had no popular mandate for this particular proposal." It rejected the Old Age Pensions Bill in 1926, but accepted it next year because the Bill had received the mandate of the electorate at the new general elections and the government initiating it had been returned to office. There has, thus, established a sort of 'mandatory convention' as in Britain. Both the Senate and the Lords do not reject a Bill on which the mandate of the electorate has been obtained.

In revising Bills the Senate does really useful work. Bills are often sent from the Commons badly drafted, hastily assembled, and, in some instances, almost unworkable. Senators have more leisure and fewer distractions than the members of the House of Commons. The talent and wider experience of some Senators make it possible for them to improve the Bills in a logical shape and draftsmanship. Then, they have no specific electorate to placate and they speak less to the gallery, for in truth there is seldom a gallery in the Senate. The investigatory work of the Senate's Standing Committees and Special Committees is also often distinguished. Detailed examination of the measures before the Senate is done in the Standing Committees at which the public may be invited to present their views and even members of the Cabinet may appear to give information and explain a particular proposal.

With regard to financial measures the British North America Act definitely states that Money Bills originate in the House of Commons.<sup>4</sup> The Senate's power to amend them is a matter of dispute between the two Chambers. The Act itself is silent on this point. The House of Commons, taking precedent from its counterpart in Britain, asserts that the Senate has no power to amend Money Bills. The Standing Rules of the Commons clearly state that "All aids and supplies granted to His Majesty by Parliament of Canada, are the sole gift of the House of Commons, and all Bills for granting such aids and supplies ought to begin with the House, as it is the undoubted right of the House to direct, limit, and appoint in all such Bills, the ends, purposes, considerations, limitations and qualifications of such grants which are not alterable by the Senate."<sup>5</sup> The Senate has "indignantly rejected" this right of the House of Commons. It has been maintained that such a power to be exclusively exercised by the Commons is an addition to the Constitution. The Senate argues that when the British North America Act explicitly refers to the origination of the Money Bills in the Commons, the omission of the Act with regard to amendment or rejection of Money Bills by the Senate is conclusive evidence that no restriction on its power was ever intended. The Senate also has urged that if it is to earnestly act as the guardian of the Provincial rights, it must have the power to interfere in financial legislation.

These are only theoretical arguments. In practice the Senate has repeatedly amended Money Bills. "At such times," writes Professor Daw-

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4. Section 53.

5. House of Commons Standing Orders and Rules, No. 61.

son. "It has not been at all uncommon for the Lower House to acquiesce in the Senate's amendments while adding the quite futile clause that the incident was not to be considered as precedent." The Senate does not openly reject a pure Money Bill. It amends it, but when it puts amendments which are not acceptable to the Commons, it is tantamount to its power of rejection. And here the power of the Senate is superior to that of the House of Lords, which functions under constitutional limitations, as provided in the Act of 1911.

Apart from its legislative and financial functions, the Senate has successfully conducted investigations at different times into current political and social problems. A Special Committee of the Senate held an inquiry in 1946, into the operation of the War Income-Tax Act and Excess Profits Tax Act and it did the job admirably well. Such inquiries can most fruitfully be conducted by the Senate and every year there are innumerable inquiries which demand some scrutiny and drastic overhauling, and the Senate has the leisure, ability and freedom to investigate them.

**Senate, a Weaker Chamber.** The Senate was intended to be the "minor legislative partner" and this intention of the Fathers finds expression in the two Constitutional provisions. One relates to the composition of the House of Commons which provides that it will be an elected Chamber. Whatever be the reasons for an appointive Senate, this single provision gives to the Commons the unquestioned position of eminence and authority as a representative Chamber. An elected Chamber is the mirror of public opinion and it must translate into practice the policy which has been endorsed by the people at the general elections. This is the first principle of a democratic government. Secondly, representation and taxation go together. Section 53 of the British North America Act gives powers to the House of Commons by providing that all Bills for the raising or spending of money shall originate in the House of Commons.

Apart from these two Constitutional provisions, the eminence and the authority of the House of Commons, and consequently weakness of the Senate, depends upon the practices of the parliamentary system of government. The essential feature of such a system of government is the responsibility of the Cabinet to the representative Chamber and the Constitution ordains that the representative Chamber is the House of Commons. Once these three fundamental propositions are put in their proper context the position of the Senate becomes permanently settled, although there may be still room for development and adjustment of the functions which fall within the areas of the two Chambers.

There are certain functional weaknesses of the Senate too. Critics regard it as a sleeping beauty which neither acts as an effective brake to the hasty and ill-considered legislation passed by the Commons, nor does it properly serve the purpose of revision. Sir George E. Foster in the course of a debate remarked, "Who on the street asks to know what is the opinion of the Senate upon this or that question? Who in

the press rarely takes any trouble to know whether the Senate has any ideas and if so, what they are upon any branch of legislative concern or upon conditions which require the best and most united work of all in order to arrive at a successful conclusion. There are others who regard the Senate merely as a House of echoes. Sir J. A. Mariot writes:

It will be observed that the Canadian Senate attempts to combine several principles, which if not absolutely contradictory are clearly distinct. Consequently, it has never possessed either the glamour of an aristocratic and hereditary Chamber, or the strength of an elected assembly, or the utility of a Senate representing the federal as opposed to the national idea. Devised with the notion of giving some sort of representation to provincial interests, it has from the first been manipulated by party leaders to subserve the interests of central executive."

But Professor Dawson is of the opinion that despite the severe handicaps from which the Senate suffers it has been able to do some genuinely useful work. "It revises and checks legislation sent up from the Commons and it takes by far the greater part of the load of private Bill legislation from overworked Commons. It has, however, not been a conspicuous success in guarding the rights of provincial or other minorities, although this was one of the chief reasons for its creation. Its attitude on social legislation has often been criticised as reactionary, but the evidence on this point is conflicting. The Senate, in short, has its merits, although they fall far short of justifying its continuance in its present form." Professor Alexander Brady says that the relative success or failure of the Senate is a matter of opinion. "Its virtues," he further adds, "have usually been unhonoured or even unrecognised; its defects well publicized. It has failed to rivet on itself wide popular attention and esteem. It is commonly neglected by newspapers and seldom does it influence profoundly policies and legislation." The Senate, as it is, is a weak Chamber and stands no comparison to the eminence, authority and importance of the House of Commons.

**Causes of the weakness of Senate.** The first great handicap placed on the Senate was the system of appointment of its members. "The founders of the Dominion," says Professor Dawson, "accepted as inevitable the fact that if the Cabinet appointed the Senators, it would be for party reasons; but even they could scarcely have expected party gratitude to become so dominant a motive." Except for the original appointments made in 1867, which represented all political groups, the Senatorship has always been a party spoils and it had gone to the orthodox members of the party in office who had served it long and with a meritorious credit. Former members of the House of Commons who had been defeated at the general elections or are "too old to battle further for office," moneyed persons who had liberally contributed to party campaigns, and others who had aided their party receive their reward and they constitute a considerable number of the appointees.

The result is, as Professor Brady remarks "Whatever the zeal and

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7. *Democratic Government in Canada*, pp. 412-13.

8. *Democracy in the Dominions*, p. 72.

9. *Government of Canada*, p. 332.



ability of appointees or the depth of their experience—often they are men of distinguished achievement—they can seldom escape in the public mind from the stigma of receiving a reward rather than a call to service.” Leftist parties have been highly critical of such party appointments and have never failed to emphasise the high percentage of Senators who sit on the boards of powerful commercial corporations. Here the Canadian Senate loosely resembles the House of Lords. It has become a fortress of wealth and consequently the Senators are predominantly an economic interest who cannot and do not look to proposals for radical, social and economic reforms with any desirable sympathy. The composition of the Senate therefore, is fundamentally responsible for the general low regard in which the Chamber is popularly held.

Another result of the composition of the Senate is the “air of superannuated indolence” which Lord Bryce discerned in the House of Lords. Life term of office inevitably leads to a larger number of Senators remaining in the Chamber long after they have passed the age of genuine usefulness. The great bulk of these superannuated members cannot perform their duties with the same energy, zeal and effectiveness as youngmen, and the youngmen have no reason to go to the Senate as it gives them no hope to a future career. The old men go there with the sense of opening up the last chapter of their career. Sir George E. Foster, after his appointment as a Senator, commented in his diary: “How colourless the Senate—the entering gate coming to extinction.”

The Senatorship is, thus, a refuge for those whose active life is almost over, and who are primarily concerned with a pleasant, secure and not very strenuous old age. Gratten O’ Leary succinctly put the issue when he said, “the Senatorship isn’t a job. It’s a title. Also it’s a blessing, a stroke of good fate: something like drawing a royal straight flush in the biggest pot of the evening, or winning the Calcutta sweep. That’s why we think it wrong to think of a Senatorship as a job; and wrong to think of the Senate as a place where people are supposed to work. Pensions aren’t given for work.”

Here is an obituary, quoted verbatim, of Senator Dessaulles who died in 1930, in his 103rd year, and it bears eloquent testimony on the usefulness or uselessness of the Senate:—

“Senator Dessaulles, dead at St. Hyacinthe, who held a seat in the Senate of Canada since 1907, had a remarkable record. So far is recalled by those around the Senate since he was there, he never once participated in any debate or gave expression to an opinion; but he followed the discussions closely and was there when the division bells rang. He was a kindly old man, held by all parties in venerable respect because of his great age.”

The result is clear. The Senate may supply the opportunities to do useful work, but it does not supply at all adequate incentive for work.

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10. In the 1945 Senate thirty-three out of the ninety-five had been over sixty years of age at the time of their appointment and this proportion more or less still continues.

Political ambition is there dead. But there is the assurance of a secure existence and the salary is ample. There is, thus, a general sense of futility in the red Chamber: few people listen to the speeches, the usual drama and excitement of politics are lacking, no vital issues hang on the Senate's votes, there are no reputations to be made, there are no fresh, aggressive, stimulating voting minds to satisfy.

More fundamental than the above factors is the fact that despite the formal equality of powers of the two Chambers the Ministry is responsible to the House of Commons and it survives only as long as it commands support from that House. Before the twenties usually one and occasionally two and even three Senators were included in the Cabinet and they were assigned definite portfolios. But Mackenzie King set a precedent and since then there is only one single Minister from the Senate and that, too, without a portfolio. This reduces the importance of the Senate in the enactment of laws and in the control of policy. Ministers introduce legislation in the House to which they belong and where they can explain and defend their policies and it is in the House of Commons that explanation and defence really matters. The Minister without Portfolio has no portfolio to look after, no policy to defend and no work to account for. It is a sinecure assignment. The Senate and the House of Commons enjoy equal legislative powers, but Money Bills must originate in the House of Commons and its voice is decisive. In case of a deadlock between the two, the Governor-General may appoint four to eight Senators to resolve the deadlock. Since Senate appointments are party appointments, the party in power will naturally make appointments to facilitate its triumph. The opposition of the Senate to the House of Commons matters nothing in the final analysis.

When all legislation originates in the House of Commons in the early part of a session of Parliament, the Senate has no business to transact. It must either wait or adjourn until the legislation of the session comes before it. "Year after year," complained Senator Arthur Meighen, "the services of this House are allowed to slumber for a good portion of the session." It is not uncommon for the Senate to adjourn for long periods immediately after the passage of the Address in reply to the Speech from the Throne. And when it meets, it functions leisurely and the debates are short. In 1938, for example, the Senate sat for 61 days and in 1939 for only 47 days. The debates generally cover less than 10 pages per day of the Hansard. "While the value of the contributions made by the members of the Canadian Parliament," remarks Professor Dawson, "can scarcely be measured by the convenient method of totalling pages of debate, it is difficult to believe that the Senators have achieved so remarkable a brevity without losing much of the content in the prodigious effects of concentration. A perusal of their remarks amply confirms the accuracy of this observation."

The Senate has also not succeeded in protecting property, provincial, and minority rights, although these were the original aims for creating the Upper Chamber in Canada. Professor Mackay has specially gone into this aspect and his conclusions are that the Senate "has no consistent record as an upholder of the rights of the provinces, and the party lines have usually proved stronger than those of the section and

province affected' Quebec is the only Province which reposes confidence in the Senate as the protector of its position and culture against encroachment or abuse. Other Provinces are much less concerned with representation in the Senate. They are really concerned with representation in the Cabinet, which in Canada is a truly federalised institution. In the maintenance of rights of other minorities, "the Senate has proved," says Prof. Dawson, "to be of moderate but no exceptional service although its alertness in Private Bill legislation has been of considerable help in protecting private property rights and public interests against the attacks of predatory corporations."

**Abolition or reform of the Senate.** The Senate, thus, suffers from its own handicaps and disabilities. It has been characterised as the weakest second Chamber in the world. All the same, it has been by no means a useless body and the Senators have performed a creditable service in revising and amending legislation. The Senators are frequently charged with partisanship, especially when a majority is hostile to the party then in office. "Yet ordinarily," says Professor Brady, "they are less motivated by party loyalty and less regimented by party discipline than members of the Commons. They are not without partisan spirit, and divide into the Government group and the opposition, seated to the right and left of the Speaker. But they are more impartial in discussing Bills, and in committees pursue their task with impressive care." With no specific electorate to placate, they are less inclined to oppose merely for the sake of partisan ends, and speak less to the gallery, for in truth there is seldom a gallery. Being secure in their positions and not being subject to dissolution, like the Lords in Britain, the Senators do not speak with one eye on the reactions of their voters to their speeches. They are responsible to no one, but, then, no one is responsible to them. The result is that although the debates in the Senate are usually brief, yet they are based upon ability and experience and often set a high standard of discussion. The Commons take due cognisance of what the Senators say. Even in financial legislation their voice counts. The question of its abolition, accordingly, does not arise. And democracy needs a second Chamber. Unless it is acceptably proved that democracy does not need a second Chamber, it is not democratic to abolish one in Canada.

But there has been from early times a demand for reforming the Senate, as no one has desired to maintain it in its present unsatisfactory condition. The difficulty of devising a second Chamber is no less acute in Canada than in other countries with parliamentary system of governments. In fact, there are certain special difficulties inherent in the Canadian structure of government. The population of the Maritime Provinces is more generously represented in the Senate than any other main section of Canada and they would be unfriendly to any scheme of reform which would tend to reduce the number of its representatives. Quebec will be no less hostile to any consideration of senatorial reform and it has always been suspicious "of every constitutional innovation, traditionally on the defensive, guarding its culture and institutions against interference from English-speaking Canada."

The Inter-Provincial Conference held in 1927, to discuss senatorial

etern decisively rejected the proposal for an elective Chamber and accordingly it continues to be nominated. "Thus the Senate Brady remarks remains as it is because so strong interests seek and many would oppose its reform and the indifference of the multitude gives it security." As a matter of fact the question of Senate abolition or reform tends to become an issue with the Opposition or Government when the party balance in the Chamber swings the other way. Senate appointments are frequently used to give not only Provincial representation but also representation to economic, racial and religious groups in the Provinces and Prime Ministers have very often placed the temporary irritations of minorities.

Some measures of reform however may not be impossible within the given framework. The Senate could be changed to better advantage by initiating more Bills in it. At the same time, the powers of the Senate should be limited, like the House of Lords, so that it could exercise only suspensive veto over ordinary legislation and exercise no control over Money Bills. Ministers should be permitted to introduce Bills and speak in either Chamber, although they would vote only in the Chamber to which they belong, or the practice as in Britain, may be utilised by placing a number of junior ministers in the Senate, or if more ministers were re-admitted in the Senate their junior ministers may be placed in the Commons.

## THE HOUSE OF COMMONS

**Importance of the Commons.** "The Canadian House of Commons, although it is not the oldest among the legislative Chambers patterned upon Westminster, is the first wherein representatives from federated colonies convened the inheritor of parliamentary tradition from the colonial legislatures which attained responsible government in the nineteenth century, and the forum for some eighty years where men of French and British descent have discussed their common affairs and achieved that delicate balance of interest on which the Canadian national states rests." The House of Commons is the great democratic organ of State government where public will finds expression and exercises its ultimate political power. It is the "grand inquest of the nation" where policies are discussed and legislative measures are hammered and to which body the executive must turn to justify its public acts and get approval.

**Composition and organisation.** The fundamental importance of the House of Commons is derived from its representative character. Canada has today full adult suffrage and, generally speaking, every man and every woman enjoys the right to vote if he or she is twenty-one years of age, is a Canadian citizen, has been ordinarily resident in Canada for twelve months preceding the election and has been ordinarily resident in the electoral district at the date of issuing the writ authorising the election. Qualifications for representatives are not given in the British North America Act, but are determined by statute. The present statutory qualifications are simple; the members of the House of Commons must be Canadian citizens and at least twenty-one years of age. Property

qualifications disappeared in 1874. All but four of the members are elected from single member constituencies. Two constituencies—Halifax and Queens—elect two members each. The maximum term of the members is five years and the actual duration of membership depends upon the dissolution of Parliament. According to the British North America Act as amended in 1949, the maximum term may now be extended "in time of real or apprehended war, invasion or insurrection... by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons." The usual term is four years. "It has, indeed, become a tradition of Canadian political life that no Prime Minister will allow a term to run for the full five years if it can possibly be avoided." This is based on experience as well as on other practical considerations.

Section 37 of the British North America Act, 1867, had provided that the House of Commons shall consist of 181 members. Further, under Section 51, it was enacted that, after the completion of the census of 1871 and each of subsequent decennial census, the representation of the four Provinces should be readjusted. Membership of the House of Commons was accordingly increased from time to time until it reached 255. In 1949, as a result of the Union of New Foundland, provision was made for its representation by seven members. This increased the membership of the House to 262. By Chapter 15 of the Statutes of 1952, the Parliament of Canada amended Section 51 of the British North America Act, providing for a new method of readjustment of representation of the House of Commons. Pursuant to this amendment a new Representation Act was passed, providing for a total of 265 members of the House of Commons.

A member of the Canadian House of Commons, unlike his fellow member in Britain, is allowed to resign his seat. A member receives \$10,000 a year, \$2,000 of which represents a tax exemption allowance. Absence from the sitting of the Houses is penalized. A member is allowed 21 days unexcused absence and for every day missed over that number, \$60 is deducted from his total payment.

**The Opposition.** The Opposition occupies an essential place in Constitutions based on the British Parliamentary system. Like many other institutions in Canada, such as the Prime Minister and Cabinet, the Opposition, too, is founded on unwritten customs.

The choice of the Canadian electorate not only determines who shall govern Canada, but by deciding which Party receives the second largest number of seats in the House of Commons, it designates which of the major parties becomes the official Opposition. The function of the Leader of the Opposition is to offer intelligent and constructive criticism of the Government and its policies. If it succeeds in overthrowing the Government, the Leader of Opposition might form the Government. If Parliament is dissolved on the advice of the Prime Minister and electorate approves the policy of the Opposition by returning it in majority at elections, its leader becomes the Prime Minister.

Although the position of the Leader of the Opposition is not recognized in the British North America Act, it received statutory acknow-



ledgment in Canada in 1927. The Senate and the House of Commons Act of the year provided for an annual salary to be paid to the Leader of the Opposition in addition to the indemnity as a Member of the House. In 1963, the Senate and the House of Commons Act was further amended to provide for an annual allowance to each member of the House of Commons (other than the Prime Minister or the Leader of the Opposition in the House of Commons) who is the leader of the party that has a recognised membership of 12 or more persons in the House.

**Similarity between the British and Canadian procedure.** In structure, Rules and Procedure the Canadian House of Commons inherits the British parliamentary customs and usage. The general principle is that whenever a matter of legislative practice or procedure is not modified or replaced by the Canadian House, the usages and the customs of the British House of Commons will be followed.

Immediately after the general elections the Governor-General-in-Council summons the House of Commons and after taking the oath the members proceed to elect their Speaker. The name of the candidate for Speakership is conventionally proposed by the Prime Minister and seconded by a member of the Cabinet and almost invariably the Opposition parties express their approval. In Britain, a Speaker of the last Parliament is always re-elected irrespective of party changes or his own party affiliation. In Canada, on the other hand, a new Speaker is usually chosen for each Parliament, and he must belong to the Government Party. This practice enables the House to alternate more frequently the Speakers from English and French Canada; the convention being that if the Speaker of one Parliament is of British origin, the Speaker of the next Parliament must be a French Canadian, and both the Speaker and the Deputy Speaker must not come from the same race.

The duties of the Speaker are as onerous as that of his prototype in Britain. He presides over the deliberations of the House, maintains decorum, puts questions to the House, reads any motion or resolution and protects the person of the members from insult. He maintains the conduct of debate in accordance with the rules and practices of the House and is the guardian of the power, the dignities, the liberties and the privileges of the House. The Speaker votes only in case of a tie.

After the election of the Speaker the House breaks, but it reassembles shortly before the time appointed by the Governor-General when the Usher of the Black Rod announces that the Governor-General desires the attendance of the House in the Senate. The Governor-General then reads Speech from the Throne outlining the policy of the Government and the legislation which it intends to bring in Parliament in the coming session. After the Speech had been delivered, the commons return to their Chamber. The Speech comes before the House for discussion on a Motion of Thanks from the Treasury Benches. It gives an opportunity to the Opposition to offer criticism against the policy of the Government and the Leader of the House—the Prime Minister—gives his explanation for pursuing such a policy. When the House adopts the Motion of Thanks, it expresses the confidence in the Government.

The basic procedure in the passage of public Bills is the same, and here, again, Canada follows Britain in making distinction between Govern-

ment Bills, Private Members' Bills, and Private Bills. The procedure is that Bills receive three readings in the House, three in the Senate, and then go to the Governor-General for his assent. In case of differences between the two Houses, a conference is held between representatives of each House to discuss and if possible to reconcile differences. If agreement is not reached, the Governor-General may nominate four to eight Senators to resolve the deadlock: the position similar to one available in Britain to create more peers to resolve the deadlock between the Lords and Commons prior to 1911. The Canadian Committee system also resembles the British Committee system: the Committee of the Whole, the Select Committees, and the Standing Committees. The procedure followed herein is also similar.

**Functions of the Commons.** Theoretically both the Houses, Commons and the Senate, possess co-equal legislative powers. But with the stabilization of the parliamentary government and because of two specific provisions in the British North America Act, 1867, i.e., the Senate is appointive whereas the House is popularly elected and that all Money Bills must originate in the Commons, the House of Commons has become the pivot of all legislation and the Senate is lost in oblivion. Bills may be introduced in either House, but Bills imposing any charge on the people or making any grant for the services must originate in the House of Commons. The Rules of Procedure lay down that "all aids and supplies granted to His Majesty by the Parliament of Canada are the sole gift of the House of Commons, and all Bills for granting such aid and supplies ought to begin with the House, as it is the undoubted right of the House to direct, limit and appoint in all such Bills the ends, purposes, considerations conditions, limitations and qualifications of such grants, which are not alterable by the Senate." Money Bills must be introduced by the Ministers.

The House of Commons must invariably ratify all the measures which the Cabinet submits, but in the process of making laws it provides an opportunity to discuss and criticise. In fact, the deliberative function is a part of the legislative function of Parliament wherever the parliamentary system of government exists. The most important function of the Opposition is to criticise matters of administration and policy-making and, thereby, to make the Government to defend its intentions and practices. Even the opinion expressed by members of the majority party may carry enough weight to bring about substantial modifications in the Cabinet's proposals. The Opposition may also be able to secure a few modest concessions. No government, whatever be its majority, can remain oblivious of the criticism of the Opposition. A government which neglects the Opposition does so at its own peril, because the lapses of the Government are the opportunities of the Opposition and it uses them to appeal to the public opinion. Nor is the Government insensitive to the reactions of its own followers. Signs of unrest against its policy in the constituencies, amongst interest groups or on the part of a sufficient number of back-benchers may lead to changes in the Government's plans and proposals.

A vital aspect of the critical function of the House of Commons is its power of controlling the executive, or its power of general super-

vision. The responsibility of the Ministry to the House of Commons involves a constant control of the House over the Government. Indeed, control and responsibility go hand in hand. The House of Commons exercises its control in two ways. The first is the constant demand in the House for information about the actions of the Government and this is done through the medium of oral or written questions. The members of the House are given opportunity normally on three days in a week to address questions to Cabinet Ministers concerning various phases of public affairs. Supplementary oral questions are sometimes allowed, but they are not very common, and are definitely not encouraged. The House may conduct investigations into the administration of departments and, thus, bring out the activities of the Government into the light of publicity.

The second is the criticism that is regularly aimed at the Government. This is done when Laws are made and the policy of the Government is under review. The best opportunity for the Opposition to criticise the policy of the Government as a whole is when it debates the Speech from the Throne. Discussion of public finance, more especially of proposals for expenditure, offers a very real opportunity for discussion and criticism. If the Opposition, for example, disapproves the Government's foreign policy, it uses the debate on appropriations for the Foreign Office as an occasion for criticism.

In addition to these regularly scheduled debates, the normal occasion for criticism of the executive is the debate on a motion of adjournment. A member may ask leave to move the adjournment of the House "for purposes of discussing a matter of urgent public importance." If the Speaker decides that the matter is urgent and at least twenty members support him the motion is allowed. If less than twenty but more than five support him, the question of leave is at once referred to the House for a decision. The most direct method of launching an attack on the Cabinet is the motion of no confidence. Motion for a vote of no confidence is really a crucial occasion in the life of the Cabinet, because it decides its fate. So long as a Government can command a comfortable majority, it is not possible for such a motion to get through, still it creates embarrassments in the ranks of the Ministry. Amendment to a Government's motion of an immediate attack on a Government measure inferentially becomes an issue of "no confidence." There are times when a Cabinet may itself take the initiative and demand a vote of confidence from the House as it was done in January, 1926.

The House of Commons is a selective body. It is here that the national talent is exhibited and the members make their mark. The House does not actually pick the Cabinet, but the fact that the Cabinet must always be able to retain the support of a majority of the House gives the Chamber a negative power of choice. The House selects ministers indirectly in yet another way. "It provides the rigorous environment in which ministerial talent must prove its worth and establish its right of office. The prospective ministers usually serve an arduous apprenticeship in the House; and while many cease to be serious contenders long before their party comes to power or vacancies occur in the Cabinet, the few able survivors have had ample opportunity to develop their capacity before they are called upon to assume office."

And, as Professor Laski observes, there is "no alternative method that in any degree approaches it."<sup>11</sup>

The House of Commons educates and leads public opinion on many questions. All that comes before the House of Commons had not been before the people at the time of the general elections and their mandate could not be obtained thereupon. Many matters are new and many problems emerge out of the national and international movement of events which could not be anticipated. The House talks, argues, investigates, opposes, decides, and very often postpones action on various matters, and while doing so it arouses interest and helps to create a more enlightened opinion throughout the country. Referring to this process in Britain, and it is equally applicable in Canada, Professor Ivor Jennings says, "So the discussion radiates from Westminster in waves of ever-decreasing elasticity. Arguments are transmitted, prevented, simplified, perhaps distorted. A "Common opinion" develops, and creates new waves which find their way back to Westminster. They set going new arguments in the smokeroom and more formally in the House. In their turn these arguments produce new rays which go back to the ordinary people. In this way there is a constant interchange between Parliament and people which does produce a constant assimilation of opinion. . . . The purpose of Parliament is to keep them (the Cabinet) in touch with the public opinion, and to keep public opinion in touch with the problems of government."<sup>12</sup>

Finally, the House of Commons is a unique institution of national importance "which present in condensed form the different interests, races, religions, classes, and occupations, whose ideas and wishes it embodies with approximate exactness." In the land of diversity it brings unity. The representatives of the people of all shades and opinions, languages and religions, territories and occupations meet together, talk and discuss their viewpoints, hammer the issues and reconcile the differences in order to present to the people one single united policy. The House is, thus, to use Mill's phrase, "the nation's committee of grievances and its Congress of opinions," the members of which, with their varied experiences and diverse samplings, are genuinely and actively concerned with the promotion of the national welfare. This gives a strength to the government of the time and enables the Cabinet to proceed with far more assurance and certainty to work which lies before it. Mr. Mackenzie King declared in the gloomy days of 1940, "I can say frankly to honourable members that it is a source of comfort rather than the opposite to have Parliament in session at a time such as this. I say that quite sincerely. There is comfort in the sense of knowing that where the situation is as serious as it is, the body of the people's representatives are here and can express freely their views, as can the Government its views and what it is doing, in a manner which it is not possible to do through the press. . . . I would not wish a long period to elapse, with the country and the World in the state in which it now is, without having an opportunity of consulting with members of Parliament and having them fully informed with respect to what the Government is doing."

11. *A Grammar of Politics*, p. 300.

12. *Parliamentary Reforms*, pp. 18-19.

## CHAPTER IV

# THE JUDICIARY

**The system of Courts.** The system of Courts obtainable in Canada possesses certain characteristics which are due to the federal nature of the Dominion. But it has not followed the American idea of what a system of Courts should be under a federation. In the United States there are two sets of Courts, Federal and State, distinctly constituted and with well demarcated jurisdiction. Within their own field of jurisdiction the Supreme Court of the United States and the Supreme Courts of Appeal in the States are the final Courts of Appeal. In certain circumstances a dispute may be transferred from one to the other. For example, if a case involves the interpretation of the Constitution or a federal statute, it may be transferred from the jurisdiction of a State Court to that of a Federal Court. Such transfers, however, do not make the rule and a case will normally finish in the system in which it originated.

The British North America Act establishes two systems of Courts, Federal and Provincial, but the dividing line between them is horizontal rather than vertical. The Dominion is empowered 'to create a general court of appeal and may establish "any additional courts for the better administration of laws of Canada."<sup>1</sup> The Provinces exercise jurisdiction over "the administration of justice in the organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matter in those courts."<sup>2</sup> Procedure in criminal matters is within the competence of the Dominion. The Dominion also controls the appointments, the remunerations and the removal of judges of the Dominion and Provincial Courts (with a few minor expectations).<sup>3</sup> The great majority of cases will originate in one of the Provincial Courts and can go up to the Supreme Court of Canada on Appeal, and until 1929 from there to the Judicial Committee of the Privy Council in Britain. The Exchequer Court of Canada, which is a Dominion Court, has been given a specialised jurisdiction, and is, accordingly, not like a Federal Court on the American model.

Under Section 99 of the British North America Act, 1867, the Judges of the superior courts hold office during good behaviour but are removable by the Governor-General on address of the Senate and the House of Commons. By virtue of the British North America Act, 1960, Judges of superior courts now cease to hold office upon attaining 75 years of age. The tenure of office of county court judges is fixed by the Judges Act as being during good behaviour, and their residence is required to

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1. Section 101.

2. Section 92, Sub-section 14.

3. Sections 96—100.



be within the county or union of counties for which the court is generally established.

**The Federal Judiciary.** The Parliament is empowered under Section 101 of the British North America Act to provide, from time to time, for the Constitution and organization of a general Court of Appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada. Under this provision, Parliament has established the Supreme Court of Canada, the Exchequer Court of Canada and certain miscellaneous courts.

**The Supreme Court of Canada.** At the apex of the Canadian system of Courts is now the Supreme Court. It was established in 1875, under the express authority of the British North America Act, to exercise appellate civil and criminal jurisdiction for the Dominion of Canada. Originally, it consisted of a Chief Justice and five judges. The number of judges was raised to six in 1927, and, then, to eight in 1949. The Court is now governed by the Supreme Court Act, 1962. The Chief Justice is now designated as the Chief Justice of Canada. It is a Bench of nine judges appointed by the Governor-General-in-Council and they hold office during good behaviour with compulsory retirement at seventy-five. The judges can be removed from office by the Governor-General-in-Council following an address of the Senate and the House of Commons. The Chief Justice receives a salary of \$25,000 a year, and the other members of the Court \$20,000. The Court sits at Ottawa and exercises general appellate jurisdiction throughout Canada in civil and criminal cases. The Court is also required to consider and advise upon questions referred to it by the Governor-General-in-Council and it may also advise the Senate and the House of Commons on Private Bills referred to the Court under any rules or orders of the Senate or the House of Commons.

Appeals may be brought to the Supreme Court from any final judgment of the highest Court of final resort in a Province in any case where the amount or value of the matter in dispute exceeds the sum of \$10,000. An appeal may be brought from any other final judgment with leave of the highest Court of final resort in the Province. If such court refuses to grant leave, the Supreme Court may grant leave to appeal from any judgment, whether final or not. Appeals in respect of indictable offences are regulated by the criminal code. Appeals from the Federal Courts are regulated by the statute establishing such courts.

The Supreme Court is also a final Court of Appeal and its judgment is conclusive in matters of constitutional interpretation, and in cases, where validity of a Dominion and Provincial statutes is in dispute.

The Judicial Committee of the Privy Council was until very recently the final court of appeal for Canada for all but criminal cases. This had eclipsed the position of the Canadian Supreme Court. For a very long time, therefore, it had been a growing feeling in Canada that to send appeals to the Judicial Committee of the Privy Council in London was below the dignity of a nation marching towards statehood. Attempts were made on various occasions to abolish it, but this could not be accomplished. When the Statute of Westminster, 1931, removed the

limitations on the competency of the Canadian Parliament, criminal appeals were abolished in 1933. An amendment to the British North America Act passed in 1949 provided an authority for the Parliament of Canada to legislate in respect to constitutional matters and in the same year a Canadian Statute abolished all appeals to the Privy Council and made the Supreme Court a court of final appeal in all cases. Its judgments in all matters are conclusive.

**The Exchequer Court.** The Exchequer court was originally closely associated with the Supreme Court of Canada, but the two were separated in 1887. It now consists of the President and five other Judges appointed by the Governor-General-in-Council. They hold office during good behaviour, with compulsory retirement at seventy-five, and are removable by the Governor-General-in-Council on address of the Senate and House of Commons.

The Court has original jurisdiction with the Provincial Courts in cases involving the revenues of the Crown, and exclusive jurisdiction over suits brought against the Crown in federal affairs. It also deals with claims against the Crown for property taken for any public purpose or injuriously affected by the construction of any public work, and claims against the Crown arising out of any death or injury to person or property resulting from the negligence of any officer or servant of the Crown while acting in the discharge of his duties upon any public work. It hears cases regarding patents, copyrights, trade marks, and industrial designs. It also exercises jurisdiction over certain classes of railway cases. The Exchequer Court also acts as a Court of Admiralty and in this capacity has original jurisdiction as well as jurisdiction in appeal.

**The Provincial Supreme Court.** Each of the Provinces has its own Supreme Court or Courts of Appeal with jurisdiction over all cases within the Province, subject to appeal to the Supreme Court of Canada. The judges are appointed by the Governor-General-in-Council and they hold office during good behaviour. These Courts, like the other major Provincial Courts, are, as already stated, under both Dominion and Provincial control. The Province constitutes, organises and controls the Courts, and determines the procedure in civil matters, while the Dominion appoints, pays, and removes judges.

**County Courts.** There is a County Court in every county, although one County Court Judge may be given the assignment of another county. The county judges are appointed by the Governor-General-in-Council during good behaviour. As in the case of the Provincial Supreme Court, the Province has control in the constitution, organisation and maintenance of the County Courts while the Dominion appoints, pays and removes the judges. The County Courts have jurisdiction over civil cases involving small amounts and matters relating thereto, such as, actions arising out of contract, personal actions, cases regarding trespass, rights of way, partnership, etc. If the parties agree, however, the jurisdiction may be extended to cover any amount. They have also authority to try cases involving major criminal offences and here the judge may sit with a jury.

**Minor Provincial Courts.** These Courts may be of different kinds and are entirely under Provincial control as to organisation, maintenance, and also to appointment, pay, and the conditions of service. Unlike the higher Courts, the tenure of these officers is at pleasure. Minor Courts deal with the estates of deceased persons, civil cases relating to minor personal actions, breaches of contract, debts, etc., involving small amounts. Magistrates' courts are set up under the Magistrates Act for the trial of designated minor criminal offences and a few civil cases under special statutes. Finally, there are other minor courts such as Juvenile Courts and Family Courts in large towns and cities, coroners' courts and courts of arbitration.

## CHAPTER V

# POLITICAL PARTIES

**The Party System in Canada.** The democratic government as it is understood and practised in Canada simply cannot function without well organised political parties. Like various other institutions inherited from the mother country, the Canadian statesmen in the early days of federation adopted the same pattern of political parties and even gave them the same names, the Conservatives and the Liberals. It does not, however, mean that there had been no other political party beyond the two. Third parties have frequently arisen, but none of them has yet been in a position to challenge effectively the predominance of the Liberals and Conservatives. But the main items in the party programmes were included by a "sheer chance of the cards." Thus, the Conservatives became protectionists and the Liberals opposed such a policy. It is really surprising that in a country inhabited by two races of different languages and religions these differences have not accounted for the division of the parties, although they have occasionally been assisted in the climb to power by skilfully exploiting sectarian and racial jealousies, especially on the issues of bilingualism and denominational schools.

The most important characteristics of the political party system in Canada are, therefore: (1) there is no clear-cut line of division of affinities among the people. Each party commands allegiance from the people in different walks of life. The rich and the less rich, for one can hardly talk of the poor in Canada, the farmers, merchants, manufacturers, shopkeepers, professional men have been found in both the major parties. The Canadian party system is, accordingly, not based upon any distinct ideology. Party membership is the result of chance. (2) The party feelings in Canada do not introduce bitterness in society. No party in Canada can go very far unless it derives support from two or more regional areas in the Dominion and as a consequence of this a national party must take as its primary purpose the reconciliation of the widely scattered aims and interests of a number of these areas and bring together people possessing divergent interests and beliefs. The differences within the parties are, thus, frequently more acute than between the parties themselves. (3) Canada has consistently followed the two-party system and it is only within the past thirty years or so that the third parties have emerged. The political parties in Canada have acquired a prominence hitherto unknown. The emergence of the Labour Party and the organisation of the farmers into a separate party with definite objects are threatening to the two-party system, as they challenge claims of the other association to represent adequately the diverse interests within the nation.

Canada has now four political parties: the Conservative Party, the Liberal Party, the Labour Party and the Farmers' Party.

**The Conservative Party.** The origin of the Conservative Party may be traced back in 1857, when a number of separate groups in the Province of Canada brought together a temporary coalition, which proved afterwards to be permanent, under the name of Liberal-Conservative. It was composed of extreme Tories, moderate Liberals from Upper Canada, together with French moderates, and some English-speaking members from Lower Canada. The coalition soon fell under the leadership of John A. MacDonald, who, by dint of his domineering personality and afterwards prompted by a dogged desire to see confederation established in Canada, was able to weld the members together. He drew members from other groups and Provinces and, thus, formed a genuine political party. So strong a hold it afterwards exercised on the people that the party was able to retain office, with but one five-year interval, until 1896.

The role and outlook of John A. MacDonald and the Conservative Party have been compared to those of Hamilton and the Federalists in the United States. This is correct, and MacDonald and his successors in the leadership of the Conservative Party often paid genuine tributes to Hamiltonian doctrines. Like the Federalists, the Conservatives stood for centralisation, identified themselves with the propertied, commercial and industrial interests, and above all with these interests succeeded in solving the practical task of nation-making. The centralising influences and the policy of unifying the people of diverse interests, origins and beliefs into one single whole found expression in the national policy of a protective tariff, in the construction of the trans-continental railway, and in many other policies which were directed towards that end. Economic nationalism was, therefore, considered the best means of welding the people in a community of different interests and aspirations. And this continues to be the policy of the party even now and its programme includes schemes of social insurance, abolition of child labour, fixing of minimum wages and maximum hours of work.

**The Liberal Party.** The origin of the Liberal Party remains hazy, but it, undoubtedly, goes back to the early reformers who fought for responsible government. After the establishment of the Confederation, however, the separate elements in the Provinces did not put any energetic effort to combine themselves and constitute a genuine political party. Many of the Liberals had opposed the confederation and when it came into being, they became lukewarm. But the centralizing policy of the Conservative Government prompted them to defend the rights of the Provinces. The Liberals, or the Clear Grits, as they were called in Upper Canada, were inspired by Jeffersonian ideas and his Anti-Federalist Party. There was another close resemblance between the Liberals and the Anti-Federalists. Both were based on a frontier agrarian democracy with distinct radical tendencies. "The Clear Grits were indeed," writes Prof. Dawson, "definitely influenced by the successors to the Jeffersonians, the Jacksonian Democrats. They were opposed to wealth and privilege in any form, and they favoured soft money, universal suffrage, frequent elections, and various other 'republican' measures well known south of the border." Another group which was affiliated with the Liberals was the **Rouge** party from Quebec. It was anti-clerical and had aroused the opposition of the Roman Catholic Church and after Confederation it had definitely declined in size and importance. To these



two elements were joined some reformers, secessionists and independents from New Brunswick and Nova Scotia.

The first Liberal Government came into power in 1873, after the Pacific Scandal, when all the three groups, the Clear Grits, Quebec Rogue, and the Progressive Liberals, combined together under the leadership of Alexander Mackenzie, although the groups acknowledged also a separate allegiance to their own leaders. Various factors were responsible for the defeat of the disunited Liberals and their remaining in the wilderness for about almost two decades. When Laurier became the Liberal leader in 1887, he welded the different groups and made a genuine national party. Laurier had realized the urgent need for national unity. "Brilliant in speech, masterly in tactics, Laurier warned his countrymen from the Conservative loyalty, attached them to his own Gladstonian Liberalism, and sought no less skilfully than MacDonald to win support throughout the whole country by emphasizing the policies of material expansion. He exalted the spirit of compromise whereby alone a national leader in Canada could survive. Above all, he purged the Liberal creed of anti-clericalism of the Rouge Group, and, thus securely anchored his party in the French Province." Laurier's successor was Mackenzie King and he followed the high ideals and traditions set by his leader with strict fidelity with the result that Mackenzie King could command in Quebec even more unqualified support. And from 1887 to 1948, for full sixty-one years, the Liberal Party had two leaders to twist its destiny whereas the Conservative Party had ten during this period. "From this unbroken continuity of political strategy it derived great prestige and formidable weight." It continues to retain its strength in Quebec and obtains enough support in other regions and is the most truly national party in Canada. It was ousted from office by the Conservatives in the elections of 1957. The Liberals returned to power in the next elections.

The Liberal Party stands for low tariffs and does not advocate the interference of the State in the economic life of the country. It still champions the rights of the Provinces and the Sovereign status of Canada within the British Empire. It stands for making trade agreements not only with the members of the British Empire, but also with the foreign countries. The analysis of the programmes of the Conservative Party and the Liberal Party will reveal that the former stands for economic nationalism whereas the latter for political nationalism and the truth is that political and economic nationalism are merely twin sisters with little difference.

**The Farmers' Party.** Since the consolidation of the national parties in the eighties and the nineties to the commencement of the Second World War third parties have periodically arisen and jeopardized the position of the dual party system. One of the serious threats came from the agrarian interests which had always commanded substantial electoral weight and at intervals assailed the privileges enjoyed by the urban areas. The Grange was the first extensive agrarian organisation in Canada to express an agrarian interest and the fertile parent of others. Since then there appeared many agrarian parties in the Provinces extending their activities to the unification of agrarian interests all over

the country. The Farmers' Party proposed the immediate abolition of tariff on many raw materials, on all foodstuffs, and on certain machinery, increase in the Imperial Preferences, graduated taxation on personal and corporation income and large estates, assisted land settlement for veterans, public ownership of coal mines and all public utilities, and numerous public reforms, such as abolition of patronage. Senate reforms, proportional representation, and the initiative, referendum and recall.

The movement made its great advance in Ontario in the Provincial election in 1919, which resulted in the formation of a Farmer-Labour Government. Two years later the United Farmers of Alberta came to power. In the Dominion election in the same year the Farmers, or Progressives, carried 65 seats in the House of Commons. But soon they petered out. The most important reason for their failure was the unremitting efforts of the Liberals to absorb them both by direct attack and infiltration. By 1926 they dwindled into 25 and were divided into three different groups. Today, the Farmers' party remains only a provincial party.

**Labour Party.** Organised labour has played a much less active and creative role than the farmers. Prior to 1939 the labour movement was industrially and politically weak, and produced no party with sufficient electoral strength to achieve more than a meagre representation in some legislatures. This is due to the socio-economic causes. In 1932, however, the Co-operative Commonwealth Federation was formed in order to pool together their political interests. The C.C.F. was able to make some general appeal to members of all occupations. It has a socialist programme and contemplates a new social order based upon sweeping economic changes. It advocates socialisation of all financial agencies, transportation, communication, and public utilities, social insurance—covering old age, illness, accident and unemployment—freedom of association, socialised health services, crop insurance, encouragement of co-operatives, abolition of the Senate, etc.

## CHAPTER VI

# CONSTITUTIONAL DEVELOPMENT IN THE COMMONWEALTH

**The British Empire.** In recent years a great deal has happened to the British Empire. By 1921 it had expanded to its greatest size, embracing an area of about 13,600,000 square miles with its population about 448,000,000. This computation is made by totalling the homeland of the United Kingdom, the Dominions, the Crown Colonies, the Empire of India, and the enemy-occupied territory to become mandates. The rule since then of its peaceful losses is also spectacular. The Dominions of Eire and Burma have become Republics; the mandate of Iran and Jordan Kingdoms; the mandate of Palestine, the Republic of Israel; the protectorate of Egypt, a Republic. British Somaliland joined with its neighbour the Trust Territory of Somaliland to form an enlarged and independent Somalia in 1960. In 1961 the Southern Cameroons ceased to be a British dependency and moving out of the Commonwealth, formed with the neighbouring Republic of Cameroon, the Federal Republic of Cameroon. South Africa ceased to be a member of the Commonwealth on becoming a Republic on 31st May, 1961. Since then many more colonies in Africa have become Sovereign and independent States. The changes made in the nomenclature of the group of countries and territories now generally known as the Commonwealth of Nations bear witness to constitutional developments in those countries and to alterations in their relationship with each other. In the Balfour Declaration of 1926, the Prime Ministers agreed that their countries were "autonomous communities within the British Empire... freely associated as members of the British Commonwealth of Nations," and in the Commonwealth Declaration of 1949, their successors agreed that the countries "united as members of the British Commonwealth of Nations" would "remain united as free and equal members of the Commonwealth of Nations." Thus, the British Empire "glided quietly and decorously into the 'British Commonwealth of Nations' and the 'British Commonwealth of Nations' slipped unobtrusively into the 'Commonwealth of Nations' without anybody precisely saving so or depriving anybody else of the pleasure of belonging to the Empire, or the British Commonwealth, or the Commonwealth, or even the British Commonwealth and Empire."<sup>1</sup>

**From Colonies to self-governing Dominions.** The unique international position and powers of the self-governing Dominions had their origin with the earliest colonial settlements. The immigrants from the United Kingdom not only brought with them English language, but

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1. Jennings, I., and Young, C.M., *Constitutional Laws of the Commonwealth*, p. 1.

also the Anglo-Saxon traditions of civil liberty and self-government reinforced as they were by the Magna-Carta, the Bill of Rights and the Habeas Corpus Act. They transplanted all these traditions, in fact, the whole fabric of the Common Law in their new homelands. The actual control over the overseas acquisitions of the Crown in the seventeenth and eighteenth centuries was often slight and the colonists of Massachusetts almost at once denied the authority of Parliament over them, yet they were not prepared to claim absolute independence from the Crown and establish their international status. The revolt of the thirteen colonies and the final recognition in 1782-83 of their independence was followed by a strong reaction on the part of the British Government, "which felt that the disaster had been due to failure to exercise due control over the potential republics of the west, and a regime of strict supervision replaced that of *laissez-faire*." Many measures were enacted which completely reversed the principle of representative government and political self-expression, that had hitherto marked out British colonies as distinct from those of any other nation. The autocratic government so established could not fail to arouse the resentment of the people, particularly in Canada, who had grown up in an atmosphere of political freedom and had long enjoyed representative institutions. They insisted on their right to enjoy the British civil law, habeas corpus, trial by jury, and, above all, representative government.

The first half of the nineteenth century witnessed the steady economic and political development of British North America, and "as the colonies increased in importance and virility so that dissatisfaction with their government increased also." Many predicted that no effort on the part of the British Government to hold the colonies could in the nature of the things be successful and in a few years "the inherent centrifugal forces would gain control and the colonies would once again declare their independence."

When Lord Durham came to Canada as Governor-in-Chief of all the five Provinces he "found two nations warring in the bosom of a single State." The two major recommendations which he made in his Report (popularly known as the Durham Report) to the British Government in order to restore order and tranquillity were: (1) the re-union of Upper and Lower Canada, and (2) the immediate grant of responsible government. He thought that responsible government was the most efficacious cure for most of the ills of the colonies. He suggested the division of subjects between the Imperial and Colonial Governments. The Governor as head of the colonial administration would follow the advice of his Council in matters of colonial concern, but, as the agent of the British Government, he would follow the policy and instructions of that Government and see that his Colonial Ministers and Assembly did not interfere and encroach upon matters concerning the Imperial Government. "The matters which so concern us," wrote Lord Durham in his despatch, "are very few. The constitution of the form of government—the regulation of foreign relations, and of trade with the mother country, the other British colonies, and foreign nations—and the disposal of the public lands, are the only points on which the mother country requires a control." The first major recommendation of the Durham Report as well as a number of

other minor ones were implemented by the Union Act of 1840. But the Act made no mention of responsible government.

A change of government in England in 1846 brought Earl of Grey to the Colonial office and Grey was prepared to give to Durham's proposal of responsible government, a fair trial. The way was paved for him when Sir John Harvey and Lord Elgin were appointed Governors of Nova Scotia and the Province of Canada respectively. In his despatches from the Colonial office Grey laid down the lines on which he felt the change to responsible government should be made. The first opportunity came in Nova Scotia when, following a general election, a direct vote of want of confidence in the administration was carried by the Assembly on January 25, 1848. The Governor's Executive Council resigned two days later and the new Premier, J.B. Uniacke, was asked to form a government the same day. In March of the same year the government of the Province of Canada was similarly defeated and immediately a new government came into office in its place. The same principle was asserted almost simultaneously in New Brunswick, and three years later it was conceded in Prince Edward Island. New Foundland achieved responsible government in 1855. In this way responsible government came to be established without being given any statutory recognition. It was found entirely in custom and usage.

Lord Durham and others had clearly realized that responsible government could only function there successfully by judiciously separating the Imperial from local affairs. But the line of demarcation between the Imperial and local affairs had never been clear and obvious and the Governors very often exercised their discretionary powers and overruled their responsible ministers in order to protect the paramount Imperial or external interests. In fact, the broad division made by Durham himself was a limit, upon the area of colonial jurisdiction, and, therefore, a limit upon self-government. But as "the general right of Dominion self-government," observes Dr. Evatt, "became more fully recognized, the question of dispute between Governor and Ministers came to relate to such questions as the true extent of the Governor's discretionary authority, and the nature of the reserve power of the Crown exercised by the Governor." This was, however, a gradual process, covering nearabout seventy years, till they reached their logical destination in 1926 and 1931 when the full equality of Great Britain and the Dominions was formally declared. The Colonies became the self-governing Dominions.

**From Colonial to Imperial Conferences, 1887-1914.** The Imperial Conferences, known before 1907, the Colonial Conferences, constituted an important landmark in the development of the self-governing colonies and in establishing co-operation between Great Britain and her overseas possessions. The first Colonial Conference was held in London in 1887, at the time of Queen Victoria's Jubilee. Representatives of all Colonies participated in this conference and exchanged views with the members of the British Government on matters of common interest. The second Colonial Conference met after ten years in 1897, and was attend-

2. Evatt, H.V., *The King and His Dominion Governors*, p. 29.



ed by the Prime Ministers of Canada, New South Wales, Victoria, New Zealand, Queensland, Cape Colony, South Australia, New Foundland, Tasmania, Western Australia and Natal. The main purpose of this conference was to exchange views with the representatives of the Colonies, in an informal and friendly manner without coming to any binding decisions which the Colonial Governments might feel reluctant to carry out. In fact, the conference usually avoided putting controversial measures to a vote, but it did discuss important matters like the Imperial federation, Empire defence, and reciprocal tariff preferences.

The conference of 1897 definitely ruled out the idea of<sup>3</sup> Imperial federation, but it did make useful suggestions with regard to inter-Imperial co-operation in defence, commercial and immigration matters. The general attitude of the representatives of all the Colonies was as a rule opposed to any decided centralizing movements, and in favour of maintaining the separate powers of each self-governing unit.

In 1902, at the time of the coronation of King Edward VII, the third Colonial Conference was held. It was, then, decided to create some permanent body to keep up the spirit of mutual co-operation. The conference of 1907 was very important for various reasons. In the first place, it changed its style from Colonial to Imperial conference. Secondly, the conference "paying a graceful compliment to Canada, formally adopt'ed the style Dominion to denote those parts of the royal possessions, other than the United Kingdom, which had attained the full measure of responsible government, and had ceased to be dependencies."<sup>4</sup> Thirdly, the conference gradually moved on from discussions of defence to foreign policy. Although the British Government was quite explicit in asserting that it alone could be held responsible for that policy, yet the earlier ban on such discussions was being slowly removed.

The 1911 Imperial Conference listened to the Foreign Secretary submit a long and careful exposition of the Empire foreign policy. In the years immediately before the outbreak of the World War, Dominion Governments were given additional information from time to time concerning defences and allied matters. Summing up the position of the Dominions up to the breaking of War, Dawson writes, "thus by 1914 Canada and other Dominions were completely self-governing in all their internal affairs, and they were also beginning to acquire substantial powers in external relations. So far as commercial treaties were concerned, the realities of power had already passed over to the Dominions, and with political treaties there had been some progress in the same directions. The Dominions had even made a modest debut at international gatherings of a minor nature. In Empire matters affecting one another, each self-governing part tended to follow its own course, subject, however, to fairly continuous informal consultation with the United Kingdom and a general consultation from time to time through the Imperial Conference. But in formulating foreign policy the Dominions had virtually no share and in the more vital matters of declaring war, making peace, appointing diplomatic agents, and participating in major international gatherings the Dominions had no share whatever."<sup>4</sup>

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3. Keith, A.B., *Dominion Autonomy in Practice*, p. 1.

4. Dawson, R.M., *The Government of Canada*, p. 58.

**Imperial Conference of 1917.** The First World War began a new chapter on the development of the Dominion status. "The drive behind this movement was the Dominions' conspicuous war effort, which gradually built up in each a strong national consciousness of its individuality, its power, and its importance. For a year or two of the War this feeling grew slowly, but it then rapidly mounted and remained at a high level. It found expression in a general conviction throughout the Dominions that their efforts and sacrifices should be recognised as a fair measure of their maturity, and that they were therefore entitled to a far greater control of their destinies than heretofore." The Imperial Conference of 1917, accordingly, resolved that any readjustment of constitutional relations (between the Dominions and Britain), "while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous of an Imperial Commonwealth, should recognise their right to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern and for such necessary concerted action founded on consultation as the several governments may determine."

In pursuance of this resolution of the conference all Dominion Prime Ministers were summoned to meet with the British War Cabinet as an Empire Cabinet, which proceeded to discuss and decide questions of high policy and the general conduct of the War. Dominion representatives in the following months held other meetings of the same nature with the British Cabinet. Later they took part in the deliberations of the Paris Peace Conference, and signed the peace treaties. When the League of Nations was established, the Dominions became its original members and were given seats in their own right on the governing bodies of the League.

**Imperial Conference of 1926 and Balfour Declaration.** The Imperial Conference of 1926 appointed a Committee, with Lord Balfour as Chairman, to investigate all matters of inter-Imperial relations. The Balfour committee explicitly defined the political status of the self-governing Dominions and stated that in their position and mutual relations Great Britain and the Dominions "are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations...." The statement or the Balfour Declaration, as it is often called, recognised and accepted the complete equality in status of the United Kingdom and the Dominions, an equality which was manifest not only in international affairs but also within the Empire. The British Commonwealth was to remain united under a common King, and subordination, either in law or in practice, was to give way to association and co-operation among autonomous partners.

The Balfour Declaration further stated that it was an essential consequence of the equality of status that "the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in

the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government." The Conference, then, proceeded to discuss a number of points implied in the Balfour Declaration and declared that:

(i) disallowance of Dominion legislation by the British authorities and reservation by the Governor-General were obsolete;

(ii) it was desirable to repeal a number of British statutes which still applied to the Dominions;

(iii) the retention of judicial appeals to the Judicial Committee of the Privy Council in England should rest entirely with the Dominion concerned;

(iv) each Dominion should possess complete treaty-making authority, acting through the King, but on the advice of the Dominion Cabinet;

(v) neither the United Kingdom nor any Dominion could be committed to active obligations in foreign affairs without the definite assent of its own government;

(vi) all parts would profit by exchange of information, consultation, and, at times, co-operation in foreign affairs, and new arrangements for consultation and communication between one part of the Empire and another should therefore receive special consideration.

**Imperial Conference of 1930.** In spite of these declarations the conference still left a number of inequalities untouched, and arrangements were made for a meeting of experts, consisting of the representatives of the United Kingdom and the Dominions, to consider how these could be removed. This body so set up is known as the Conference on the Operation of Dominion Legislation and the Merchant Shipping Legislation. The Conference submitted its Report in 1929 which was considered at the Imperial Conference of 1930. The Imperial Conference concurred with the Report and advised necessary legislation by the Imperial Parliament to give legal recognition to the status of equality contained and defined in the Balfour Declaration, and to remove the constitutional restriction in the path of the Dominions to achieve that status.

## STATUTE OF WESTMINSTER

**Main provisions of the Statute.** The Statute of Westminster Bill was introduced in the House of Commons on November 12, 1930, and after covering the various stages there and in the House of Lords, it received the Royal assent on December 11, 1931. The Africa Statute of Westminster was entitled "an act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930." The Preamble to the Statute of Westminster recognised that "the Crown is the symbol of free association of the members of the British Commonwealth of Nations" and declared that as "they are united by a common

allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom." It was, thus, admitted that no Parliament in the British Commonwealth ought to amend the succession to the Throne or the Royal Style and Titles, except in agreement with the others. The position of the King acquired a new meaning. He was the King of Canada and Australia not because he was the King of the United Kingdom, but because he was the King of Canada, and the King of Australia separately from the King of the United Kingdom; several monarchs wrapped up in one person, but each was completely divorced from the rest.

The third paragraph in the Preamble declared that "whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion." Section 4 of the Statute also provided that no law of the United Kingdom should in future extend to any Dominion as part of the law of that Dominion, otherwise than at the request of that Dominion. The identical provision in the Preamble was interpretative of Section 4 of the Statute. Section 4 was not considered adequate due to the possibility that judges might hold that Parliament of the United Kingdom was Sovereign and no Parliament could enact a law limiting its powers for ever and thereby bound its successors. The third paragraph of the Preamble was accordingly, put in order to strengthen the provisions of Section 4. What the Preamble declared in a constitutional convention and this "particular convention is formally stated in order that it may be quite clear that legislation which is perfectly legal may, nevertheless, be a breach of convention."<sup>5</sup>

Section 2 of the Statute repealed the Colonial Laws Validity Act, 1865, and enabled the Parliament of a Dominion to repeal Imperial legislation applying to the Dominion as part of the law of the Dominion. Three questions were raised by this provision. The first was that it enabled the Dominion to repeal its own Constituent Statute and, thus, the Dominion Parliament was empowered to amend or repeal its Constitution Act, though it was an Act of the Parliament of the United Kingdom. The Union of South Africa and the Irish Free State, accordingly, used this section of the Statute of Westminster to amend their Constituent Acts. It was decided by the Appellate Division of the Supreme Court of South Africa in *Ndlovu v. Hofmeyr* that the Union Parliament was competent to do so. The Irish Free State went further by providing itself with a new Constitution, becoming Eire, and finally legislating for itself out of the Commonwealth. In Canada the Provinces urged that the Dominion Parliament should not have the power to amend the British North America Acts and, accordingly, Section 7 was inserted

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5. Jennings and Young, *Constitutional Law of the Commonwealth*, p. 125.



in the Statute of Westminster to prevent the conferment of any such power by Section 2. Thus, the Parliament of the United Kingdom amended the British North America Acts.

The second question was whether a Dominion Parliament had power to amend the royal prerogative, especially in relation to appeals to the Judicial Committee of the Privy Council, which were governed partly by legislation and partly by prerogative. This question was answered in the affirmative by the Privy Council itself in *Morre v. Attorney General for the Irish Free State*, *British Coal Corporation v. The King*, and *Attorney-General for Ontario v. Attorney-General for Canada*. Thus, in consequence of the powers conferred by the Statute of Westminster, the Parliament of Canada was enabled in 1933 to abolish criminal appeals to the Judicial Committee of the Privy Council.

In the third place the question was raised whether the power to repeal or amend "any existing or future Act of Parliament of the United Kingdom" included a power to repeal or amend the Statute of Westminster itself. Though none of the Dominions had done so in express words, in substance the Statute was amended by South Africa in the Status of the Union Act, 1934, and by New Zealand in the Statute of Westminster Adoption Act, 1947; and it was in effect repealed either by the Irish Free State in the Constitution of Eire or by the Republic of Ireland Act, 1948. "It must, however, be emphasised," observe Jennings and Young, "that such amendments and repeals take effect only in the law of the Dominion: a Dominion Parliament has no power to amend or repeal the Statute as part of the law of the United Kingdom. Thus the secession of Eire had to be effected in the law of the United Kingdom (but not the law of the Eire) by an Act of its own Parliament, the Ireland Act, 1949." But South Africa seceded by its own law on May 31, 1961.

The Statute also declared, vide Section 3, that a Dominion Parliament had the power to enact laws having extra-territorial operation. The Colonial Courts of Admiralty Act, 1890, and the Merchant Shipping Act, 1894, were no longer to apply to the Dominions.

**Dominion Status in Application.** The Statute of Westminster, thus, gave legal recognition to the principle of equality of status defined in the Balfour Declaration and reinforced by the Imperial Conference of 1930. It came to be statutorily established that the Dominions enjoyed complete autonomy in their internal and external affairs and the ties which bound them together with Great Britain were of equality and not of subordination. The allegiance of the Dominions to the reigning monarch of Great Britain did not assign to them a place of inferiority so far as their relations with the British Government were concerned. He was as much their King as he was of Great Britain, several monarchs wrapped up in one person completely distinct from one another. The King acted on the advice of the Dominion Ministers in all matters relating to the administration of the Dominion. In South Africa, the Union Parliament passed in 1934 the Royal Executive Functions and Seals Act, a companion Act to the Status of the Union Act, which made it possible for all the executive functions of the Union to be exercised, whether by



the King or the Governor-General, upon the advice of the Union Ministers. When in 1939, the King was to visit Canada in person, and it was desired that he should participate personally in some of the formal functions of government, a difficulty arose, because, by law, he could perform those functions only through the use of British Seals and these Seals were under the control of his British Ministers and they could not be taken away from Britain. The Dominion Parliament, accordingly, passed the Seals Acts of 1939 to make it possible for the King to take part personally in Canadian Government.

This change in the position of the King *ipso facto*, brought change in the position of the Dominion Governor-General. He represents now not the King of the United Kingdom, but the King of the Dominion concerned. The Governor-General is, no doubt, appointed by the King, by letters patent issued under the Royal Sign Manual, but in the selection His Majesty is guided by the advice of the Dominion Ministry. The Dominion Ministry recommends the appointment to the King and the advice so tendered is invariably accepted. Britain simply checks up the availability of the person so advised to be appointed if he happens to be her national. The Governor-General occupies a position in relation to the conduct of public affairs in the Dominion similar to that which the King occupies in relation to the conduct of public affairs in Great Britain. He is a constitutional head and the actual exercise of powers and rights associated with the office of the representative of the King belongs to His Majesty's responsible ministers in the Dominion.

The Dominions are free to make any law they like, even amend or repeal their Constituent Acts, and there is no limit on their legislative powers. No Dominion statute can be declared void because it is repugnant to the law of the United Kingdom, and that no act of Parliament in Britain is to extend to a Dominion unless it declares that the Dominion has requested and consented to its enactment. The Governor-General cannot veto any law passed by the Dominion Parliament or reserve it for the assent of the King. The Dominions are also free to administer their own laws and have them interpreted by their own courts without interference from or subordination to Great Britain. There are some laws and conventions which may appear to impose certain limitations over the legislative sovereignty of the Dominions, but if at all there are limitations they are not real limitations since the Dominions possess full liberty to abolish, repeal, or amend them.

According to law, appeals may be taken from the Dominions to the Judicial Committee of the Privy Council in London. But this is hardly a restriction. It is open to the Dominion Parliament to abolish such a provision. Canada abolished criminal appeals in 1933, and in 1949, a Canadian statute abolished all appeals to the Privy Council and made her own Supreme Court the final Court of Appeal in all cases. The King has the prerogative of mercy, but it is, again, open to the Dominion Parliament to regulate or cancel such a prerogative.

The principle of equality of status can be discerned more in the con-

duct of the external affairs and the mutual relations of the Dominions. In this context equality of status means that each Commonwealth government is the final judge of what its policy in any matter should be and of the extent to which it should co-operate with the other governments in the conduct of external affairs. This follows naturally from the fact that each government is responsible to its Parliament for the policies that it pursues and for the manner in which it applies them. The membership of the Dominions as original members to the defunct League of Nations and to the United Nations now are important to establish their independent status. Then, every Dominion has the right of being represented in foreign States through its own ministers. They can and have carried on independent negotiations with foreign States on commercial and allied subjects and concluded treaties through their own ministers consistent with their own respective policies and programmes. The Dominions also possess the right to renounce obligations in respect of treaties to which they had not been parties. For example, none of the Dominions accepted the obligations imposed by the Locarno Pact of 1925, which was negotiated and signed by Great Britain without the consent of the Dominions.

The Dominions have the right to join or abstain from war in which Great Britain may be engaged. — It is now a settled doctrine that no Dominion need take steps to aid the Commonwealth in any war which has not been brought about by its own action. The action of the Dominions on the outbreak of the Second World War in 1939, furnished an instructive contrast to the practice of 1914. Australia and New Zealand considered that the British declaration of war included them as well. Eire declared her neutrality. The South African Government of General Hertzog moved a motion of neutrality in the Union Parliament which was, however, defeated by 80 votes against 67. The Hertzog Government resigned and the new Government under General Smuts came into power and South Africa declared war on September 6, 1939 whereas England had declared it on September 3. Canada did the same after a lapse of seven days. Mr. Mackenzie King, the Prime Minister, in his speech to Parliament on September 7, 1939 maintained, "...; and may I add the further statement, that such action as this government is taking today it is taking in the name of Canada as a nation possessing in its own right all the power and authority of a nation in the fullest sense. The action we are taking today, and such further action as this Parliament may authorize, is being and will be taken by this country voluntarily, not because of any colonial or inferior status vis-a-vis Great Britain, but because of an equality of status. We are a nation in the fullest sense, a member of the British Commonwealth of Nations, sharing like freedom with Britain herself, a freedom which we believe we must all combine to save."<sup>97</sup>

Subsequent developments have flowed steadily in the one direction. The War itself, the formation of the activities of United Nations, the North Atlantic Treaty Organization, the Australia-New Zealand-United

7. Malscigh, Nicholas, *Documents and Speeches of British Commonwealth Affairs*, Vol. 1, p. 468.

States Pacific Security Council, the Korean War, and so forth, have all furnished irrefutable evidence that the Dominions are now independent nations in the fullest sense of the word. Finally, the Dominions are independent to recognise or refuse recognition of a particular State. Recognition by Great Britain does not mean a recognition by the Dominions or a similar action by one Dominion is binding on the rest.

**Intra-Commonwealth relations.** The mutual understanding and sympathy and the close co-operation which for so long characterised the relations of different members of the Commonwealth are nevertheless still maintained, though now they arise between autonomous powers dealing with one another as equals. Every day there is a race of confidential communications passing from one capital to another: special missions and delegations are sent from one country to another to gather information on schemes of development or to discuss matters and projects of common interest and benefit, officials are exchanged on subjects of common concern, meetings and consultations occur at different levels with an occasional conference of Prime Ministers to settle matters of great moment, as on the European Common Market. The Commonwealth, today, can still be best explained in the often overlooked part of the Balfour Declaration of 1926, where it was said, "Free institutions are its life blood. Free co-operation is its instrument." Mr. Lester Pearson, the Canadian Secretary of State for External Affairs, explained on June 18, 1953, the relations between Canada and the other nations of the Commonwealth. He observed, "Outwardly and inwardly Canada has come of age, but she has no desire to leave the Commonwealth family in which she has grown up. The last war and its aftermath have seen my country accept responsibilities in the international field which we would hardly have contemplated before 1939. We are no longer much concerned with the assertion of a nationhood which we can take now for granted. We are more concerned with the search for ways by which without jeopardizing what is essential to our own national freedom, we may share the international responsibilities which all free peoples will accept if liberty is to be maintained and security established.... The Commonwealth.... is capable of significant co-operation and collective action. Furthermore, there is in the Commonwealth always the desire to work together, to see each other's point of view, even when that desire does not express itself in immediate agreement.... When divisions rack the world, plain friendship between nation and nation is worth more than we often realize."

**Secession** Some authorities on constitutional law are of the opinion that the Dominions have acquired, under the provisions of the Statute of Westminster, the right to secede from the Commonwealth. Dr. Keith holds a contrary view and says that "the Union of the parts of the Commonwealth is one which cannot be dissolved by unilateral action." Jennings and Young consider the position from the point of view of the law of that country and according to the laws of the other parts of the Commonwealth including the United Kingdom. They maintain, "The conclusion is therefore, that a Dominion (other than Canada and Australia) can secede under its own law, but that an Act of the Parliament of the United Kingdom would be necessary in order that the seces-

sion might have effect by the law of the United Kingdom." But this is hardly necessary. Status in international law depends on the recognition of the community of nations. If any one of the Dominions were to secede, it would most certainly receive international recognition and the fact that the United Kingdom law was not altered by such a secession would be of small importance.

Secession is so fundamental a change that it could not have been the intention of the Parliament of the United Kingdom to authorize it. There is nothing about it in the Reports of the Imperial Conferences, though a good deal had been said about it. The Constitution of Eire, 1937, was passed by the Oireachtas under the amending power of the Constitution of 1922 (as amended by the Statute of Westminster). It declared that the Eire was a "sovereign, independent, democratic State." But the Constitution of Eire did not repeal the Executive Authority (External Relations) Act, 1936, which recognised the King as the symbol of co-operation between the countries of the British Commonwealth. Eire, accordingly, did not secede from the Commonwealth, though it had become a sovereign, independent, democratic State. But on Easter Monday, 1949, it ceased to be a Dominion, seceding from the British Commonwealth of Nations, when the Republic of Ireland Act, 1948, replaced the Executive Authority (External Relations) Act, 1936 and declared that Eire was an independent republic under the name of the Republic of Ireland. South Africa seceded in 1961.

India became a Dominion under the Indian Independence Act, 1947, and consequently it conferred on it all the powers conferred on the Parliaments of the older Dominions by the Statute of Westminster. It, therefore, had power to repeal all legislation of the United Kingdom applying to India and it was expressly provided that it had power to repeal the Indian Independence Act itself. Except that the jurisdiction of the Privy Council was abolished by the Abolition of Privy Council Jurisdiction Act, 1949, the Constituent Assembly did not in any way regulate the relations between India and the United Kingdom until the new Constitution of India came into operation on January 26, 1950. The Constitution declared India "a Sovereign Democratic Republic" and Article 395 of the Constitution repealed the Indian Independence Act, 1947, and the Government of India Act, 1935 and thereby seceded from the British Commonwealth "united by a common allegiance to the Crown." But India agreed to remain a member of the Commonwealth by "accepting King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth." Thus, allegiance to the Crown ceased to be regarded as the essential pre-requisite of membership of the Commonwealth. The Crown's position now is that of the symbol of association. If a nation wishes to be a member of the Commonwealth it must accept the Crown as the symbol of its free association with other Commonwealth countries.

This nature of the Commonwealth brings the question of secession into still more prominence. Though the chances may be remote at this juncture of world tension for any Commonwealth country to secede, yet

legal prohibitions if any, altogether disappear. Prime Minister Nehru made the point clear in his speech to the Constituent Assembly of India on May 16, 1949. He said, "We join the Commonwealth obviously because we think it is beneficial to us and to other causes in the world that we wish to advance. Other countries of the Commonwealth want us to remain there because they think it is beneficial to them. It is mutually understood that it is to the advantage of the nations in the Commonwealth and therefore they join. At the same time it is made perfectly clear that each country is completely free to go its own way, it may be that they may go, sometimes go so far as to break away from the Commonwealth." South Africa's example typifies Prime Minister Nehru's contention.

**The changing Concept of the Commonwealth.** The Commonwealth has thus changed in composition since the Second World War, and in doing so has again demonstrated its extraordinary ability to adapt itself to a changing environment. Ireland and South Africa have seceded, so have India and Pakistan as Dominions. Both India and Pakistan are in the Commonwealth and though both do not owe allegiance to the Crown, they accept it "as the symbol of the free association of its independent member nations and as such Head of the Commonwealth." Referring to the position of the King as the symbol of free association, and head of the Commonwealth, the Prime Minister of India maintained in his broadcast on May 10, 1949, "It must be remembered that the Commonwealth is not super State in any sense of the term. We have agreed to consider the King as the symbolic head of this free association. But the King has no function attached to that status in the Commonwealth. So far as the Constitution of India is concerned the King has no place and we shall owe no allegiance to him." Sardar Patel too, expressed exactly the same opinion in the course of his address to a Press Conference, held at New Delhi on April 28, 1949. When Sardar Patel was asked by one of the correspondents what the functions of the King would be as the head of the Commonwealth, he replied, "so far his functions are concerned, they are hardly any. But he gets a status."

Winston Churchill said in the House of Commons on February 11, 1952, in moving address of sympathy on the death of George VI that "The House will observe in the Royal Proclamation the importance and significance assigned to the word 'Realm'. There was a time—and not so long ago—when the word 'Dominion' was greatly esteemed. But now, almost instinctively and certainly spontaneously, the many states, nations and races included in the British Commonwealth and Empire have found in the word 'Realm' the expression of their sense of unity combined in most cases with a positive allegiance to the Crown or a proud or respectful association with them." The dropping of the word 'Dominion' in the Association Proclamation appeared to many students of Commonwealth Relations to be one more step towards what is sometimes spoken of as "The end of the Dominion Status." It may be submitted that there is no decline in the status of Dominion when the word 'Dominion' is dropped therefrom. The use of the word 'Dominion' itself is conventional. It was used by the Imperial Conference of 1907 to distinguish the more or less self-governing parts of the Empire from the non-self-governing



parts. The phrase 'self governing Dominions' was soon shortened to the 'Dominions' with the word 'self-governing' understood, but undefined. In the years intervening 1907 and 1926, 'self governing' became more and more to mean free from control from the United Kingdom or by any other government and in 1926 equality of status was declared to be the true criterion of the Dominions and, thus, the use of the word Dominion Status. The legal consequences of the equality of statu of the Dominions or Dominion status were carried some stages farther in the Statute of Westminster.

Thus, the terminology in the Commonwealth relations is changing and it has to change with the changing composition of the Commonwealth. It would be appropriate to replace it by 'Member Status' or 'Realm Status,' because of the change in the Royal Style and Titles which has been brought about since the accession of Queen Elizabeth and is in accord with current constitutional practice. In a way it is happy to end the use of the term 'Dominion' or 'Dominion Status.' The popular opinion attached to 'Dominion Status' carries with it some notion of inferiority to the United Kingdom, "some historical memory of subordinate status, of adolescence, of the mother Country's apron-strings." The use of the term 'Member Status' or 'Realm Status' has no such association, and as Dr. Wheare points out, "It contains no embarrassing reminders of past subjection." It applies to all self-governing, independent nations, who are members of the Commonwealth, no matter whether they owe allegiance to the King or not. Independence and equality were the essential characteristics of the Dominion Status and this is precisely the meaning and implication of the 'Member Status' or 'Realm Status.' This is the importance and significance assigned to the word 'Realm' as Churchill declared in the House of Commons on February 11, 1952. The Commonwealth is, thus, not a static organism. As the product of evolution, it is capable of adapting itself, as it has done so successfully in the past, to changing circumstances and needs.

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# The Government of Switzerland

## CHAPTER I

# THE COUNTRY AND ITS PEOPLE

**Special interest in Swiss democracy.** Switzerland is the ethnological as well as the geographical centre of Europe. It is a landlocked country situated in the heart of Western Europe covering an area of 15,976 square miles with a population numbering about four and a half million, and borders for over a thousand miles upon three large neighbours—Italy, Germany and France—as well as on smaller Austria and tiny Liechtenstein. No natural boundary marks it off from the Germans to the north and east, from the French to the west and from the Italians to the south. Its central Alpine position has made it the source of several international rivers: the Rhine, flowing northward into the North Sea, the Danube and the Po flowing south-eastward into the Black Sea and into the Adriatic, and the Rhone flowing south-westward into the Mediterranean. All these rivers spring or receive affluents springing from the Swiss Alps and pass through or touch upon the territory of ten foreign countries.

The Swiss people are not a homogeneous whole. They sharply differ in race, language, religion, and even to a certain extent in civilization. Yet in this diversity is to be found the unity of the Swiss nation, and Switzerland presents to the world the most striking example of not only a united people, "but one of the most united, and certainly the most patriotic, among the people of Europe." Secondly, as a result of her geographical position and her small size, Switzerland has succeeded in remaining aloof from the wars of Europe and in becoming a centre of world activity by virtue of an internationally guaranteed neutrality. The neutrality of Switzerland was guaranteed by the Congress of Vienna in 1815 and reaffirmed by the League of Nations in 1920 and it formed the anchor of the nation's foreign policy during both World Wars.

Switzerland was the first in the world to experiment with republican institutions, and the only one State in Europe which has always been a republic. When the United States was born as an independent nation, Switzerland had behind it a republican tradition of some five hundred years. The impact of these republican institutions has been profound on the United States and other countries adopting the democratic way of political life. It is a government, moreover, under which the principles of direct democracy have been extensively applied. These devices of direct democracy were first adopted by the State of South Dakota in the United States in 1898, and set the ball rolling to vindicate the doctrine of popular sovereignty. Finally Switzerland has worked out a system of government **unique** in character, but which in certain respects combines the stability of the American Presidential system with the responsibility of the Parliamentary system.

**Physical Characteristics.** Switzerland is the "country of a thousand valleys" and the Swiss people dwell on both sides of a gigantic mass separated from one another by craggy heights and wide-spreading snow fields. Vast mountainous areas render about a quarter of the territory unproductive. The major portion of the remaining area is suitable only for pastures or for woodland, and only about 35 per cent is actually devoted to agriculture production. Agriculture on the whole supports 22.2 per cent of the entire population.

Nor has nature been bountiful in her mineral resources. Oil and coal do not exist and raw materials are almost entirely lacking too. There is almost nothing of value which is exportable. The broken terrain of the country makes transportation and communications difficult. The only natural advantages are important sources of hydro-electric power.

The hostility of nature in Switzerland, however, has been "mastered by man, civilised by him and stamped everywhere by his presence, his labour and activities. Nature only permitted Switzerland to exist, but man has made it a fairly prosperous country with a reasonably stable economy. Agriculture has been maintained at a very high level and the Wahlen Plan, carried out in the Second World War, represented the country's determined food policy to diminish her dependence on imported food stuffs. She has admirably succeeded in it and today Switzerland produces no less than 80 per cent of her own needs and imports only 20 per cent.

Paradoxical as it may seem, Switzerland is primarily an industrial country and 45 per cent of her population is dependent upon manufacturing industries. She balances her otherwise deficit economy by the excess of exports of manufactured goods and in normal times Switzerland is among the nations of the world whose foreign trade per head of the population is the greatest. By virtue of her water power and skilled workmanship, she has developed highly specialised manufactures such as machinery, electro-technical supplies, watches and textiles. The natural beauty of her landscape lures hundreds and thousands of foreign tourists, summer and winter, and the Swiss hotel industry remains one of the best equipped and most intelligently directed in the world. The tourist trade, in fact, is one of the essential credit items in the Swiss balance of payments. All told, the Swiss are now a prosperous population and the striking feature of their prosperity is a significant degree of equality. There "is no proletariat, no misery and no hovels" in Switzerland. Material anxiety exists nowhere and prosperity extends to everyone and everywhere. The standard of living of the people in general is comparatively higher than in many of her neighbouring countries. This astonishing success, the Swiss people owe primarily to their own labour "reinforced by a practical intelligence of quite an exceptional quality."

**Linguistic differences.** Linguistically Switzerland is heterogeneous and the Swiss nation defies all nationalistic canons of demographic and cultural unity. Almost three-fourths of her people speak German, one-fifth French, the remainder Italian, except for a few who speak Romanche, an ancient language of Latin origin. It must, however, be remembered that the linguistic groups are geographically sharply separated from each

other by the cantonal boundaries. Thus, the Ticino is almost exclusively (90.3 per cent) an Italian-speaking Canton. Geneva (80.6 per cent) Vaud (86.1 per cent) and Neuchâtel (86.9 per cent) are solidly French-speaking, and all the remaining Cantons, except Berne and Fribourg, are almost exclusively German. Even in Berne "the German population predominates over the French in the ratio of five to one" and in Fribourg the French population predominates over the German in the ratio of two to one." Romansh is the prevailing language in the Grisons.

Since the adoption of the Constitution of 1848, the three main languages have been recognised official languages of the Confederation. The various Cantons choose their own official language or languages. A noticeable feature of the present-day Swiss life is the 'linguistic interpenetration' among the various Cantons. Almost all educated people in Switzerland use two or even three languages. Nevertheless it is a trilingual country and nothing whatever is done officially or privately, to lessen the linguistic differences among the Swiss. Not is there the slightest suggestion of any linguistic propaganda. In fact, linguistic peace reigns in this happy land of the Swiss and differences of language are regarded as a stabilising factor to their national unity.

**Religious differences.** Switzerland's religious diversity presented some grave problems in the past and it led to civil war and foreign strife. But fortunately for the national unity of the country, the religious and linguistic areas do not coincide, but overlap. The Protestants outnumber the Catholics in twelve Cantons of which nine are German and three French-speaking. The Catholics, on the other hand, outnumber the Protestants in ten Cantons, of which seven are German, two are French and one is Italian-speaking. Moreover, in most of the Protestant Cantons there are strong Catholic minorities whereas in eight out of the ten Catholic Cantons the Catholics cover 80 per cent of the total population. "This geographical and statistical distribution," observes Rappard, "of the two rival faiths, even if it has not always prevented oppression, obviously makes for mutual toleration." The population as a whole is 57 per cent Protestant and 41 per cent Catholic.

The attitude of the Swiss to their religious differences is exactly the same as their attitude to their language differences. Religious minorities are highly respected and, as said earlier, they do not coincide with linguistic minorities. One of the main purposes of the federal Constitution set up in 1848 and amended in 1874 was to break the barriers created between Protestants and Catholics due to religious differences and, thus, to create a spirit of truly Swiss citizenship and guarantee certain fundamental rights to all Swiss people no matter to which confession they had faith and to which part of the country they belonged. When the Constitution placed absolute reliance on matters of economic prosperity of the people and inculcated in them the spirit of national consciousness, it promoted and facilitated the growth of national loyalties. Today, there is complete religious toleration and the Swiss recognise the right of every one to profess the religion he prefers. The idea of oppressing religious minorities is foreign to the Swiss mentality and there is not a single Swiss who imagines that national unity can be furthered by confession in any parti-

1. Rappard, W.E., *The Government of Switzerland* (1936), p. 11.



cular religion. "Quite the contrary here, too," emphasises Andre Siegfried, "diversity is accepted as a condition of federal harmony for Swiss patriotism consolidates itself on a very different ground."

**The Swiss a united nation.** Switzerland is, thus, a land of paradoxes. It affords a striking example of a federal experiment which tends to overcome conflicting State interests without annihilating their identity. It also mocks the principle of political "self-determination" for racial and linguistic groups and offers a splendid example of how statehood and national patriotism can be fostered in utter defiance of such a principle. Woodrow Wilson wrote in 1896, "The Cantons... having allied themselves... went on to show the world how Germans, Frenchmen, and Italians, if they only respect each other's liberties as they would have their own respected, may by mutual helpfulness and forbearance build up a union at once stable and free." Woodrow Wilson himself was the father of the principle of self-determination.

But Swiss diversity is not confined only to language and religion. There are differences in the occupations of inhabitants, in the external conditions of their life, in their ideas and habits of thought. Then, there is the local pride which clings to time honoured ways and customs and resists the tendencies, strong as they have become, that make for uniformity. Despite these differences, Swiss legal and moral unity has grown firmer with each passing generation. They are an exceptionally united and an exceptionally national nation. There is no people in Europe, nay all the world over, among whom a sense of a national unity and of patriotic devotion is more firmly fixed than among the Swiss. Bryce, while analysing the salient features of the Swiss nation, says: "A strenuous patriotism bracing up the sense of national unity, an abounding variety in the details of social, of economic and of political life, coupled with an attachment of local self-government which having been the life-breath of the original Cantons, passed into the minds and heart of others also, making them wish to share in the ancient traditions, and contributing to the overthrow of the oligarchy in the cities even where, as in Berne, it had been strongest." Thus, members of three races, even four languages, and two religions have become one people.

## THE STRUGGLE FOR UNITY

**Early history.** Switzerland, as Andre Siegfried says, was not formed by unification but by aggregation. Originally, Switzerland consisted of a number of Sovereign States without any co-ordinating central authority. These States comprised residents of different populations dwelling around the Alps. The inhabitants of these mountain valleys did not possess a common race or a common history or speak a common language, though they shared a common mode of life.

Towards the end of thirteenth century, however, three small Teutonic communities entered into a league of mutual defence to protect their common rights and privileges against the existing encroachments of their feudal lords; the most important being the Hapsburg rulers of Austria.

themselves of Swiss origin and then as Emperors of the Holy Roman Empire. The Hapsburgs made an attempt to restore their feudal authority, but were met with successful resistance of the three confederated Cantons at the battle of Morgarten in 1315. During the next forty years, five more Cantons joined the confederacy of the original three. The confederation won its second victory over Austria in 1386 and thereby declared its *de facto* independence. For two and a half centuries there was the confederation maintained its existence, though the alliance was very often threatened by secessionist movements, created by inter-cantonal strife.

The religious dissensions of the Reformation period once again brought into prominence the secessionist tendency. Half the Cantons embraced Protestantism and the other half adhered to the old faith. The confederation, however, stayed for the supreme interest of common defence held its members together. In 1648, the Treaty of Westphalia finally released the confederation from the suzerainty of the Holy Roman Empire and recognised its independence externally. By this time the number of the confederating Cantons had gone up to thirteen.

**Nature of the Ancient Confederation.** The authority of the confederation, thus, gradually extended over the greater part of the present Swiss territory. Although the Cantons proved united enough to throw off outside control, they soon began to quarrel among themselves. In the management of their domestic affairs the Cantons acted as completely Sovereign entities. Their political organisation varied greatly: the rural Cantons were pure democracies and governed themselves by meetings of the people, some, like Bern, were close oligarchies of nobles; and in others oligarchy was more or less tempered by a popular element."

Switzerland remained all through this period an alliance bound together only for offensive and defensive purposes. The Confederation, accordingly, had jurisdiction only over foreign relations, matters relating to peace and war, and inter-cantonal disputes. These affairs were managed by a Diet which met at irregular intervals in one of the Cantons. The delegates who sat in the Diet were the agents of their Cantons and they acted according to their specific instructions. In the Diet a certain formal precedence was given to the larger Cantons, such as Berne and Zurich, but it was a constant source of irritation for others who insisted on the substance of their equality "and behaved in a manner not unlike that of a Sovereign State participating in an international conference." The decisions of this assembly were not regarded legally binding unless they were unanimous. In fact the Cantons looked at the Diet with suspicion and as a consequence of this strong local affinities had come to be firmly established.

It is interesting to note in this context that some of the Cantons had by conquests acquired new territories and they regarded their acquisitions like subject areas denying to their inhabitants all rights and privileges which the Cantons claimed for themselves and their citizens.

**French Revolution and Restoration.** Then came the French Revolution sweeping away all the local institutions. The armies of the French

Revolution foisted the Helvetic Republic in 1798 upon the weak and dis-united confederacy, but the Swiss reacted so strongly against the French-imposed Constitution that Napoleon was forced to restore the Constitution of the Cantons by the Act of Mediation of 1803. Under this Act six new Cantons were formed chiefly out of allied and subject territories, speaking French and Italian. After the fall of Napoleon, the Congress of Vienna gave to Switzerland the old Confederate and cantonal institutions of the eighteenth century and added three more Cantons to it. The total number of the Cantons thus forming the confederacy came to be 22.

Although the New Constitution did not establish any central authority as such, it did establish a Diet containing a representative of each Canton, voting on instructions. The Diet was competent to declare war, conclude peace, name ambassadors, and to levy troops in accordance with a system of cantonal contingents. It could also send troops into any part of Switzerland threatened by disorder. The Cantons, however, maintained their complete internal autonomy which many of them now used to restore aristocratic regimes. They could, moreover, conclude treaties provided they were not prejudicial to the Confederation or to the rights of other Cantons.

**Birth of modern Switzerland.** The French suzerainty proved, indeed, a blessing in disguise for it was between 1798 and 1815 that the basis of modern Switzerland had been firmly laid. The Act of Mediation added 6 more Cantons to the already 13. Three more, all French-speaking, were added in 1815, thus, giving to Switzerland its present configuration. It was during this period that the trilingual status of the country, as it is today, was officially recognised. Finally, the French, liberal democratic and centralising influences began to manifest themselves into the Swiss political institutions. The "Federal Agreement" of 1815, therefore, achieved unity in diversity.

Partly as a result of the liberal revolution of 1830 in France, a movement arose to revise the cantonal Constitutions in Switzerland in conformity with the democratic principles. In 1832, the Diet appointed a Commission to prepare anew or revise the federal pact. But it made no progress due to the serious religious differences. In 1845 the seven Catholic Cantons formed a separate league called the **Sonderbund**. The formation of this league led to a Civil War which was suppressed within a month.

The defeat of the seven Catholic Cantons was, in fact, the triumph for the movement of national unity. Influenced by the internal dissensions and motivated by the European liberal movement of 1848, the Swiss Diet now approved a new Constitution which aimed to bring about a stronger and more highly organised government. Inspired to a certain extent by the example of the United States the Constitution of September 1848 transformed Switzerland into a Federal Government.

**Constitution of 1848.** The Constitution of 1848 was the child of compromise and it reflected the growth of new ideas with an attempt to retain ancient practices. The federating Cantons insisted on their retaining a sovereign character. A compromise was, accordingly, reached and the twenty-two Cantons remained sovereign "so far as their sovereignty is

not limited by the Federal Constitution." The powers of the Federal Government extended to diplomatic and military affairs as well as to certain economic matters, such as posts, customs, weights and measures and such other matters in which concerted action was deemed necessary with a view to achieving national unity. The executive power was vested in a Federal Council consisting of seven members elected by the Federal Assembly.

The legislative power was vested in a Federal Assembly, divided into two Chambers, the Council of States equally representing the Cantons, and the National Council representing the population. The judicial power was vested in the Federal Tribunal, but it had no jurisdiction to declare laws unconstitutional. The Constitution guaranteed the sovereignty of the territories of the Cantons and authorised the Federal Government to intervene in Cantonal affairs without awaiting a request from the Cantonal authority in case of internal disturbance or threatened conflict between several Cantons.

**The Constitution of 1874.** The Constitution of 1848 remained in force for twenty-six years. In the meantime, the tendency towards greater centralisation became powerful, although the Federalists still advocated certain social and municipal privileges of the Cantons. The Radicalists, on the other hand, persisted in their demands for the abolition of such rights and privileges. They, indeed, pleaded for certain inalienable rights and liberties for all the Swiss people alike under the protection of a unified and centralised law. They also desired for the nationalisation of railways under federal ownership, and that legislation should be referred to the referendum of the entire Swiss population, not as inhabitants of Cantons but as a single and unified nation.

The Radical movement carried with it a considerable majority of the public opinion necessitating thereby the revision of the Constitution of 1848. The Federal Assembly drew up a new Constitution and referred it to the people for their approval. It was adopted in April by a vote of 340,000 and 14½ Cantons against 198,000 and 7½ Cantons.

The new Constitution, which came into operation on May 29, 1874, is now the working Constitution of Switzerland. It gave to the Federal Government centralised control over military matters and the initiative in unifying certain matters of commercial law. Since 1874, the Constitution has been amended a number of times. These amendments have still further centralised the powers of the Federal Government, have imposed upon the new Government new task in the realm of economic regulation and social insurance, and have increased the direct participation of the people in the process of legislation. In 1935, complete revision of the Constitution by popular initiative was requested by those groups who advocated strengthening the powers of the Cantons, and those who believed in the principle of occupational representation and its evolution into the corporative State. But it was rejected by the people.

## CHAPTER II

# BASIC FEATURES OF THE SWISS CONFEDERATION

**The Swiss Confederation.** The Republic of Switzerland, known by the formal title of Swiss Confederation, is composed of twenty-two Sovereign Cantons, namely Zurich, Berne,<sup>1</sup> Lucerne Uri, Schywyz Unterwalden, Glaris, Zug, Freiburg, Solothurn, Basel, Schaffhausen Appenzell, St. Gall Grisons, Aargau, Thurgaw, Ticino, Vaud, Valais, Neuchatel, and Geneva. The three Cantons, Unterwalden, Basel, and Appenzell are further split up into half Cantons and each half Canton is entirely independent of its twin and differs from a whole Canton only in two respects. In the first place, a half Canton sends only one member to the Council of States, or the Federal Upper Chamber, instead of two as the full Cantons do. Secondly, a half Canton is entitled to cast a half vote on all questions entailing amendment of the Constitution.<sup>2</sup> The subdivision of these three Cantons was necessitated because of religious, historical and other local causes. It would, therefore, be more accurate to say that the Swiss Confederation consists of twenty-five Cantons, each with its own Constitution, its own citizenship, its own laws, customs, traditions, history and habits of thought.

**Switzerland is really a Federation.** Switzerland is really a federation, though Article I of the Constitution describes it as the Swiss Confederation. But it is a misnomer to designate it a confederation, in spite of the constitutional use of the term. A Confederation implies a loose league of States without a strong Central Government and it has chances of dissolution. The Swiss Confederation, on the other hand, came into being, as the Preamble of the Constitution says, to strengthen the alliance of the confederates, and to maintain and further "the unity, strength and honour of the Swiss nation." The Preamble further adds that in order to achieve the solidarity of the Swiss nation a "Federal Constitution" has been adopted. Even if it be accepted that the Preamble has no juristic meaning, it, no doubt, clarifies the intention of the framers of the Constitution and the express will of the people and the Cantons who adopted it at a referendum. The Cantons of Switzerland, in fact, agreed to modify, like

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1. Some of the French-speaking citizens of the Bernese Jura wish to be separated from the German-speaking Bernese of the rest of the Canton. A cantonal initiative for the division of the Berne was rejected in July 1959. But the demand for separation is still there.

2. There had been a demand for the unity of Basle. A Constitutional Commission, consisting of representatives of the two Cantons, met on November 28, 1960 for drafting a new unified Constitution.

3. The constitutional position of the half-Canton becomes clear vide Article 123 of the Constitution. It specifies: "To reckon the majority of States the vote of a half-Canton is counted as a half vote."



the original 13 States of the United States, their erstwhile sovereignty in such a way as to grant adequate authority for national purposes to the Central Government of the Confederation. The powers of the Central Government are epitomised in the objects of the Confederation. Article 2 of the Constitution reads, "The aim of the Confederation is to preserve the outward independence of the fatherland, to maintain internal peace and order, to protect the freedom and the rights of the Confederates and to promote their common prosperity. The authority of the Central Government, accordingly, extends over all matters in respect of foreign affairs, questions of peace and war, conclusion of alliances and treaties, management and control of currency, communications, commerce, weights and measures, naturalisation and expatriation, higher education, conservation of natural resources and all other fiscal matters concerning the prosperity of Switzerland.

Here is a parallelism between the Constitution of Switzerland and that of the United States. The Swiss Constitution expressly declares that the Cantons are "sovereign in so far as their sovereignty is not limited by the Federal Constitution, and as such, they exercise all rights which are not transferred to the Federal power." The Constitution of the United States ordains that "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively or to the people." In each instance the constituent units have transferred specific powers to the Federal Government and reserved all residual powers to themselves. In both instances, in any case of conflict, over which authority has been transferred to the Central Government, the federal authority is supreme, and in case of conflict between the two it is the will of the Federal Government that prevails. That is the spirit of union which aims to give prestige and strength to the national government. If the constituent units are to toy with it, federalism in its essence disappears.

There are, however, two major differences between the American and the Swiss systems. In the first place, the Constitution, both in Switzerland and in the United States, is supreme, but the means of protecting that supremacy in Switzerland are juridically imperfect. Switzerland does not have any judicial review of the constitutionality of federal legislation. Her legislative branch is supreme: its own interpretation of its constitutional powers is binding and final. Secondly, in the United States the federal administration is usually in a position to administer its laws. In Switzerland the obligation to carry out federal legislation frequently devolves upon the Cantonal governments. It has no organization of its own and possesses scanty means to have its laws enforced. All depends upon the goodwill and co-operation of the Cantonal governments. Of course, it goes to their credit that they have never left the national government to hold the baby.

In the course of time, however, the growth of federal power became more and more pronounced. As the need for national unity increased and as problems calling for governmental regulation or assistance emerg-

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4. Article 3.

5. Tenth Amendment.

ed, they overstepped Cantonal boundaries and assumed nation-wide importance. Among these were military training, banking, patents, transportation, traffic in arms and alcoholic beverages, production and marketing of grains and railroads and radios both of which were nationalised. Agriculture, manufacturing, and the tourist traffic were subsidised, industry was protected, import quotas were fixed, unemployment relief and compulsory insurance were initiated. When the Federal Government took to direct and excise duties, it offered Cantons share in the new revenues which hitherto were the exclusive monopoly of the Cantons.

Four important factors have contributed to the process of centralisation; war, economic depression, the demand for ever-increasing social services, and the mechanical and technological revolution in transport and industry. These factors are not peculiar to Switzerland. They are as much in the Swiss as in other federations. But the fact that Switzerland remains surrounded by three powerful neighbours, viz., France, Italy and Germany, accelerated the pace of centralisation. In 1914 and especially in 1939 the Federal Assembly granted the government exceptional and unlimited powers to protect the security, integrity and neutrality of the country, and to safeguard its credit, economic interests and food supply. These plenary powers involved restrictions on the liberties and the rights of the Swiss to a staggering extent but the people readily accepted them as necessary for preserving their independence and sovereignty. Both pro-Nazi and Communist organisations were suppressed. In August 1935, Professor Prozig of the Berne University was dismissed, because he had taken, as a leader of the Swiss National Socialist Party, oath of allegiance to Hitler. In October 1936 the Federal Council suppressed by law an **irredentistic movement in Ticino**, the Italian-speaking Canton. Likewise, the activities of the Communist Party were banned in the country and in 1935, Communist propaganda was prohibited by law. The extent of Swiss nationalism can be examined from the fact that in April 1937, the Canton of Neuchatel decided by a plebiscite, and for the first time in Switzerland's history, to suppress Communist organisations "for their super, and anti-national activities."<sup>6</sup> After the army had been transferred to the Central Government, civil and criminal law became federal instead of cantonal. The motto "one law and one army" was an endeavour to strengthen the cohesion of Switzerland.

**Federal status of the Cantons.** These developments in the extension of the powers of the Federal Government have been viewed by many writers as alarming. When the War emergency was over or the country had been freed from the economic depression, it was expected that the range of federal action would decrease. But it has not happened so. Swiss economic life continues to be strictly controlled in its various aspects and with it there is a corresponding growth of the federal bureaucracy and consequently a grumbling about its expense. "The danger of this tendency," says Andre, "is that to the extent they suffer the encroachments of the central power the Cantons will gradually cease to be sove-

6. As quoted in Ramesh Chandra Ghosh's *The Government of the Swiss Republic* (1953), p. 43. Geneva banned the Communist Party on 13th June 1937. Vaud did the same by plebiscite on January 30, 1938 by 34,603 votes against 12,700 votes. *Ibid.*, fn.

reign States at all and become simple district administrations carrying out the behests of the Central authority." This is, however, an exaggerated view. The spirit of the Swiss Confederation, since its inception and particularly since 1848 when it became a really federal State, has always been to ensure and protect the autonomy of the Cantons, and to preserve their individual and separate entity. The Cantons remain the more genuine and more living democracies and the federative structure of the State, as Hans Huber says, "comes to complete both the idea of freedom and the idea of democracy."

The Cantons are the constituent and pre-existing members of the federal State. In fact, the federal State was formed to unite and protect its constituent members. The powers of the Cantons are original and they exercise all rights which are not delegated to the Federal Government.

Although the 'sovereignty' of the Cantons has steadily diminished in favour of the Confederation, nonetheless it is from the Cantons that the Confederation draws its authority and derives its constitutional usages. The Cantons are the original parts of the federal system of government and they retain their essential prerogatives. Maintenance of internal peace and security is their concern. Construction of public works and highways, provision for a system of public education, care of the social dependents, control of elections and local government are all their responsibility. It is only by being a citizen of a Canton that one acquires the citizenship of Switzerland and Cantonal laws still determine many of the citizen's civil rights. Many affairs of the Central Government are managed by Cantonal governments. Civil and criminal laws, federal subjects, are administered by the Courts which are exclusively cantonal. The federal government simply makes military regulations and appoints superior officers, but enforcement of those regulations, raising of certain contingents for the national army and provision of the personal equipment of each soldier, are the concern of the Cantons. The Federal Tribunal has no officers of its own. It depends upon Cantonal governments for the execution of its judgments.

To sum up, the Swiss Constitution expressly recognises the juridical personality of the Cantons in the composition of all federal organs. The Council of States represents the Cantons on the basis of equality and corresponds to the American Senate. The National Council represents the people in proportion to the number of electors in each Canton with the proviso that each Canton, no matter how small, shall have at least one deputy. The personality of the Cantons is also recognised in the process of amending the Federal Constitution. No change in the constitutions can be considered legally adopted unless it is approved by a majority of votes of the citizens and also by a majority of the Cantons.

**A comparatively longer document.** The Swiss Constitution is rather a lengthy document, much longer than the Constitution of the United States on which it is generally modelled. It goes into a good many details dealing with matters as fishing and hunting, qualifications of the members of the liberal professions, sickness and burial of the indigent, cattle diseases, gambling houses, and lotteries. All these matters in reality be-

long to the sphere of ordinary rather than to that of constitutional legislation. Behind this plethora of details was perhaps the desire for sharp division of authority between the Cantons and the Federal Government.

**Spirit of Republicanism.** All through the Swiss Constitution there is in evidence a strong spirit of republicanism. This is, in fact, the very breath of the Swiss way of life. Article 6 of the Constitution requires the Confederation to guarantee the Canonical Constitutions, provided that the latter ensure the exercise of political rights according to republican (representative or democratic) forms. The meaning of this provision becomes more clear when it is read along with Article 4. It says, "All Swiss citizens are equal before the law. In Switzerland, there shall be no subjects, nor privileges of place, birth, person or family." This provision, according to Christopher Hughes, "is now a rule of law and incontestably the most active rule of law of the whole Constitution." The founders of modern Switzerland were animated "by the desire to emancipate the individual from the shackles of the aristocratic, mercantilistic and clerical traditions which had for centuries limited" the individual's freedom. They, accordingly, abolished all aristocratic and oligarchic privileges and guaranteed to the Swiss people equality before law. Every Swiss who has reached the age of twenty years and who is not excluded from the rights of active citizenship, has the rights to determine his government, and the acceptance of the Constitution by the majority of the people, and its amendment at any time on popular demand.

There are, thus, in Switzerland no subjects, nor any privileges of rank, birth, person or family. All political institutions of the country—federal, cantonal and communal—are elective in character, and the direct participation of the people in the affairs of government, and for making changes in the Constitution are the basic principles of the nation's political practices. The principle of republicanism and direct sovereignty of the nation is, indeed, the bulwark of Swiss democracy and the people have accepted it in a religious spirit.

**Does not contain a Bill of Rights.** The Swiss Constitution contains no formal Bill of Rights. Nevertheless a score or more articles scattered throughout the document guarantee the right of conscience and creed, liberty of the press, the right to form associations, the right to petition, the right to property and equality before the law. The intention of the framers of the Constitution was probably to confine the expression "the constitutional rights of citizens" in the narrower sense and to include only freedom-rights, i.e., equality, freedom of trade, religion, and association. But, as Hughes observes, "of the pack of constitutional rights, Equality before the Law is the Joker"<sup>10</sup> and the Federal Tribunal has interpreted Article 4 so as to cover the political rights as well as the freedom rights.<sup>11</sup> It also covers the political and freedom rights guaranteed either expressly

7. *The Federal Constitution of Switzerland* (1954), pp. 6-7.

8. Rappard, D.E., *The Government of Switzerland*, op. cit., pp. 198-99.

9. Article 113, Clause 3, "The Federal Tribunal takes cognisance also of appeals against violation of constitutional rights of citizens...."

10. *The Federal Constitution of Switzerland*, op. cit., p. 7.

11. *Ibid.*, p. 123.



or implicitly in the Cantonal Constitutions.<sup>12</sup> This protection of the citizen, according to Hans Huber, "is in no wise inferior to that guaranteed by the American Constitution with its clauses of Due Process of Law and equal Protection of the Law."

**Provisions relating to Religion.** To safeguard against all possibilities of religious conflicts which for long had distracted Switzerland, the constitution suggests various provisions. Freedom of belief and free exercise of worship within the limits of morality and public order are guaranteed throughout every Canton. No person can be compelled to become a member of any religious society, or take part in any religious act, or to submit to any religious instruction. Nor can his civil or political rights be abridged by any ecclesiastical or religious provisions. At the same time, no person can refuse to fulfil, on the ground of the religious opinion, any obligation which citizenship of Switzerland may demand. Moreover, no person can be compelled to pay taxes the proceeds of which go to finance a religious body to which he does not belong. No bishopric can be created within the Swiss territory without the consent of the Federal Government. Ecclesiastical jurisdiction has been abolished; burial places belong to civil authorities; the right of marriage cannot be limited either on religious or economic grounds. The order of Jesuits and the societies affiliated to it are prohibited to exist. The Federal Government can extend this prohibition to other religious orders whose activities may be deemed to endanger the existence of the State or disturb the peace between different religions. The founding of new religious houses or religious orders, and the re-establishment of those which have been suppressed is forbidden.

**Democracy and Switzerland are almost synonymous.** "Among the modern democracies," writes James Bryce in the opening Chapter on the Government of Switzerland, "which are true democracies, Switzerland has the highest claim to be studied. It is the oldest, for it contains communities in which popular government dates further back than it does anywhere else in the world; and it has pushed democratic doctrines further, and worked them out more consistently than any other European States."<sup>13</sup> The principle of Swiss democracy "is in fact, to be communal before being cantonal, and to be cantonal before being federal." The basis of political authority is that of local autonomy and the popular will is formed from the bottom upward. Switzerland is a land of small communities, rural and urban, and commune was from the earliest times a potent factor in accustoming the people to control their own affairs. It is still the political unit of the nation and the focus of its public life. It is a means of educating citizens in public affairs and instilling in them the sense of civil duty. Both the commune and the Canton appear to them the living realities of a direct or quasi-direct consultation of the people in all matters which concern their immediate administrative problems.

This democratic sense runs all through the federal Constitution and

12. The Federal Tribunal considers that certain rights are necessarily by implication guaranteed by a *Cantonal Constitution*, even if it is silent on the point.

13. *Modern Democracies*, Vol. I, 367.



it may be safely said that Switzerland and democracy have now become almost synonymous. In spite of the tendency towards centralization, the introduction of the constitutional initiative in 1891, proportional representation for the election of the National Council in 1919, and of the optional referendum on international treaties in 1921 sufficiently prove that the democratic purpose of the people which had created the present Swiss Republic in 1848, still remains intact. The Forty-seventh Amendment of September 11, 1949 was in favour of a "Return to Democracy" and it is now no longer possible for the Federal Government to levy direct federal taxes. Neither can the Federal Assembly issue an emergency decree for more than one year without the approval of the people. Rapard has correctly maintained that "The forms of democracy have undoubtedly undergone a change under the impact of irresistible economic influences, but the spirit has remained the same."

In spite of this democratic sense Switzerland can be described as one of the least democratic systems. This contradiction arises from the fact that Switzerland refuses her women the right to vote on national affairs and on most local questions. The old prejudices still continue and Switzerland is the only important nation in Europe and one of the few remaining in the world, that does not place at par her womanhood with men in the enjoyment of political rights and this is a negation of the basic principle of democracy, which accepts man as a man on a footing of equality.

**Instruments of Direct Democracy.** The Swiss faith in democracy as a political principle is most characteristically revealed in the people's extensive use of the instruments of direct popular government. The most ancient of these is **Landsgemeinde** or open town meetings in which every male adult can speak, make his own laws and elect offices. This over five hundred years old tradition of government still obtains in the five **Landsgemeinde** Cantons, Glarus, Appenzell Outer Rhodes, Appenzell Inner Rhodes, Obwalden and Nidwalden. In all other Cantons a representative republican form of government exists where a frequent use is made of the modern instruments of direct democracy, namely, the popular referendum and the popular initiative. The use of these instruments is also made for matters affecting the Confederation.

**Liberalism.** Still another principle of the Swiss Constitution is its liberalism. The authors of the Constitution were profoundly influenced by the liberal philosophy of the nineteenth century and the constitutional phraseology used by them stresses the impact of that philosophy at every point. The Constitution aimed to emancipate the individual from all guiding and restraining influences of the Church and of all other paternalistic agencies. All political privileges have been done with. The freedom of petition, of belief, of speech, of the press, of assembly, equality before the law, etc., have been guaranteed. Economic liberty of the individual has been fully secured. The Constitution also recognises the duty of the State to provide free and compulsory instruction and public schools have, accordingly, been kept open to the adherents of all religious faiths. It is further provided that instruction in public schools should be

managed in such a way as not to infringe upon anyone's liberty of conscience or belief.

**A Dynamic Constitution.** All the same, the Constitution is a living document and it presents a singular example of adaptability within the extent of a written Constitution. The Constitution has been so amended from time to time as to represent the popular aspirations consistent with the exigencies of time. The policy of nationalisation and the advancement of various State projects are clear indications of the country's drift towards the welfare State. In fact the emphasis in Switzerland, immediately after the Constitution of 1874 came into operation, had been on the protection of the individual rather than on the will to emancipate him. He has, thus, been protected against industrial exploitation by labour legislation in 1877, 1908 and 1920, against epidemics and other dangers to his health by various sanitary measures in 1897, 1905 and 1913 as well as against himself by the sundry terms of temperance and anti-alcoholic legislation in 1885, 1908 and 1930 and by anti-gambling measure in 1920.

But the great change was necessitated by the economic depression of 1930 when the workers, the farmers, and the middle-class all demanded State intervention to extricate them from the baneful results of their economic frustration, and to introduce schemes for their economic security. In order to protect her political independence and to save the country from the subversive elements either from the Right or the Left, and to safeguard her traditional neutrality during the two World Wars some restrictions were imposed on the liberty of speech and association of the citizens. The Swiss people have, however, always shown their love of personal liberty and whenever the government has unduly interfered with it, they have consistently rejected at the polls even the most reasonable protective measures. In 1884, 1896, 1903, 1922, 1923, 1929, 1935, 1937, 1939 referenda on Bills intended to protect the community at the expense of the freedom of the individual gave expression to the liberal attitude of the people and the way in which they protected their most cherished liberties.

**Federal Executive.** The Constitution vests the executive power in the Federal Council composed of seven members and elected by the Federal Assembly for four years. There is no single man in Switzerland who can be said to occupy the august office of the chief executive head of the State. The executive power is entrusted to a Council instead of to a man. The officer, whose title is the 'President of the Confederation,' is just one out of the seven who make the Federal Council and is elected by the Federal Assembly for a single year. The office of the President passes by rotation among the members of the Council and he is, therefore, just one like them. He is in no sense the chief of administration, has no more power than his other colleagues in the Council, and is in no way more responsible than others for the conduct of the government. He is simply the Chairman of the Executive Committee of the nation and, as such, performs certain ceremonial duties of a titular head of the State. The executive in Switzerland is, thus, a collegium fulfilling simultaneously the functions of a government and of a chief of the State.

**Federal Legislature.** The federal legislature is bicameral. The Council of States represents the Cantons and corresponds to the American Senate. The National Council is a representative Chamber of the people. The mode of election and the terms of office of the representatives vary from Canton to Canton. The two Chambers are co-ordinate in all respects and their equality of powers induces Dr. Strong to maintain that the "Swiss legislature, like the Swiss executive, is unique. It is the only legislature in the world the functions of whose Upper House are in no way differentiated from the Lower."

Two important features of the Swiss legislature may, however, be noted. First, the framers of the Constitution did not pay much attention to the doctrine of the Separation of Powers, and, accordingly, vested the Federal Assembly with all kinds of authority, legislative, executive, judicial and constituent. Second legislation in Switzerland requires the final verdict of the people through the instrument of the referendum. The people can also initiate legislation.

**Federal Judiciary.** The Constitution provides for a Federal Tribunal and although it is very often described as a Supreme Court of Switzerland, yet it hardly possesses powers which can entitle it to be so. It is not, like the Supreme Court of the United States, the custodian of the Constitution, for it cannot declare invalid legislation passed by the Federal Assembly or the Cantonal legislatures or any executive action. The Constitution expressly assigns to the Federal Assembly itself the power of interpreting the Constitution. It can, however, annul any law passed by the Cantons which is held to violate the provisions of the Constitution. Second, the Federal Tribunal stands alone instead of being at the head of a great national judicial system. The Federal Tribunal, accordingly, does not possess the exalted dignity of a Federal Court.

**A Rigid Constitution.** The Swiss Constitution is rigid and the procedure adopted to amend it is complicated. But it is by no means so difficult to put it in practice as in the United States. The method of revision is precisely stated in Chapter III of the Constitution of 1874, as amended on July 5, 1891. The revision of the Constitution may mean either a total revision or a partial revision. The former refers to the substitution of a new Constitution for the old one and the latter is only in relation to a specific provision of the Constitution.

The Swiss Constitution introduces the instruments of Constitutional Referendum and the Constitutional Initiative in the process of amending the Constitution. The Constitutional Referendum implies submission to popular vote all constitutional amendments for their final approval or disapproval. There are two aspects of popular vote. One is that all constitutional amendments must be ratified by a majority of the Swiss citizens, and by a majority of the Cantons. If the necessary majority cannot be obtained at both the levels, then, the amendment cannot become operative. Secondly, the constitutional initiative empowers the people themselves to propose either a total or partial revision of the Constitution.

## AMENDING THE CONSTITUTION

The proposed revision of the Constitution may be partial or total.

But all changes in the Constitution must be approved at a national referendum by a majority of the votes cast and by a majority of the Cantons. Referenda can be initiated by the federal legislature or by the people through a petition. The procedure provided for amending the Constitution is as follows:—

(1) As said above, Constitutional amendments may be total or partial. The legislature may initiate either type by the ordinary process of legislative action. The Federal Council may draw up a proposal which is then submitted to the two Houses, the Council of States and the National Council, for independent deliberation or one of the two Houses may start the process. If both the Houses agree it is submitted to the people on the next convenient date. If a majority of the citizens voting at a referendum, and majority of the Cantons approve it, then the revision is deemed to have been adopted. In determining the will of the Cantons, each Canton possesses one vote and each half Canton half a vote.

(2) If, however, only one House of the Federal Legislature agrees to the proposed revision and the other does not agree, then:

(i) it becomes first necessary to decide whether the proposed revision is necessary or not. This is decided by the people at a referendum;

(ii) if the people approve the proposed revision by a majority vote, new elections to the Federal Assembly are held. Approval of the Cantons here is not required;

(iii) after the elections have been held, the newly elected Council of States and the National Council proceed to consider the proposed revision;

(iv) if both the Houses of the Assembly approve it which is a foregone conclusion, the revision is submitted to the referendum of the people and the Cantons;

(v) if passed by a majority of the people voting as also by a majority of the Cantons, the revision comes into force.

**Constitutional Initiative.** A complete revision of the Constitution or specific amendments thereto may also be made by popular initiative, that is, on a petition of at least 50,000 Swiss citizens. If a complete revision is required, the subsequent procedure remains the same when one House of the Federal Assembly agrees to the revision and the other opposes it, i.e.,

(i) the question whether there should be a revision of the Constitution or not is referred to the people for their verdict;

(ii) if a majority of the citizens voting at a referendum are in its favour, then, fresh elections to the Federal Assembly are held;

(iii) the newly elected Assembly drafts the new Constitution and if it is approved;

(iv) it is submitted to a referendum of the people and the Cantons;

(v) if passed by a majority of the people voting as also by a majority of the Cantons, the revised Constitution comes into force.

When the popular petition proposes only a partial revision, the procedure, thereafter, depends upon whether the amendment has been formulated in specific or merely in general terms. A demand in general terms for revision is just an indication of a desire by at least 50,000 citizens urging the need of a particular amendment. A specific demand, on the other hand, is in the form of a Bill complete in all details.

When the demand for amendment is in general terms, the Federal Assembly, if it agrees to such an amendment proceeds at once to draw up the amendment in accordance with the wishes of the people proposing it. Then, it is submitted to the vote of the people and the Cantons. If it is not approved by the Federal Assembly the Federal Council is required to submit the question whether there shall be a partial revision or not to the vote of the people. If the majority of the citizens vote in favour of the revision, the Federal Assembly shall draft the proposed amendment in accordance with the initiative and, then, submit it to a regular referendum of the people and the Cantons.

When the proposal for a partial revision is in the form of a complete Bill, the Federal Assembly after giving its approval must submit it to a referendum of the people and the Cantons. If the Federal Assembly does not approve the Bill, it may recommend its rejection at a referendum of the people, or frame its own counter proposal and submit the same along with the proposal for revision as initiated to the usual process of referendum. In both the cases the majority of the citizens voting and the majority of the Cantons are necessary.

To be clear, the whole procedure accepted for partial revision on the initiative of the people may be summarised as follows:

1. If the demand for partial revision is unformulated, i.e., it is couched in general terms, the Federal Assembly, if it approves it, frames the amendment and, then, submits it for the ratification of the people and the Cantons.

2. If the Federal Assembly does not approve the amendment, then,

- (i) the question whether there shall be a partial revision or not is submitted to the people for their decision. No reference need be made to the Cantons;

- (ii) if majority of the citizens voting favour the revision, the existing Federal Assembly, although it had already expressed its disapproval of the proposed revision, is required to draft the amendment in conformity to the popularly initiated proposal and submit it to a referendum of the people and the Cantons.

3. If it is a formulated proposal, the Federal Assembly is first required to approve it and, then, it is referred to a referendum of the people and the Cantons. If the Federal Assembly does not approve of the revision, it may recommend to a referendum:

- (i) that the proposed revision may be rejected, or

- (ii) may frame its own counter proposals and submit them along with the original popularly initiated proposal for the decision of the people and the Cantons.



**Estimate of the Method of Amendment.** There have been two proposals since 1874 for total revision: in 1880 when a partial revision by petition of 100,000 was not recognised and a project of Swiss Nazis, right-wing Catholics and others in 1935. Both were rejected. There is a fair possibility that the total revision of the Constitution may be attempted again. There seems to be a growing feeling in Switzerland that the Constitution should be entirely redrafted in order to eliminate the confusion that exists as a result of the numerous partial amendments (some of which have up to four additions) to eliminate certain articles that no longer have any real validity and in general to create a basic instrument more adapted to the times.<sup>15</sup> But a really poignant situation would arise if the decision for total revision were at any time accepted. It is difficult to see how under the stress of modern conditions the Assembly could neglect its own normal business for the long period necessary to work out the text of a new Constitution. It has accordingly been suggested that a separate Constituent Assembly be elected, if total revision was ever decided upon.

In general, constitutional amendments proposed by the legislature have been frequent and successful. In 112 years from 1848 to 1960, the legislature proposed seventy-six amendments of which fifty-one were accepted by the people and the Cantons. From 1874 to 1960, some forty-five initiatives were submitted, seven of which the people accepted. The legislature has used its power to submit counter proposals nine times and for six times these were accepted by the people. "There has been a steady increase in the use of the initiative although no corresponding increase in acceptances."<sup>16</sup>

But just a few of the partial revisions effected have altered the constitutive parts of the Constitution. The vast majority of them have extended the competence of the Central Government, particularly in restriction of the freedom of trade and industry. Other amendments impose upon the citizens the exacting standards of morality in matters of drink, gambling, etc. Amendments to constitutive parts of the Constitution include popular Constitutional Initiative 1891, Administrative Jurisdiction, and Delegation to Departments 1914, Proportional Representation 1918, Treaty Referendum 1921, altering the number of inhabitants per National Councillor 1931 and 1950, raising the term of office of National Councillor, and hence of Federal Councillor and Chancellor to four years in 1931, rules for declaring *arrête*, 'urgent' amending Article 89 in 1939 and 1949. Among the amendments which extend Federal competence may be particularly noted the Federal Civil and Penal Code Articles of 1898 and the Economic Articles of 1947.

The notable feature of the Swiss Constitution is its development through formal constitutional amendments alone. There is no growth

15. Cooding, G.A., *The Federal Government of Switzerland*, p. 61.

16. *Ibid.*

17. *Ibid.*, p. 63.

18. In Swiss practice there is a little difference in either form or substance between a law and an *arrête*. The major difference, in practice, is that *arrête* can, under certain circumstances, be exempt from legislative referendum.

through judicial decisions and precedents, because of the absence of the system of judicial review. The Federal Tribunal cannot declare *ultra vires* a law of the Federal Assembly. The Swiss theory is that the sovereign power should remain in the hands of the people or their representatives in the legislature. An initiative proposal to invest the Federal Tribunal with power to review legislation was rejected at a referendum in 1939. Hans Haber, who himself was a member of the Federal Tribunal, remarked that the Swiss people "saw in the general examination of constitutional law an infringement of democratic principles."

Another fact to be noted in this connection is that it is "easier to the Swiss people to amend their fundamental law than their ordinary statutes against the will of a hostile Parliament." This is due to the reason that the Swiss people have no power of initiative in the matter of ordinary legislation. They can on a petition of 30,000 citizens demand a referendum on any Federal Law or decree, but they can never "directly provoke the adoption, repeal or amendment of a Law by the Federal authorities." The proposals for constitutional amendments in Switzerland have been made by the people frequently.

## CIVIL RIGHTS

As mentioned above, the Constitution does not include a separate chapter on Bill of Rights, although it contains some two dozen scattered Articles dealing with the rights of the individuals. Not only are they defined as well as asserted, but in many cases corresponding duties of the individuals are also prescribed. All these rights are protected by the courts against infringement by any Cantonal authority. "This protection can include an appeal to the Federal Tribunal which is the highest court in the land. In practice such appeals are numerous," especially concerned with a violation of the general right of "equality before the law." Here is a summary of the rights of the Swiss citizen.

**Swiss citizenship.** Citizenship in Switzerland has threefold bases: communal, cantonal and federal. A person cannot be a Swiss citizen without being a citizen of a Canton and a person cannot be a cantonal citizen without being a citizen of a commune. The Constitution itself does not define Swiss citizenship. Article 43 simply provides that "Every citizen of a Canton is a Swiss citizen." Cantonal Constitutions provide that every citizen must also be a citizen of a commune, thus, establishing the threefold basis of citizenship. Switzerland does not recognise the principle of *jus soli*. According to the principle of *jus sanguinis* a child whose father is a Swiss citizen becomes a Swiss citizen and a citizen of his father's commune and Canton. A woman who marries a Swiss from another commune becomes a citizen of her husband's commune. Swiss citizenship is inalienable and the Constitution provides that the government cannot expel a Swiss citizen from the country, except under a few rules.

**Freedom of Movement.** In general every Swiss national has the

19. *How Switzerland is Governed*, p. 10.

20. Rappard, W.E., *The Government of Switzerland*, *op. cit.*, p. 60.

...the Swiss are ... in ques- may be ... grave mis- and ... to whom the commune of origin or Canton ... after having been officially requested to ... the Canton of origin is permitted to ref ...

### Equality before the Law.

... **ank, birth, person, or family."** Article ...

### The Constitution also provides that

... **and during active military service.**

### Freedom of Press, Association and Petition.

The freedom of press ...

The Swiss are also guaranteed the freedom of association and petition. The freedom of association embraces the formation of organized groups for religious, social, economic and political purposes and includes the right to assembly. But this right is subject to the provision that

21. *Constitution of the Swiss Confederation*, p. 50.

neither the purpose of such associations nor the means it employs are in any way "unlawful or dangerous to the State." Then, there is the right to petition. This right, however, does not carry much practical utility now as a result of the adoption of Constitutional initiative.

**Freedom of Religion.** Freedom to religion is guaranteed by Article 49 which reads "Liberty of conscience and belief is inviolable." Article 50 States, "The free exercise of forms of worship is guaranteed within the limits compatible with public order and decency." No person can be compelled to become a member of any religious body, to submit to any religious instruction, to perform any religious act, or to incur any punishment of any sort by reason of religious opinion. No person can be compelled to pay taxes the proceeds of which are devoted specifically to pay the expenses of the rituals of any religious community of which he is not a member. Finally, the exercise of civil or political rights cannot be limited by religious or ecclesiastical requirements or conditions of any nature.

## CHAPTER III

# THE CANTONAL AND LOCAL GOVERNMENT

**The Communes and the Cantons.** The principle of Swiss democracy, as said before, is "to be communal before being cantonal, and to be cantonal before being federal." Switzerland is a union of highly developed autonomous communities within the federal State, and in the political life of the Swiss citizen the Canton looms larger than the federal State. The commune is essentially the initial cell of Swiss democracy, it is the first basis of the administrative fabric, and a place which educates citizens in public affairs and instils in them a sense of civic duty. Then, come the Cantons, constituents of the Confederation.

"In the eyes of the citizen," write Andre Siegfried, "the Canton is the living reality much more so than the Confederation which may well appear to him as little more than a cold administrative mechanism. Each citizen feels himself a Swiss as a matter of course, but before being Swiss he is a native of Zurich or Glarus or Valais." He is the citizen of a Canton before being a Swiss citizen. Although, the present trend towards the nationalisation of political power and political loyalty have reduced their historic individuality and cantonal feeling is slowly diminishing, yet the Constitution still recognises their sovereignty in so far as it "is not limited by the Federal Constitution and, as such, they exercise all rights which are not transferred to the General power." Cantons are still in fact the real centres of the political life of the nation. "It is to his Canton and to his city or village," writes Rappard, that a Swiss citizen "pays most of his direct taxes. It is to vote for and against cantonal and communal measures, for or against candidates to cantonal or communal office, that he is most frequently called to the polls. It was, until a generation ago, exclusively, and it still is mainly, on cantonal issues that political parties were and are formed and that many of the most important political battles are won and lost. Most constitutional changes were . . . wrought in the Cantons before they become ripe for consideration by the federal legislature." We, accordingly, give precedence to cantonal and communal political institutions before we actually consider those of the federal State. Really Swiss politics are only half understood without a knowledge of local institutions.

**Constitutional position of the Cantons.** The Cantons twenty-two in number—or rather twenty-five, for three are divided into half Cantons with their own separate governments—are very unequal in size and population. Their rights and powers correspond generally to those of the States in the American Union and the Australian Federal Common-

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1. Article 3.

2. *The Government of Switzerland, op. cit.*, p. 31.



wealth. Article 3 of the Swiss Constitution definitely specifies that residuary powers belong to the Cantons and that they are 'sovereign' within their sphere of competence. To the Federal Government are assigned specified powers. Each Canton possesses its own Constitution and its own machinery of government—executive, legislative and judicial organs, a fiscal system and a civil service. And the Cantons control all forms of local self-government.

The Constitutions of the twenty-five Cantons and half Cantons must comply with the provisions of the Federal Constitution. The Confederation guarantees the Cantonal Constitutions, provided that they: (a) do not contain anything contrary to the provisions of the Federal Constitution; (b) provide for the exercise of political rights in conformity with Republican representative or democratic forms of government; and (c) have been accepted by the people and may be amended on the demand of the absolute majority of the citizens. Within these limitations, the Cantons are free to construct their Constitutions and alter them as they please. In the beginning, the Cantonal Constitutions had been amended quite frequently and in some cases entailed a total revision. The net result of these amendments was that now all the Constitutions, more or less, prescribe identical political institutions, except the four half Cantons and one full Canton, five in all, where there is pure democracy.

**Two types of Cantons.** Cantons are of two types—those ruled by primary, and those ruled by representative assemblies. To the first category belong the five pure democracies of Obwalden, Nidwalden, Appenzell Interior, Appenzell Exterior and Glarus. The first two are half Cantons and they collectively make the Canton of Unterwalden. The third and the fourth, too, are half Cantons making together the Canton of Appenzell, Glarus is a full Canton. The origin of the curious institution of a half Canton usually goes back to the simple fact that internal dissensions could not be settled except by territorial division. Obwalden and Nidwalden dissolved their common **Landsgemeinde** as early as 1432. Appenzell fell apart in 1592 as an outcome of the Reformation, which resulted in a half-catholic, half-protestant Canton. The remaining nineteen Cantons are representative democracies.

**The Landsgemeinde.** The Canton of Glarus and the four half Cantons into which Appenzell and Unterwalden are divided still centre political authority in their over five hundred years old **Landsgemeinde** or annual assembly of all citizens which makes laws and elects officers, executive and administrative. In other words, the people directly exercise their superior power in an annual open air meeting, instead of through elected representatives.

The open air meeting, called a **Landsgemeinde**, is held annually on a Sunday morning in April or May in the public square of the capital city or in a nearby meadow. Attendance is compulsory for all adult male citizens, but in practice all do not attend. The meeting is presided over by the head of the Cantonal government in an atmosphere marked by solemnity, prayers, hymns and sometimes collective oaths. No turbulence and unusual activity or practice is ever in evidence. The proceedings are orderly and dignified and are usually witnessed by children from other parts of Switzerland.

The **Landsgemeinde** elects by show of hands the head of the government, members of the Executive Council, the Cantonal representatives in the Council of States, judges and officials. The tradition is to re-elect the incumbents so long as they wish. The meeting further approves the accounts, votes the budget, and other legislative Bills submitted to it. The **Landsgemeinde** has also the power to change the Cantonal Constitution.

The constitutional structure of a Canton consists of a Parliament, **Landrat** or a Cantonal Council, and an executive body, **Regierungsrat** or Council of State. The **Landrat** or the Cantonal Council is elected for a period of four years not by the **Landsgemeinde** but by separate electoral districts. This Cantonal Council is, in fact, a subsidiary legislature and attends to all the details that cannot be brought before the people in the open meeting, passes ordinances, votes the smaller appropriations, examines the accounts, and elects the minor officials. It also prepares the legislative work to be presented to the **Landsgemeinde**. This procedure is adopted obviously to prevent hasty and ill-considered action by the large public meeting. At one time the Cantonal Council tried to draw the whole control of legislative affairs into their own hands and no question could be brought in the **Landsgemeinde** without their approval. But after a good deal of struggle the people reasserted their right of private initiative. It is now the rule that one or more citizens can in some form propose any measure, provided notice had been given to the Cantonal authorities beforehand.

The **Regierungsrat**, or the Administrative Council, is usually composed of seven members elected by the **Landsgemeinde**. This is the Cantonal Executive Council and is presided over by the **Landamman** or the Head of the Government. The **Landamman** also presides over the **Landsgemeinde**.

## REPRESENTATIVE CANTONS

In all other Cantons representative Republican form of Government prevails.

**The Great Council.** The legislative power and the supervision of administration is vested in a unicameral representative assembly of the Canton, variously named, Great Council or Cantonal Council. All Cantonal legislatures are unicameral as a matter of tradition. As the instruments of initiative and referendum provide for popular control over legislation consequently no need is felt for the check provided by a second Chamber.

The membership of the Cantonal legislatures tends to be large in comparison with the size of the population it represents. In some Cantons the number is fixed by the Constitution. For example, the Constitution of Zurich calls for as many as 180 representatives. Generally speaking, the proportion between inhabitants and representatives varies ranging from 1 to 250 to 1 to 4,000. The term of office of the legislators also varies. In most Cantons, it is four years; in the remainder it is from one to six years. The general tendency, however, is towards longer terms, because they are reluctant to go in for elections so frequently. There must

be at least one annual session to pass the budget. In some Cantons the legislature may be dissolved by popular vote. But with the general introduction of referendum the necessity of dissolving the legislature does no longer exist. Legislators in the Cantons receive no fixed salaries, but only a nominal sum per *diem*.

The powers of the Cantonal legislature include control and supervision of administration; control over the annual budget, loans, and taxation; power to declare a state of emergency and to call up Cantonal troops if necessary; to grant amnesty and pardon; ratification of inter-Cantonal treaties; naturalisation; election of superior judges in most of the Cantons and of the members of Cantonal authorities dealing with education, church affairs and banking.

**Referendum and Initiative.** Every representative Canton provides for Constitutional Initiative and a compulsory Constitutional Referendum. That is to say, every Canton is required by the Federal Constitution to submit all changes in its Constitution for the acceptance or rejection by the people.<sup>3</sup> The Constitution can also be amended whenever the absolute majority of citizens demand it.<sup>4</sup> All Cantons go further and have the legislative referendum also, and an assortment of other devices, varying from Canton to Canton, such as budget referendum, or a compulsory legislative referendum for laws entailing expenditure beyond a certain limit. Initiative on ordinary legislation is permitted. The effect of the operation of these popular instruments is that the citizens are called to the polls from four to eight, or even more times a year, and each time they are required to vote on several issues.

**Cantonal Executive Power.** Each Canton is governed by a collegial executive body known as the **Government Council** in German-speaking Switzerland, and **Council of State** in the French part. The collegial system of executive is in harmony with the Swiss tradition and is a universal institution throughout Switzerland, both in the Cantons and the Federal Government. It is usually composed of five or seven members, but Berne and Appenzell and Interior Rhodes have nine and Nidwalden has eleven. The executive is a representative body of all the political parties in the Canton. Sometimes deliberate effort is made to give the parties proportional representation. Broadly speaking, the executive council is a "business board" with little political colour. The councillors are elected for a term from one to five years; in most Cantons the term is four years.

The Chairman of the Council, **Landamman**, is rarely elected for more than one year at a time, and is not immediately eligible for re-election. In some Cantons the Chairmen are elected by the Cantonal legislatures, in others by their colleagues, and in the rest by the people. They do not enjoy any special power or authority. They are just like others in the Council.

The Councillors are usually re-elected and the Swiss tradition is that good men ought to continue in office so long as their health and ambitions permit. Consequently, although their terms are short, it is often looked

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3. Article 6.

4. *Ibid.*

upon as a life job. Their work is, just like that of the Federal Councillors, divided into various departments and a councillor is usually the head of one department. They must appear and report to the State legislature on the Cantonal administration, take part in its debates, propose measures and draft when required by the legislature to do so. They also follow the federal example of not resigning even if the legislature does not support their plans.

In spite of the obvious subordination of the executive to the Cantonal legislature, it must be admitted that the position and the knowledge which the Councillors possess, secure for them great influence with the Great or Cantonal Council. It has the strength which experience acquires by permanence in office and, as such, the Executive Council supplies the chief impulse to the legislature.

### COMMUNES AND DISTRICTS

**The Communes.** There are now 3,118 Communes in Switzerland and they vary in size and population. They have the right of self-government within the limits prescribed by the Cantonal Constitutions and the statutory laws of the Cantons concerned. In matters assigned to them, for example, education, public health, poor relief, water supply, police, etc., they have complete autonomy and in their administration they possess the same structure as the Cantons. The general direction of local affairs, the decision of all matters connected thereto and the appointment of the principal officers of the Commune are vested in the assembly of all adult male citizens of the Commune. For the conduct of current business and for the execution of the communal laws, the assembly of all the people elects a Council. In most of the French parts of Switzerland and particularly in the large Communes, the assembly of the people does not transact business directly. On the other hand, they elect a Communal Council which transacts business on behalf of the assembly of the people. The French Communes, therefore, have two Councils: a large one which deals with questions of general policy and all matters of importance, second, a smaller executive body with the Mayor at its head and entrusted with the duty of the execution of communal laws. The decisions of the bigger Council, which may be called a municipal Parliament, are sometimes subject to referendum.

**The Districts.** The District is an intermediate division between the Canton and the Commune. But it does not constitute, except in a few places, a political community like the Commune. The District is merely an administrative unit. The chief district official is elected by the people and at some places he is assisted by a Council with advisory functions. The district official represents the Cantonal Government in the district and, with the assistance of his subordinates, carries out its orders, executes the laws and acts as a link between the Canton and the Commune.

Swiss local government presents some significant features unknown elsewhere. Every Swiss citizen must be a citizen of some commune before he can acquire the citizenship of a Canton and Switzerland. No foreigner can be naturalized in Switzerland who has not previously been declared acceptable as a member by a commune. Secondly, the home commune,

as it is called, is ultimately responsible for him and his family. "The Federal Constitution assumes that, in case of their absolute indigence, this Commune must support them, wherever they happen to be living, although it may of course oblige them to return to their political home."<sup>5</sup> Then, every Commune has an estate distinct from the one to which all residents contribute by taxation. The management of such an estate is reserved to the **members** of the Commune and not **residents** of the Commune. The law distinguishes between the local commune, in which every citizen has an equal right to vote and is liable to equal taxation after three months of residence, and the commune of origin or home commune.<sup>6</sup> Then, the more important municipalities undertake and perform many economic activities which may be characterised as a socialistic tendency. The growth of this kind of municipal socialism in Switzerland has now become an important characteristic of Swiss political life in general, though no Socialist party has marked a conspicuous place for itself in the country.

While summing up the nature and importance of local self-government in Switzerland, Lord Bryce maintained that the commune is not only the basis of the administrative fabric, "but also the training which the people have received from practice in it has been a chief cause of their success in working republican institutions. Nowhere in Europe has it been so fully left to the hands of the people. The Swiss themselves lay stress upon it, as a means of educating the citizens in public work, as instilling the sense of civic duty, and as enabling governmental action to be used for the benefit of the community without either sacrificing local initiative or working the action of the central authority too strong and too pervasive."<sup>7</sup>

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5. Rappard, W.E., *The Government of Switzerland*, p. 53.

6. *Ibid.*

7. *Modern Democracies*, Vol. I, p. 375.



## CHAPTER IV

# THE FRAME OF NATIONAL GOVERNMENT

### THE FEDERAL EXECUTIVE

**Organisation of the Executive.** The supreme directing and executive authority of the Confederation is exercised by a commission of seven men known as the **Bundesrat** or **Federal Council** located at Berne. This commission of seven men or Federal Council is chosen every four years by the Federal Assembly, that is, at the joint session of the National Council and the Council of States. One of the members of the Federal Council is annually elected by the Assembly to serve as its Chairman and is designated Federal President, while another is chosen as Vice-President.

The term of office of the Federal Council coincides with the tenure of the National Council. It is elected at the beginning of each National Council and is completely renewed after every general election. Vacancies arising within the normal period of four years are filled at the next meeting of the Assembly for the unexpired term of office. Although it is not required by the Constitution, the Federal Councillors are almost always chosen from among the members of the Assembly. When so chosen, they must resign their seats in the legislature. The Constitution, however, prescribes that "no more than one person from each Canton may be chosen for the Federal Council." Custom, on the other hand, insists one Councillor shall always come from Berne, another from Zurich and one from Vaud. This was, however, broken in the years from 1875 to 1881 and again from 1944 to 1947. The normal arrangement being that the Federal Council is composed of four German-speaking members, two from French-speaking part, and one member from Ticino, the Italian-speaking Canton. The wisdom of this distribution has been proved by long experience, because all the three language groups and both confessions are more or less fairly represented.

There have several times been proposals for direct election of the Federal Council by the people and there has twice been a referendum on the subject in 1900 and 1942. But it had been unsuccessful both times. Lowell thought that popular election of the Federal Councillors would intensify party rivalry extending its "influence over the whole range of policies, and produce a radical change in the character of public life." The national conventions which would come into existence for the nomination of the candidates, "would put an end to the low development of party which renders the permanent, business-like, non-partisan character of the Federal Council possible, which makes it possible for the Councillors to retain their places permanently even when their

policy does not prevail. The Councillors would become the standard-bearers of the different groups, and could hardly maintain the mediating attitude that has made their position unique among the governments of the world." The proposal for direct election has each time been made to secure representation on the Council for an excluded party or section of the country. It may, therefore, be said, as Hughes remarks, "that the threat of proposing a constitutional initiative for direct election is the section behind the custom of having all main parties represented on the Federal Council." This may be illustrated from the party representation in the Federal Council. In 1943 there were 3 Liberals, 2 Catholics, 1 Farmer and 1 Socialist. In 1951, 3 Radical Liberals, 2 Catholic Conservatives, 1 Social Democrat and 1 Peasant and Middle class were chosen. The nature of representations remains more or less similar.

**Federal Council not a Partisan Body.** The Federal Council, says Bryce, "stands outside party, is not chosen to do party work, does not determine party policy, yet is not wholly without some party colour." The Councillors are chosen neither from the parliamentary majority as in Britain, nor are they political leaders of different parties or groups, as in France, who coalesce to form the Government. They are a heterogeneous group of politicians belonging to four different parties who are chosen for their capacity as administrators. Speakers or tacticians are not needed in the Swiss executive. No matter how well-qualified on other accounts, no one can expect to be elected to the Federal Council unless which, above all others, the Swiss demand of those who hold public office—modesty. "In his previous Cantonal and national service, he must have left an image of a person dedicated to his work without thought of personal recognition. The office must seek the candidate, not the candidate the office." It is administrative skill, mental grasp, good sense, tact and temper, the sum total of the virtuous qualities, that recommend a candidate for selection. According to Dicey two ideas underlie the institutions of Switzerland. The first is, the universal acceptance of the sovereignty of the people, and the second is, that politics is a matter of business with the Swiss people.<sup>2</sup> It is this second idea which guides the nation in the selection of their administrators and get their affairs managed by men of capacity.

Moreover, the Federal Council is not an independent or co-ordinate branch of government. It is essentially a business body subordinate to the Federal Assembly. It is not expected to frame and control the policy of the government. Its duty consists in conducting the administration and giving advice on legislation. Policy belongs to the Federal Assembly and the Federal Councillors are there to carry out its behest. They are, indeed, the servants of the policy-framing and policy-initiating body and, accordingly, they cannot be partisans. All differences among themselves, though they are chosen from different parties, are ironed out by a spirit of compromise as public opinion in Switzerland expects every one

2. Lowell, A.L., *Government and Parties in Continental Europe*, Vol. II, p. 320.

3. *The Federal Government of Switzerland*, p. 108.

4. *Modern Democracies*, Vol. I, p. 394.

5. Dicey, *Law of the Constitution*, pp. 608-09.

to subordinate his own feelings to the public good. Lowell rightly remarks that the influence of the Federal Council depends to a great extent on the confidence in its impartiality, and hence its position is fortified by anything that tends to strengthen and perpetuate its non-partisan character.

**Lengthy Tenure of Federal Councillors.** The obvious result is that the Federal Council is unique in its stability. It is virtually a permanent body, though chosen afresh every four years. The old members are always re-elected as long as they care to serve. If the National Council is dissolved earlier than the end of its normal four-year term, the first business of the new Assembly is to elect the Federal Council and in practice it means re-electing the old members without any consideration of the change in the complexion of the National Council. The non-partisan character of the Council and the fact that the Councillors are irremovable from office further contribute to their lengthy tenure. The average period of service is more than ten years, but persons like Signor Giuseppe Motta, a Federal Councillor from Ticino, have held office from 1911 to 1940. Dr. Philippe Etter served for 23 years, Dr. Karl Koblet for 14 years, Dr. Max Petitpierre for 10 years and Dr. Rodolphe Rubattel for 8 years.

Two important reasons may be assigned for this lengthy tenure. One, of course, is that to the Swiss it seems as irrational for the State to lose a valuable administrator on account of a difference of opinion. Dicey likens the Swiss Federal Council to a Board of Directors of a joint-stock company, and adds that there is no more reason for altering its composition if it is doing its work efficiently in the general interest than there is to alter the membership of such a board under similar circumstances. Second, when a Councillor dies or resigns, the range of candidates for the place is quite limited, for, in practice, Councillors are almost invariably selected from the members of the Federal Assembly which is by no means a numerous body. Moreover, the Constitution ordains that no more than one member from a single Canton may be chosen, and by usage the Cantons of Berne, Zurich and Vaud must be represented. This limitation narrows the choice. Finally, the office itself does not carry a fabulous salary and other amenities are also meagre. The Federal Councillor now draws a salary of 110,000 francs per annum. It is certainly an improvement over what it was in 1848 and even 1951, but a large number of Federal Councillors remain men of the people. It is told of a Federal Councillor that when he was asked why he travelled third class, he replied, "Because there isn't a fourth." The Swiss people are frugal and simple in habits and they do not want public offices to become glamorous. Their call to a public office is duty and patriotic devotion. They let those continue in office who are dedicated.

**Organisation of Federal Administration.** The work of federal administration is divided into seven departments, equivalent to the num-

6. *Government and Parties in Continental Europe*, pp. 202-03.

7. Dr. Josef Escher succeeded Dr. Errico Celio in 1950 on his appointment as Swiss Minister in Rome. Herr Von Steiger and Herr Nobles retired because of their age and were succeeded by Dr. H. Feldmann and Prof. M. Weber on December 3, 1951.

8. Article 95.

ber of the Federal Councillors. The allocation of departments is made among themselves by mutual arrangement. Each Councillor presides over a department and as his tenure of office is pretty lengthy, he retains for practical reasons of convenience and economy, the same department continuously. The assignment is, however, nominally made afresh every year. At one time there was a complaint that actual changes in the allotment were too frequent. It is no longer the case now and the complaint is that changes are not made often enough.

Although the business of the Federal Council is divided into different departments and one of the members is at the head of each department, yet the Constitution ordains that "decisions shall be under the name and by the authority of the Federal Council." This provision gives to the Federal Council a corporate personality and makes it corporately responsible. It acts as a collegiate body and, thus, its decisions always come from the body as a whole. The Constitution further prescribes that the Federal Council "can only proceed to business when at least four members are present."<sup>9</sup> The Law of 1914 on the organization of Federal Administration also provides that the deliberations of the Federal Council shall be in private, that decisions shall normally be by count of hands, that there must be at least three votes, and a majority of the Councillors present, on the majority side, and that the President has a casting vote.<sup>10</sup> All this means that the **Federal Council** must meet at least once a week and its deliberations are secret. Four members of the Council constitute a quorum and decisions are taken on a majority basis, but all the decisions must be supported by at least three members.

There has been some criticism on the corporate responsibility of the Federal Council, and it has long been said that "there are seven Federal Councillors, but no Federal Council." It is true that members of four different parties can hardly hammer out a common policy. Then, the Councillors are not obliged to stand by each other, or even to pretend to hold out the same opinions and there have been occasions when members of the Council have argued against each other in Assembly, when sharply divided on policy. Decision, moreover, is by majority vote. But since the deliberations of the Federal Council are secret, and former Councillors are reluctant to recount their experiences, it is difficult to state definitely how much diversity of opinion ordinarily exists. It seems quite evident, however, that members of the Council do not carry their party principles too far. This is partly due to the Swiss habit of compromise and submission to the majority. But, as Hughes remarks, "the loneliness of the very high office and the greatness of responsibility can hardly fail to engender a corporate spirit; the essential element for obtaining genuine agreements—secrecy of discussion—is after all present."<sup>12</sup> The Councillors also know it that the final decision of all the most important questions rests with the Assembly, the sovereign body whose servants they all are. The most routine decisions in the ordi-

9. Article 103.

10. Article 100

11. Articles 4, 6 and 7 of the Law of 1914.

12. Hughes, C., *The Federal Constitution of Switzerland*, p. 116.

nary transaction of business are made by the Councillor competent in the matter and then placed before the Council for usual ratification.

**The President.** The officer whose constitutional title is the "President of the Confederation" is one of the seven Councillors and is nominated, as also the Vice-President, by the Federal Assembly for a period of one year. Swiss democracy insists upon the principle of rotation and the Constitution expressly provides that the retiring President cannot be elected either as President or as Vice-President for the following year, and the same member cannot be Vice-President for two consecutive years. Usage, however, requires that the Vice-President succeeds the President and the two offices rotate among the members of the Federal Council according to seniority. New Federal Councillors serve beneath all their seniors before filling the Presidency and those who have filled the office go to the bottom of the list. It means that the Councillor can become a President for more than one term though not consecutively. M. Grasspe Motta was five times President. Herr Müller was President in 1899, 1907 and 1913, and Dr. Philippe Lier in 1939, 1942, 1947 and 1953. Dr. Max Petipierre has run three terms.

Although the President of the Confederation holds an office of some dignity and enjoys some precedence over his colleagues, yet his precedence over the rest is merely a formal precedence. He is in no sense the chief executive. He is not even *primus inter pares*, as he becomes one like others after the expiry of a year. Nor is he the chief administrator as he has no more power than his colleagues and is no more responsible than other Councillors are for the governance of the country. All decisions emanate from the Federal Council as a single authority. The President is simply a Chairman of the Federal Council and presides over its meetings. As Chairman only, he exercises a casting vote and that, too, in case of a tie. Such official authority as he may exercise comes to him as a member of the Council and as head of one of the seven administrative departments. He gets a salary equal to each of his other colleagues, except an additional allowance of 5,000 francs for meeting entertainment costs for the year of his office. Switzerland has no palatial Government House for its President and he is not even provided with an official car. There is no grandeur and as the Presidency confers a more or less nominal honour, Swiss citizens are apt to forget who their President is "just now", although they are likely to know by name the majority of the members of the Federal Council.

If such are the powers and authority of the Swiss President, then, it is generally asked where is the need for such an office? The answer is simple. There are certain duties, such as receiving potentates and ministers of other countries, which are impossible for seven men to perform simultaneously. Besides, there are some ceremonial national duties which must necessarily be performed by some one. The functions of the

### 13. Article 98.

14. Under the Federal Arrete of 1959, the annual salary of a Federal Councillor is 65,000 francs. Those who are above 55 years of age are entitled to, after 10 years in office, a pension which varies between forty and sixty per cent of salary, according to their tenure of office.



President are laid down in the Law on the Organization of Federal Administration of 1914 and it gives him certain very limited emergency powers, general supervisory powers, and the responsibility for the Federal Chancellery. It, also, states that "the President represents the Confederation at home and abroad." Formerly by virtue of the system known as 'the Presidential Department,' the President of the Confederation was also head of the Foreign Office. But as the President changed annually the Foreign Department also circulated among the members of the Federal Council. The result was that there was no continuity of direction in the management of a branch of public business, which perhaps more than any other, requires permanence. Under the influence of Councillor Numar Droz the experiment of dissociating the Presidency from the Foreign Department was tried during the years 1887-94. It was again tried in 1915-17, and was permanently adopted in 1920. At present a Federal Councillor may well remain in the department to which he was first appointed until he retires, may it be a Foreign Department or any other Department.

**Functions of the Federal Council.** Article 95 of the Constitution designates the Federal Council as "the supreme executive and governing authority of the Confederation." As the supreme executive of Switzerland, the Federal Council is entrusted with most of the duties that its counterparts have in other countries. In Switzerland, however, much of the responsibility is shared with other organs of government. Article 102 contains a long list of the principal functions and duties of the Federal Council.

1. It conducts the affairs of the Confederation in accordance with federal laws and decrees.

2. The Federal Council must ensure due observance of the Constitution, the law and decrees of the Confederation, and Federal Treaties. For the observance of international treaties, the Federal Government does not appoint its own officers. They are, as a rule, executed by the Cantonal authorities. The Federal Council is empowered to intervene and take necessary action, either on its own initiative or in response to an appeal against a grievance, if the Cantonal governments do not co-operate in the proper execution of federal laws, decrees and international treaties, unless the appeal is of the type which should go to the Federal Tribunal as provided for in Article 113. In the classes of cases reserved for the Federal Tribunal, the Federal Council is entitled to take measures on its own initiative to secure the observance of the Constitution, "both to prevent the unlawful action and perhaps to remedy it, but without prejudice to an eventual appeal to the Tribunal."<sup>15</sup>

The Federal Council has exercised this authority with great tact and discretion by permitting elasticity in interpretation. Even where there is a sufficient cause of trouble with a Canton, its methods of compulsion and use of force are more consistent with the Gandhian technique. The subsidies given to the Cantons are withheld and troops are sent "who accomplish their mission without bloodshed; for they do not pillage, burn or kill, but peaceably quartered there at the expense of the Canton,

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15. Hughes, C., *The Federal Government of Switzerland*, p. 112.

and literally eat it into submission. This is certainly a novel way of enforcing obedience to the law, but with the frugal Swiss it is very effective."<sup>16</sup>

3. According to a constitutional provision the Cantons must have their Constitutions and alterations sanctioned ('guaranteed') by the Assembly. That is to say, the Federal Assembly has to pass an *arrete* granting or refusing the guarantee. It is the duty of the Federal Council to supervise the 'guarantee' of Cantonal Constitutions.<sup>17</sup> The guarantee is granted provided that the Cantonal Constitution contains nothing contrary to the provisions of the Federal Constitution; that the Cantonal institutions are representative or democratic; and that such political institutions have the consent of the people.

4. The Federal Council submits projects of laws and *arretes* to the Federal Assembly and gives its preliminary advice upon projects which the Councils or the Cantons may send up to it. The usual procedure is that the Federal Council submits a message or report accompanied by a draft embodying the action which the Federal Council wishes the Assembly to take. This draft forms the basis of discussion in the Commission of each Chamber of the Assembly. The Federal Council may thus initiate legislation and the Federal Assembly only amends it. Legislative measures may be initiated by the people or by the dominant party in the Assembly. At the instance of any member of the Assembly a resolution may be passed requesting the Federal Council "to address itself to the subject and prepare a Bill." It also frequently advises other Chamber of the Assembly or the Canton whenever asked to give advice on the form or substance of a measure. The Assembly receives the recommendations of the Council accompanying the draft law with respect and hesitates to enact it when the Council's report is unfavourable.

The legislative responsibilities of the Federal Council do not end here. As a general rule, a Councillor is assigned to guide the Bill all the way through the legislative process. The Bill is examined in the Committee in his presence and he gives his advice and comments. When it goes to either Chamber of the Federal Assembly, the Councillor is there to introduce the Bill, to explain its objects and purposes, and to defend it, if necessary. As Prof. Codding says, the Councillor in general acts "as its shepherd before the legislative wolves."<sup>18</sup> The result is, in the words of Professor Rappard, "one is forced to admit that the most responsible and influential work is that not of the so-called legislature, but of the executive."<sup>19</sup>

5. Deputies of both the Houses of the Federal Assembly are given the right of interpellation. It is the duty of a member of the Federal Council to reply either immediately or at a later session. After the reply has been made, the deputy who initiated the interpellation is given the opportunity to declare whether he was satisfied or not with the reply. If

16. Lowell, A.L., *Government and Parties in Continental Europe*, Vol. II, p. 197.

17. Article 102, Section 3.

18. Codding, G.A., *The Federal Government of Switzerland*, p. 93.

19. Rappard, W.E., *The Government of Switzerland*, p. 84.

he is not satisfied, he can have recourse to motion or postulate. If the motion passes, the Council need not resign. Since 1946, the National Council has also made use of the "question hour." A Deputy may question members of the Federal Council on any subject concerning the federal administration.

6. As a result of the growing legislation and increasingly complex nature of governmental activities the Federal Assembly delegates to the Federal Council a great deal of discretion in the administration of federal law. The Federal Council issues rules and regulations thereto which have the force of laws. Such rules and regulations are subject to the legislative referendum. There has been a steady increase in the power of issuing ordinances even in normal times. In times of emergency, the ordinance legislative power practically replaced normal legislation. It has become a custom at such times for the Federal Assembly to grant the Federal Council "full powers" to issue any ordinances it sees fit for the protection of Switzerland's neutrality and economic stability. In 1914 and 1939 the Federal Assembly conferred powers on the Federal Council which even permitted it to deviate from the Constitution.

7. The Federal Council examines the laws and ordinances of the Cantons that are required to be submitted for its approval. It also supervises the branches of Cantonal administration where such supervision is incumbent upon it.

8. It looks into the execution of judgments of the Federal Tribunal and of agreements and arbitration awards upon disputes between Cantons. The execution of the decisions of the courts and of many provisions of the Constitution, and of much federal legislation is left to the Cantons. If the Cantons fail to carry out these obligations, then, in the last resort the appeal is made to the Federal Council.

9. All federal appointments, except those entrusted to the Federal Assembly, the Federal Tribunal, or any other authority, are made by the Federal Council. The Federal Council in practice delegates its rights of appointment in very many cases to the various branches of administration and other independent authorities, like a Broadcasting Corporation.

10. It examines the treaties which the Cantons make with each other or with foreign countries and sanctions them if it thinks fit, otherwise the Federal Council lodges an appeal with the Federal Assembly for annulling the same.<sup>20</sup>

11. The Federal Council conducts the foreign relations of Switzerland, safeguards the external interests of the Confederation, ensures the external safety of the country, and maintenance of her independence and her neutrality. The Federal Council also negotiates treaties and ratifies them after approval of the Federal Assembly.

12. It looks after the internal security of the Confederation, and the maintenance of peace and order. Actually the maintenance of internal peace and order is the concern of the Cantonal governments. If internal order breaks down, then only federal intervention takes place.

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20. Article 85, Section 5.

The Federal Assembly determines the measures to be taken<sup>21</sup> and the Federal Council looks after them. "What is presumably meant is that the Federal Council asks for an *arrete*, which the Federal Assembly passes and the Federal Council carries out."

13. In the case of emergency, when the Federal Assembly is not in session, the Federal Council is empowered to call out troops and employ them as it may think fit. But it must convene a session of the Assembly immediately, if the number of troops called out exceeds two thousand men or if they remain mobilised for more than three weeks.

14. The Federal Council has charge of the Federal Army and all branches of administration thereof which are vested in the Confederation.

15. It administers the Federal finances and prepares the budget and submits accounts of federal receipts and expenditure.

16. The Federal Council supervises the official conduct of all officers and employees of the Federal administration.

17. The Federal Council gives an account of its work to the Federal Assembly in each ordinary session, presents to it a report on the internal conditions in the country and foreign relations of the Confederation, and recommends for its consideration such measures which it thinks useful for promoting the general welfare. It also submits special reports when the Federal Assembly or either of its Houses demand.

18. Finally, the Federal Council has some powers of a judicial nature. It hears appeals of private individuals against decisions of the various Departments and against decisions of the Federal Railways Administration. It has also appellate jurisdiction over decisions of the Cantonal governments in cases relating to discrimination in elementary schools, differences "arising out of treaties relating to trade, patents, military taxation, questions about occupation and settlement, consumption taxes, customs, Cantonal elections, gratuitous equipment of the militia."

**Executive subordination to the Legislature.** The powers of the Federal Council are really enormous. But in terms of law it is the servant of the Assembly. This is essentially due to the theory of the Swiss Constitution that the executive is not an independent or co-ordinate branch of government. The Assembly elects the Federal Councillors and their term of office coincides with that of the National Council. When the National Council is dissolved for a total revision of the Constitution under Article 120, the Federal Council must also be re-elected for the remainder of the legislative period. The President and the Vice-President are also the nominees of the Assembly.

The functions of the Federal Council are only supervisory. The policy emanates originally and finally from the Assembly. Article 71 of the Constitution contains the statement that the Assembly is the "supreme power in the Confederation." And it is really so. The Federal Council has no initiative of its own, and when it exercises the prerogatives relating to foreign affairs, to the armed forces, or to the ordinary conduct of public administration, there must be either previous authority of the

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21. Article 86, Section 7. Also refer to Article 16.



Assembly for all those acts or subsequent ratification. The Assembly's practice of granting full powers in an emergency to the Federal Council definitely suggests that the Assembly can claim back the powers it effectively delegates. The Assembly, moreover, frequently issues directions in the form of resolutions or motions indicating the manner in which the Council's functions shall be discharged. The Council is, also, required to submit annual report to the Assembly. The report is debated, department by department, and eventually sanctioned. The Council may also be required to make special report when the Federal Assembly or one section thereof demands it. The Councillors are not members of the Assembly and yet they attend all plenary legislative sessions, answer questions, give explanation and join in debate. If the Assembly disagrees with them or reverses their decisions in legislative or executive matters, the Councillors do not accept it a political affront and resign. On the contrary, they submit to the will of the Assembly as the final authority and try loyally to carry out its directions. The Council, as Prof. Dicey puts it, "is expected to carry out and does carry out, the policy of the Assembly, and ultimately the policy of the nation, just as a good man of business is expected to carry out the order of his employer."<sup>22</sup> Lowell expresses the same idea a little more cogently. It is, he says, "a general maxim of public life in Switzerland that an official gives his advice, but, like a lawyer or an architect, he does not feel obliged to throw up his position because his advice is not followed." He may not resign even when the personal policy of a Councillor has been rejected by the people. The resignation of Herr Welti, who resigned in 1891, when his railway nationalisation policy having been accepted by the Assembly was afterwards rejected by the people at the referendum, was declared as "unconstitutional."<sup>23</sup>

**Not a Parliamentary type of Government.** It follows, then, that the Swiss Federal Council is not a parliamentary Cabinet. In reality it is highly misleading to name the Council a Cabinet. The term Cabinet implies a degree of party solidarity which the Swiss body does not possess. Party solidarity necessitates political homogeneity as team work demands oneness of purpose and aim. The ministers, who make the Cabinet, are the real functionaries, they belong to the parliamentary majority party, and are chosen to carry out party pledges. They are responsible to the legislature, individually and collectively, for all their official acts and remain in office so long as they retain its confidence which, for all intents and purposes, means the confidence of the people who elected them in majority. The Swiss Council, no doubt, is elected by the Federal Assembly, but the Councillors are not required by the Constitution to be members of the Assembly, and if they are, as they generally are, before their nomination as Federal Councillors, they must resign their seats therefrom. They become Councillors not because that they belong to the parliamentary majority party or are the leaders of the political parties, but in their capacity as administrators and in conformity with Swiss demo-

22. *The Law of the Constitution*, p. 611. Also refer to Bryce, *Modern Democracies*, Vol. I, p. 446.

23. *Encyclopædia Britannica*, 11th ed., p. 211. After the First World War, the number of such resignations has increased.

Ghosh, R.C., *The Government of the Swiss Republic*, p. 92.



cratic sense that they represent all interests, people and territories. It is true that they appear in both the Chambers of the Assembly, take an active part in debates, and answer to questions put to them by members,<sup>24</sup> yet they do not profess and advocate a policy. Nor do they vote. The law, no doubt, demands that the Federal Council should hold regular meetings once a week, its deliberations should be in private and its decisions reached by majority vote,<sup>25</sup> and the Constitution insists that "decisions shall be under the name and by the authority of the Federal Council."<sup>26</sup> Nonetheless the Federal Council is not a homogeneous whole and differences of opinion among the Councillors are permitted and allowed to become known. They occasionally speak on opposite sides in the legislature, although it goes to the credit of Swiss democracy that such differences rarely cause trouble. But this is not the way of Cabinet government. Differences of any kind are not permitted in the ministerial ranks.

The Constitution also permits the Federal Council to recommend to the Assembly for its consideration such legislative measures as it may think useful for promoting general welfare.<sup>27</sup> It is also very common for the Assembly to pass a resolution and request the Federal Council to prepare a Bill on some subject, and, in fact, all measures not introduced by the Council are, as a rule, referred to it before they are sent to a committee or taken up for debate. In this way, the Council exerts a great influence in shaping the actual legislation. Still, it does not give to the Federal Council a legal legislative leadership. Its role remains only advisory and here lies the fundamental difference.

But the real difference between a Cabinet and Swiss Federal Council hinges upon their relationship with the legislature. The Cabinet is created by the legislature and it exists on its confidence. In Switzerland the relations between the two are based upon an entirely different principle. While the connection between the Federal Council and the Assembly is quite close and in many aspects akin to what it is between the Cabinet and the legislature under a parliamentary system of government, yet the Federal Council neither leads nor controls the Assembly. The Assembly is the master and it possesses "the supreme power in the Confederation,"<sup>28</sup> the Federal Council is just its subordinate authority. The Constitution does not make the executive an independent or co-ordinate department of government. The Federal Council is not responsible to the Assembly in the same way as a Cabinet is to the legislature. Moreover, resignation of a Councillor is not likely to bring a crisis. The Federal Councillors must not resign collectively or individually when their measures are rejected or their policies reversed by the Assembly. They continue in office no matter what the Assembly does to their Bills or executive orders. This is so, because the Federal Councillors do not initiate or con-

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24. Article 101.

25. Articles 4, 6, 7. Organization of Federal Administration and Law, 1914.

26. Article 103.

27. Article 102, Section 4.

28. Article 71.

trol the policy and they are not collectively pledged to pursue it. They have no policy of their own. Herein lies the real secret of the Federal Council's position.

**Not even a Presidential System of Government.** If the Swiss Federal Council is not akin to a Parliamentary Cabinet, it is not even the Presidential type of executive. There is, indeed, no semblance between the two. The Federal Council is not, like the executive in the United States, a separate branch of government. The American Presidency is a single executive and the Constitution assigns to the President independent and exclusive powers with a policy of his own. The President is, in brief, both a executive and the executive. Congress cannot encroach upon his constitutional rights, nor can it limit his action. The only contact between the executive and the legislature is through the Presidential messages, otherwise neither he nor the members of his 'Cabinet' have any access to either House of Congress. The Secretaries, who are the administrative heads of the different departments of government and are said to make the President's Cabinet, are appointed by him and they remain in office so long as he wishes them to continue. It is for the President to decide when and how to consult them. It is, again, for the President to determine whether to accept their advice or not. They are the advisers of the President and they really make his 'family'. The office of the President does not depend upon Congress. He is popularly elected for a term of four years and his office goes by calendar. In fact, the Swiss Confederation has no President as the Cantons have no Governors. The collegial system is the traditional form of Government and the only one in use in Switzerland.

The Swiss Federal Council is not a separate branch of government with an independent policy of its own. It has been given no veto upon laws to prevent encroachment upon its rights. Nor is it completely divorced from the legislature. The connection between the Federal Council and the Assembly is close and intimate. In fact, the Federal Council is very often described as the "Executive Committee of the Swiss Parliament." Whatever it be, it remains a fact that the Federal Council is not an independent authority at all, for its administrative acts are supervised, controlled or reversed by the Assembly.

**What is it then?** To sum up, the Swiss Federal executive is neither Parliamentary nor Presidential. It is unique by itself inasmuch as that it is collegial body of seven members who serve as the country's supreme executive. The framers of the Constitution rejected the American precedent of a single elected exponent of the country's executive power. They were, no doubt, not unconscious of the advantages of unity and continuity of action inherent in an elected President. But as they added, "The Committee could not think of proposing the creation of an office so contrary to the ideas and habits of the Swiss people who might see therein evidence of a monarchical or dictatorial tendency. In Switzerland one attached to councils....Our democratic feeling revolts against any exclusive personal pre-eminence."<sup>29</sup>

The Constitution in 1848, accordingly, entrusted the supreme direct-

29. As quoted in Brooks' *The Government of Switzerland*, p. 76.

ing and executive power in the Confederation to a Federal Council consisting of seven members, and the relevant provisions are still in force today. Having created a collegial executive, it was made to include the important features of both the Parliamentary and Presidential systems of government. The Swiss executive is, indeed, the mixture of the two and the architects of the Constitution were original in giving to their country an absolutely new mechanism of government which combined the merits and excluded the defects of both the parliamentary and non-parliamentary systems. Lord Bryce correctly remarks that the Federal Council is not a Cabinet like that of Britain and the countries which have imitated her Cabinet system, "for it does not lead the legislature, and is not displaceable thereby. Neither is it independent of the legislature, like the executive of the United States and of their republics which have borrowed therefrom the so-called 'Presidential system,' and though it has some of the features of both these schemes, it differs from both in having no distinctly partisan character."

This is surely the unique feature of the Swiss Constitution. In no other modern republic is executive power entrusted to a council instead of to an individual, and in no other free country has the working executive so little to do with politics. The Swiss Federal Council, to quote Bryce again, "stands outside party, is not chosen to do party work, does not determine party policy, yet is not wholly without some party colour." The practice now accepted and followed, since the election of 1959, is that the composition of the Federal Council should reflect as far as possible the strength of all the major political parties.

**Advantages of the Swiss Collegial Executive System.** The constitutional position and the work of the collegiate executive are really admirable, for it has some of the chief merits of the Cabinet system without the disadvantages. In Switzerland there is the same mutual confidence and co-operation between the legislature and the executive as it is obtainable under the parliamentary system of government. But a Cabinet should advantageously belong to one single majority party in the legislature or to a combination of two or more parties who agree to work out a common political programme. The Swiss Federal Council, on the other hand, is representative of all the opinions and areas in the country, and still it is pledged to no political programme. Such a representative executive does not leave an opportunity for the Opposition to grow and exist. When all the interests and opinions are given their due share of influence in the conduct of public affairs, it really means a democracy: a government of all, by all and for all—a real government by consent. Then, the Federal Council is a reputed non-partisan body and its role is not only to advise and influence the Federal Assembly, but also to mediate, "should need arise, between contending parties, adjusting difficulties and arranging compromises in a spirit of conciliation."<sup>30</sup> This is not difficult in Switzerland because public opinion expects of every Swiss to subordinate his own feelings to the public good and, as such, personal ambition in Switzerland has played a smaller part than in any other free country. Lowell, accordingly, says that the Federal Council "may almost

30. Article 95.

31. Bryce, *Modern Democracies*, Vol. I, p. 398.

be regarded as a mainspring and is certainly the balance-wheel of the national government.<sup>32</sup>

Another advantage of the Swiss collegiate executive is its permanence and stability. As it is not dependent on the vote of the legislature for its life, the executive, in Switzerland, is stable, more or less permanent and certain to follow a coherent and consistent administrative policy. Moreover, the Swiss system enables proved administrative talent to be kept in the service of the nation, no matter what personal opinion they may hold on particular issues. Such a homogeneity in diversity, stability and continuity are inconceivable under a parliamentary system of government.

Finally, the Swiss system secures continuity in policy and permits traditions to be formed. When the members are appointed singly and at considerable intervals, it "lifts the body above the transient impulses that stir the people." There are no partisan commotions and flaring up of emotions. Both of these are really invaluable traditions in the life of a democratic nation and such traditions cement continuity in policy. It is, no doubt, often contended that continuity and traditions have the tendency to make administration "groovy," but this is hardly a danger in Switzerland where every citizen is imbued with a public spirit and where Councillors are always accessible, and in constant touch with the Assembly.

**Growth in the Powers of the Federal Council.** According to law the Federal Council is the servant of the Assembly, but in reality it is exactly not so. The Federal Council, observes Lord Bryce, "exerts in practice almost as much authority as do English, and more than do some French Cabinets, so that it may be said to lead as well as follow."<sup>33</sup> A lengthy tenure of office adds to the Councillor's official prestige, administrative skill and political judgment. The mere fact that the Federal Assembly transfers to the Council most of the legislative initiative and very often seeks its advice on all measures offer to the Councillors vast opportunities to determine the tenure and direction of public policy.<sup>34</sup> The nature of modern legislation, which requires considerable technical knowledge, has further helped to transfer the legislative initiative into the hands of an expert body like the Federal Council.

With the help of its expert staff the Federal Council drafts the Bill and presents to the Assembly, along with a well-reasoned report presenting the purpose of the proposed legislation and giving the reasons why it should or should not be enacted. Even in the case where the Federal Council drafts Bill on the direction of the Assembly, it usually does not enact the draft law when the Council's report is unfavourable. Next, the Council enjoys the delegation of legislative powers and the rules and regulations framed thereunder are as valid as the law itself. Emergency powers of the Council are as significant as its ordinance-making power. "One of the most sweeping grant of power to any democratic

32. *Government and Parties in Continental Europe*, Vol. I, p. 398.

33. *Modern Democracies*, Vol. I, p. 397.

34. Refer to Rappard's *The Federal Government of Switzerland*, pp. 82-



executive whose country was not actually engaged in war was given in 1939 to the Federal Council."<sup>35</sup> The powers given to the Council by the Assembly both in 1914 and 1939 went very far to suspending the Constitution altogether, made the government almost the sole legislature and did much to check the interplay of democratic institutions, especially of the referendum.

In fact, a steady growth in the powers of the Federal Council had been the course of Swiss constitutional history. Since the introduction of proportional representation, the Federal Assembly has ceased to be dominated by one or two political parties. "It is increasingly turning out to be an arena of political higgling and haggling between a large number of parties" with the consequent result that the Assembly does not today enjoy its past prestige and power. The Assembly's loss is the Council's gain. Moreover, in the process of centralisation in Switzerland the authority of all the central institutions has considerably extended but by comparison with the Federal Assembly, the Federal Council has become more powerful and independent.

The contemporary tendency all the world over for strengthening the executive power has also helped to disturb the Swiss balance of power. Practically irremovable, and difficult to control by reason of the great technical complexity of its tasks, it has, according to Andre, "gradually come to wield a quasi-absolute power." The two World Wars and the economic depression of 1930, were the most important of all the causes which have contributed to the growth of the powers of the Federal Council. In their efforts to maintain Switzerland's traditional neutrality and to protect the country's economy during and after the Wars, the Federal Assembly delegated "blanket" authority over matters, hitherto regulated directly by statute, to the Federal Council. In pursuance of these powers, the Council has issued ordinances vitally affecting personal liberties and properties of the people. It has also issued decrees relating to private law in the name of public security or necessity. The power of issuing ordinances, though it is a normal feature in the Continental countries, was hitherto unknown in Switzerland. Adopted as a measure of national expediency or exigency, it has come to stay in Switzerland and has assumed a normal character of the Federal Council's executive authority. Is this new development not antagonistic to the traditional Swiss principle of legislative supremacy? The system of direct democracy has probably given the most fatal blow to the supreme power of the Assembly. On many occasions legislative measures passed by the Assembly by a heavy majority have been rejected by the people at a referendum. Then, many constitutional amendments initiated by the people but opposed by Assembly have been finally adopted by the people. Even with regard to ordinary legislation the Federal Council, in the words of Bryce, "is a guide as well as an instrument, and often suggests as well as drafts measures." When the supreme authority receives suggestions and accepts them, and allows the same suggesting authority to draft for it legislative measures, which are the expression of its supremacy, it really does not remain supreme, though legally it may continue to be so.

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35. Codding, G.A., *The Federal Government of Switzerland*, p. 85.



## THE FEDERAL ADMINISTRATION

The Federal administration is divided into seven departments each headed by a Federal Councillor. By virtue of the law on the organization of Federal Administration of 1914, the departments are: (1) The Political Department; (2) Department of the Interior; (3) Department of Justice and Police; (4) Military Department; (5) Department of Finance and Customs; (6) Public Economy; and (7) Traffic and Power. The departments are allocated by the Federal Council itself among its members. Every Federal Councillor is also Deputy for another department.

The functions assigned to departments are constantly changing and the Law of 1914 is not a convenient document for determining the jurisdiction of each department. Moreover, Article 23 of the Law gives the Federal Council power to determine what subject-matters are to be delegated to the departments "to deal with on their own, and provides for appeals to the Federal Council itself against such departmental decisions in certain circumstances."<sup>36</sup>

The Political Department embraces some minor political responsibilities, but it is essentially a foreign office and deals with foreign relations of the Confederation. Before 1914, this department was known as the Presidential Department and it always went to the President of the Confederation. But this required an annual change, with the change of President and, accordingly, there was no continuity of direction which is so essential in the conduct of foreign affairs. Now the Political Department goes to one of the Councillors and it continues under him so long as he remains a member of the Federal council, no matter whether he happens at the same time to be the President of the Confederation or not. M. Ernest Noles, the President for 1949, held charge of the Department of Finance and Customs while Dr. Max Petitpierre was in charge of the Political Department from 1945 to 1951 and continued to hold the same for another four-year term after his re-election. Since neutrality is an essential condition of Switzerland's domestic peace, the task of the Political Department is really arduous. The choice of the people in selecting a person who should shoulder this responsibility has been remarkable and it has fallen on such men as Ador (1917), Mota (1920-40), and Petitpierre.

"Neutrality has no value," writes Andre, "unless the independence it represents is defended by force of arms." Neutrality, thus, includes the defence of Switzerland's own independence by force of arms, if necessary, and the Swiss guard themselves with vigilance and suspicion against any possible aggression from her neighbours. Military Department is, accordingly, the next most important. The Confederation is not authorised to maintain a standing army," and standing army here means a mercenary army.<sup>37</sup> The Swiss army consists of conscripts, a very small cadre of regular officers, and some maintenance troops. All Swiss young-men of an adequate physical standard must do military service, except

36. Hughes, C., *The Federal Constitution of Switzerland*, op. cit., p. 117.

37. Article 13.

38. Hughes, C., *The Federal Constitution of Switzerland*, op. cit., p. 147.

certain officials while in office and the clergy of recognised denominations. Cantons are also permitted to maintain military contingents. The Federal Government exercises control over federal army, war material, organisation of the army, and military education.

The functions of the Interior Department are miscellaneous and more or less similar to its counterpart in the United States. It is assigned the function of carrying out the Federal Government's policies with regard to education, public works, conservation, and public health. Of the remaining departments, the Departments of Posts and Railways and Public Economy require a little consideration. The Confederation owns and manages the postal, telephone, telegraphic, wireless and railway system. The Railway Administration is a separate entity, though its functions under the control of the Department of Posts and Railways. It enjoys a considerable degree of autonomy and, *inter alia*, has a separate budget. The Department of Public Economy is concerned with industry, agriculture, and social insurance. It helps in the exploitation of natural resources and devises measures for accelerating Switzerland's productivity.

**The Civil Service.** The personnel of the Swiss Civil Service is not numerous as in other countries in spite of the increase in the Central Government's activities and a general tendency towards centralization. This is primarily due to the fact that the Federal authorities do not maintain their officers in the Cantons. All federal measures are put into execution by the local authorities. Apart from the employees of the post office, the railways, and certain exceptional branches of administration, there are no federal officials.

The two World Wars, however, have considerably added to the number of the civil servants. The magnitude of the increase can be examined from these figures. In 1939, the total number of the civil servants was 10,842 and in 1948 it increased to 29,630. After the War some reduction was brought about and the next year the number fell to 26,131. A further reduction by 8,000 was effected in the following years. In 1959, the central administration employed only about 17,554. Nonetheless, extension in the powers of the Central Government is generally deemed in Switzerland as an encroachment on the autonomy of the Cantons. The growth of bureaucracy and the creation of bureaucratic mentality in administration "must tend in the long run," remarks Andre Seigfried, "to compromise the spirit of a regime which is founded on cantonal autonomy and popular delegation, that is to say, a regime which is founded on confidence in men rather than on administrative mechanism from which the human element tends to be more and more excluded.

The Federal civil servants, except a very few of the most important which lie in the gift of the National Assembly, and others appointed by the Federal Tribunal or other federal authorities as the Federal Railway Administration, are appointed by the Federal Council and are dismissed by it for any dereliction of duty. Appointments to the higher posts are made usually for a term of four years subject to re-appointment, which is just a mere formality. These appointments may, therefore, be described as permanent. There is nothing resembling the American Spoils System. Very rarely is any one dismissed for political reasons; nor do such reasons

play a great part in appointments. Moreover, meagreness of salaries does not make jobs worth struggling for in Switzerland, and public opinion, too, "would reprehend any attempt to appoint incompetent men for Party reasons." The retirement age is sixty-five years.

**The Federal Chancellory.** The Federal Chancellory at the head of which is the Chancellor of the Confederation, is responsible for the secretarial business of the Federal Assembly and of the Federal Council.<sup>39</sup> The Chancellory is under the superintendence of the President of the Confederation, and the ultimate superintendence of the Assembly. The Chancellor is elected by the Assembly in joint session<sup>40</sup> for four years but in practice he continues in office until he retires. "The election has a fairly political flavour, and regard is had to the alterations of languages and confessions."<sup>41</sup> The Vice-Chancellors are appointed by the Federal Council, and "one of them usually acquires a sort of moral claim to the office of Chancellor before the place falls vacant."

The personality of the Chancellor is not important, for his duties are chiefly formal and mechanical. The office, however, is of considerable dignity and confers upon its holder a sort of honorary headship of the Federal Civil Services. There is no British equivalent—but the functions have a faint similarity with those of the clerk of the Country Council, while the prestige is not entirely unlike that of the Speaker of the House of Commons." His duties include:

(i) The clerkship of the Federal Council, and the "reorientation" of journalists after its meetings;

(ii) The office of clerk-at-the-table of the two councils and of the Assembly in joint session; his Deputy acts for him in the other Chamber. His functions, as such, include the supervision of the shorthand, and of the translation, and "What we should call the office of the Sergeant-At-Arms";

(iii) The supervision of the publication of the legal acts of the Federal Assembly and the Federal Council;

(iv) The counter-signing of Federal Acts, and the organization of federal elections and initiative and referendum votes;

(v) Certain duties regarding organisation and methods of federal administration.

**Merit of Swiss Administration.** Bryce points out two prominent merits of Swiss Government and administration in general. One is the cheapness of administration. Finances are carefully managed and current normal administrative expenses are kept appreciably down. It is true that the two World Wars meant a mounting expenditure beyond the financial capacity of Switzerland, but the people being thrifty and inquisitive, who apply to "public expenditure a vigorous standard such as that

39. Article 105.

40. Articles 92 and 85, Section 4.

41. Hughes, C., *The Federal Constitution of Switzerland*, op. cit., p. 109.

regulates a peasant household," their economy is relatively stable and the country has not to face serious financial embarrassments.

Purity, according to Bryce, is the second prominent feature of the Swiss administration. The Federal and Cantonal Governments are practically free from corruption and public scandals are rare, but when they occur "the guilty person, however strong his position had been, must quit public life forthwith."

To this may be added the third, an efficient bureaucracy entirely responsible to democratic government. Professor C. J. Friedrichs, a special student of public administration, goes so far as to say of Switzerland, "Except to the extent to which she was helped by the example of France and Germany, she is full proof of the contention that a democracy is able to do a better job, in fact, than of other systems. For there can be little question that upon close scrutiny by unbiased investigator the Swiss appear to have a more effective responsive officialdom than any other country except Sweden (and Sweden also is very democratically governed)."

## CHAPTER V

# THE FRAME OF NATIONAL GOVERNMENT (Contd.)

### THE FEDERAL LEGISLATURE

**The Federal Assembly.** The federal legislature is bicameral and is known as the **Assemblée Federale** or the Federal Assembly. Its two Chambers are: **Conseil des états**, the Council of States and **Conseil national** or the National Council. The Swiss Parliament is supreme and the Constitution clearly establishes so when it says "subject to the rights of the people and of the Cantons...the supreme authority of the Confederation is exercised by the Federal Assembly."<sup>1</sup> The Assembly passes the laws which may neither be vetoed by the President of the Confederation nor declared unconstitutional by any Swiss Court. The supremacy of the Federal Assembly further means that other organs of government are not co-ordinate and independent, but are subordinate to it, subject to the provisions of the Constitution. It not only legislates in legislative as well as constitutional matters, but it also chooses the members of the executive—the Federal Council—and elects the Judiciary as well as the Chancellor who is the permanent head of the civil service. The decisions of the Assembly are final and not subject to appeal. To put all this in the words of Rappard, the Federal Assembly is supreme "as long as it retains the confidence and performs the will of the electorate."<sup>2</sup> The electorate has the right to veto all the unpopular Bills by defeating them at a referendum and it has been done so often. "The Swiss voter," remarks Bryce, "always independent, is most independent when he has to review the action of his legislature."<sup>3</sup> There is, thus, no possibility in Switzerland of legislative tyranny, or tyranny of a parliamentary majority and this was fully demonstrated in 1884 in connection with the four laws, called at that time, "the four-humped camel" and characterised as "the high-handed behaviour of the ruling majority of the Assembly." All these laws were rejected at a referendum.

### THE COUNCIL OF STATES

**Composition and Organization.** The Council of States represents the component units of the Confederation on the basis of equality and corresponds to the American Senate. Every Canton, no matter what its size or population, is entitled to two representatives, and every half-

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1. Article 71.

2. Rappard, W.E., *The Government of Switzerland*, op. cit., p. 56.

3. Bryce, *Modern Democracies*, Vol. I, p. 436.



Canton one representative.' The total membership of Council of States is, thus, 44.

Each Canton determines by its own laws the mode of election of the deputies, the length of their terms of office, and the allowances paid to them. In certain Cantons the deputies are elected directly while in some others they are elected directly. In the **Landsgemeinde** Cantons they are elected by the **Landsgemeinde**. There is, accordingly, no uniform method of election, or a similar tenure of office, or an equal fixed salary. The terms of office vary all the way from one to four years, three years being the most common. In St. Gallen it is one year. In two Cantons the deputies may be recalled by the legislature before the expiration of their term.

The only restrictions on elections to the Council of States are contained in Articles 6, 81, and 108 of the Constitution. According to Article 6 all Cantonal elections must be democratic. Article 81 provides that members of the National Council must not at the same time be members of the National Council or the Federal Council. Article 108 makes membership in the Council of States incompatible with membership on the Federal Tribunal.

The membership of the Council of States is usually quite stable as most deputies are re-elected for as long as they wish to serve. The calibre of the Deputies is pretty high and they command sufficient experience in national and Cantonal public affairs. Only those who have proved their worth in Cantonal affairs and quite often they are drawn from the Cantonal Executive Councils or their Legislatures.

The Council of States must meet once a year in ordinary session on a day fixed by standing orders. Provision is made in the Constitution for the calling of special session either by the Federal Council, or on the request of one-quarter of the Deputies, or of five Cantons.<sup>4</sup> The Council elects its own Chairman and Vice-Chairman for each ordinary and extraordinary session. But the Constitution provides that the Chairman or Vice-Chairman may not be chosen from the Deputies of the same Canton whose representative was Chairman during the ordinary session immediately preceding.<sup>5</sup> The effect of this constitutional provision is that the office circulates among Cantons.<sup>6</sup> The Chairman presides over the meetings and is largely responsible for the determination of the daily order of business to be transacted. He votes only in case of a tie, but in elections he votes in the same manner as other members.

The attendance of an absolute majority of the total number of the Deputies (44) is necessary for the valid transaction of business,<sup>7</sup> that is 23 members, and all questions are decided by an absolute majority of

4. Article 80.

5. Article 86.

6. Article 82.

7. The position of the half-Cantons is not clear.

8. Article 87. It means that 23 out of 44 Deputies must be present. It is the duty of the Chairman of the Council to ensure this, if necessary by roll-call.

those voting.<sup>9</sup> The Deputies vote without instructions from their Cantons, and this constitutional provision implies that the members of the Council of States do not represent separate Cantonal interests and they cannot be armed with definite instructions as to how they should vote on particular issues. "The programme which the Article implies," observes Christopher Hughes, "is that members should vote from their consciences and not from instructions"<sup>10</sup> of either the Cantonal legislatures or of their parties or other associations.

**The Council of States a weaker Chamber.** The Council of States possesses equal rights and powers with the National Council. All legislative measures may be introduced in either of the two Houses and must be approved by both the Houses to become laws. In case of disagreement, and when second deliberation too has yielded no results, the differences are submitted to a Joint Conference Committee. If the conference committee fails in its efforts to reach an agreement, the Bill in question is dropped. Neither of the two Chambers enjoys priority even in regard to financial matters. The framers of the Constitution had really attempted to make the Council of States a close second to the American Senate, and occupy the same position of precedence in the framework of the national government. But the Council has failed, for several reasons, to fulfil the expectations of its makers. Its history has, in fact, been almost the reverse of the American Senate. The latter was in the beginning inferior, both in influence and public esteem, to the House of Representatives. It was only in the second generation of statesmen that the Senate assumed its present dominating role. The Swiss Council of States, on the other hand, began its career with high hopes and great reputation. But gradually it receded into the background and men of energy and ambition began preferring to sit in the National Council. The Swiss Council of States, unlike the Senate, is given no special functions and the tenure of office of Deputies being not uniform and in some cases even subject to recall, it provided little attraction for promising youngmen who looked on it as only a stepping stone to the other Chamber. Nor does it provide an element of continuity from which traditions might flow. When both the Chambers possess equal powers and identical functions, the one which represents the people and is elected for a fixed period is sure to attract statesmen of reputation and add to its prestige and stature. It becomes the pivot of political authority and the centre of weighted power. It is not surprising, therefore, if the Council of States enjoys less authority and influence than the National Council.

But it does not mean that the Council of States commands a distinctly subordinate position like other Upper Chambers in countries having parliamentary type of government. It enjoys equal powers, constitutional, legislative and financial, with the other Chamber. Laws may originate in either of the two and must pass through both the Councils "and therefore the Councils must agree between themselves which shall have 'prior-

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9. Article 88. An absolute majority in Switzerland means 'more than half', i.e., of those voting, of those present, of the whole Council, etc. Hughes C., *The Federal Constitution of Switzerland*, op. cit., p. 99.

10. Article 91.

11. *The Federal Constitution of Switzerland*, op. cit., p. 104.

ity' in any particular business." Annual business, such as the budget goes one year to one Council first, the next year to the other Council first. The Council of States is not a submissive body. It often disagrees with measures passed by the National Council and not only insists on the disagreement, of course a rare event in the Swiss political life, but it also persists which means dropping of the Bill. The National Council has no veto over its powers, legislative and financial.

The Council of States has, thus, preserved its distinct entity. Its deliberations are, as might be expected from its smaller size, more dispassionate and more detailed than those of the National Council. In particular, the members of the official committees appointed by the Council of States take a pride in the thoroughness of their reports. Talent also flows in the Council of States. Most of them are highly educated. Almost half of the membership of the Council in 1960 had been recipients of doctorates. Moreover, of late years there has been a tendency to make the terms of office of the members of the Council of States uniform, four years as that in the case of the National Council. Yet, the National Council is ultimately the more powerful. The obvious reason, and an important one, for the weakness of the Council of States is that the House gets through its business, because of its small membership—44 only—more rapidly than the National Council. The result is that "often having nothing to do, it has acquired an undeserved reputation for idleness."

## THE NATIONAL COUNCIL

**Composition and Organisation.** The important and influential Chamber, then, is the National Council, a representative House of the Swiss people. The composition and organization of the National Council, unlike the Council of States, are regulated entirely by the Federal Constitution. Since 1963, it has a fixed membership of 200. The Deputies are elected directly by secret ballot and since 1910 by proportional representation. Every Swiss male citizen who has completed his twentieth year, and who has not otherwise been disqualified for active citizenship by the legislation of the Canton where he has his place of residence, has the right to vote.<sup>12</sup> Each Canton or half-Canton, as the case may be, forms an electoral constituency and seats are allotted to it at the ratio of one for every 24,000 of the total population; fractions greater than 12,000 are counted as 24,000.<sup>13</sup> But each Canton, or half-Canton, whatever its population, must at least have one Deputy.<sup>14</sup>

The National Council is elected for four years. It is not subject to dissolution, except for total revision of the Constitution when one

12. Article 73.

13. Before 1919 elections were by a single member constituencies with a second election if an absolute majority was not obtained at the first.

14. Article 74. Manhood suffrage was introduced in Switzerland as early as 1848. Women are excluded from voting but their disqualification appears nowhere in the Constitution.

15. Article 72. The law has been changed twice to keep pace with the growing population.

16. *Ibid.*

House differs from the other.<sup>17</sup> Qualifications for membership are the same as required for voting. But all clergy, executive and principal administrative servants of the Confederation, members of the Council of States, and the Federal Councillors are especially excluded and are not eligible for election.

The House elects its own Chairman and Vice-Chairman for each ordinary or extraordinary session, neither being eligible for the same office in the next consecutive regular session. The word "session" is interpreted as meaning the annual session provided for in Article 86. The Chairman of the National Council is, thus, elected for one year. And the system of compulsory rotation of office, consistent with the Swiss tradition, is designed to guard against concentration of power in one man. It is also intended that the office should not be concentrated in any one party or Canton or linguistic group. The Chairman does not have extensive powers. He has a casting vote which he exercises in case of a tie according to the established usages of the House. But when the House assembles for purposes of election, the Chairman votes in the same way as other members.

**Sessions and Debates.** The National Council meets in regular sessions at the beginning of December and has generally four sittings.<sup>18</sup> The sessions are very short lasting only about three weeks apiece. The Federal Council may summon an extraordinary session should an emergency arise.<sup>19</sup> The House meets at 8 a.m. in summer and at 9 a.m. in winter, every day except Saturday and Sunday. Attendance is regular and punctual and a member absenting himself without strong reasons is deemed neglectful of his duty. The House devotes itself strictly to the dispatch of business and the normal Swiss Deputy shows just the qualities that are associated with the Swiss character. A Swiss Deputy is "solid, shrewd, unemotional or at any rate indisposed to reveal his emotions. He takes a practical commonsense and what may be called middle-class view of questions." The Swiss Federal Assembly is, therefore, the most business-like body in the world doing its work quietly. The debates are orderly and there are few set speeches. Rhetoric is almost unknown and the usual cheers and cries of approval or dissent are rarely heard. Obstruction is unknown and divisions are much less frequent. "The sessions of the National Council," writes Andre, "are more like meetings of an administrative body affecting only indirectly

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#### 17. Article 74.

18. Article 86 provides that the Assembly is to meet at least once a year for an ordinary session. The practice is to count all the sittings of the Assembly in one year as a single session adjourned. The date of assembling for the ordinary session is fixed by law. The Law on the Relations between the Councils of 9th October, 1908 fixes the 1st Monday in December as the start of the first part of the ordinary session and the first Monday in June as the start of the second part. The Councils also regularly hold ordinary sittings in March and September.

19. Article 86 provides that both the Councils shall be convened for an extraordinary session by decision of the Federal Council or on request from one quarter of the members of the National Council or from five Cantons. Once only in 1891 both the Chambers were convened on demand of a quarter of the members of the National Council.



those who are not immediately concerned—but what an efficient administration!" Deputies may speak in any of the four national languages and every public document is published in German, French and Italian. There are no official stenographers and the debates are scantily reported even in the leading newspapers. Occasionally, the Council may order the *verbatim* reporting and publication of important discussions.

The Constitution provides that both the Councils conduct business only when an absolute majority of their respective members is present, that is, 101 in the case of the National Council. All decisions are made by a majority of those voting with the exception of the approval of "urgent" *arretes* which, being exempt from the legislative referendum, require the approval of a majority of all the members. Swiss Deputies do not receive a salary for service in the Federal Assembly. The members of the National Council receive an allowance for each day the House is in session. Deputies are exempted from military service during their tenure in office and need not pay the military exemption tax.

**No Official Opposition.** The role of political parties in the Swiss legislature is far inferior to that prevailing in Britain and other democratic countries. This is due to two reasons: Firstly, the National Council cannot displace the Federal Councillors. Secondly, even in the legislative sphere, the supremacy of the Assembly is qualified by the ultimate sovereign power of the people and they can at a referendum negative the decisions of the Assembly. There is neither any Treasury Bench nor one for Opposition, since neither exists. The Federal Councillors are not members of the legislature, though they can appear in any House of the Assembly. But it does not entitle them to vote. When business relating to a particular department is considered by either of the Councils, the Federal Councillor who heads the department concerned attends, answers questions, gives explanations and joins in its debates. All this, however, does not give to the Councillor the position and influence of a minister under the parliamentary government. The Councillors are assigned seats on a *dias* right and left of the Chairman of the House. And as they are not members of the House, they cannot be leaders of parliamentary majority party, no matter what personal influence they otherwise may wield. When there is no ministerial party there can be no Opposition. The Swiss people do not exhibit hostility. Nor do they make regular campaigns of it. They view legislation by its practical utility, no matter whether their own party or others sponsor it. The proof of such an attitude can best be illustrated from the fact that Deputies belonging to the same party do not necessarily sit together. They usually sit by Cantons irrespective of their party labels.

**Joint Sitzings.** Both the Councils sit separately to transact their ordinary business, but they meet in a joint session for three definite purposes:—

(1) to elect the Federal Council, the Federal Tribunal, the Federal Insurance Tribunal, the President of the Federal Council as also the Vice-President who are both President and Vice-President of the Confederation, the President and Vice-President of the Federal Tribunal and of the Federal Insurance Tribunal, the Chancellor of the Confederation,



and the Commander-in-Chief of the Army;<sup>20</sup>

(2) to exercise the federal power of pardon;<sup>21</sup> and

(3) to resolve conflicts of jurisdiction between the major federal organs.

When the two Chambers sit together, the Chairman of the National Council presides, decisions are reached by a majority of all the Deputies voting together.<sup>22</sup>

### LEGISLATIVE PROCEDURE

The Constitution gives the right to introduce legislation to both the Houses of the Federal Assembly—the Council of States and the National Council, to each member of both the Houses, to each Canton and half-Canton, and the Federal Council. In practice, it is the Federal Council which initiates as well as introduces major portion of the legislation. When the Council feels that some new legislation is necessary or the prevailing laws need amendments, for the efficient and proper functioning of the government, or when it feels that there is a popular demand for a new law, it proceeds on its own initiative to draft a Bill with the help of its expert staff. The draft-laws, together with the Council's report detailing its own views on the proposed legislation, are submitted to the two Houses of the Assembly for their consideration.

If the Federal Assembly itself decides upon the need of some legislation, it requests the Federal Council to act through procedures known as the "motion" and the "postulate." A motion is a command of the Assembly to the Council to act and such a command must be the result of the agreement of both the Houses. "The postulate is of lesser gravity, but leads towards the same objective." Instead of "**commanding**" the Council to submit a draft law; a postulate merely "**invites**" the Federal Council to act. It may originate in any of the two Houses and does not require the agreement of both. Immediately on receipt of the "motion" or "postulate" the Federal Council proceeds to draft the Bill on the lines proposed and presents the same with its report to the Assembly. The Council may also recommend in its report rejection of the purposed legislation. The Council usually gives utmost consideration to motions and postulates, but it does not mean that it must necessarily comply with. "Motions are deemed to lapse when the signatories cease to be members of the Council, or if the motion is not discussed at all within two years, or is not answered by the Federal Council within four years."<sup>23</sup> Postulates have even shorter life span if not taken up by the Federal Council.<sup>24</sup>

Since both Houses of the Assembly have co-equal powers and neither

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20. Article 85, Section 4.

21. The difference between pardon and amnesty is that (1) the former is an individual one whereas amnesty is a mass measure, and (2) the amnesty is in advance of sentence whereas pardon is subsequent to punishment. Hughes, G., *The Federal Government of Switzerland*, p. 95.

22. Article 92.

23. Hughes, G., *The Federal Government of Switzerland*, p. 149.

24. *Ibid.*, p. 156.

is superior to the other, the Federal Council submits its Bills and messages to the Chairmen of the Council of States and the National Council at their first session. The Chairmen decide among themselves which House will be the first to deal with each piece of business. Unless the Federal Council has designated a Bill as "urgent," the division of business must be sanctioned by each House. In case of "urgent" Bills, the decision of the two Chairmen is binding. The Bills are ordinarily sent to the appropriate committees immediately after the allotment of the business. The committees may hold their meetings in any part of the country and generally they carry their work in the interval between the sessions of the Assembly. The committees receive the secretarial assistance of the Federal Chancellery and may summon any official of the Federal Government for evidence, explanation and classification. The committees seldom change the sense of the draft-laws, but they often do make suggestions for amending the proposed laws. Minority reports frequently accompany the majority reports.

There are three stages in the discussion of a Bill in each House. After receiving the report of the Committee, the House to which it is allotted first debates "entering upon the matter." If it is agreed upon, then, the House proceeds to discuss the Bill clause by clause. After it has been fully discussed, the Bill is voted upon as a whole. If it is approved, the Bill is then sent to the other House wherein the same procedure is followed. "In exceptional cases, and in the event the draft Bill is capable of being broken up logically, each House simultaneously may take different Sections of the same Bill for debate. As soon as each Section is approved by one House, it is sent immediately to the other for consideration."<sup>25</sup>

When the Bill has been passed by both the Houses, the Federal Chancellery prepares the official text which is signed by the Chairmen and Secretaries of both the Houses. The text is then submitted to the Federal Council for publication and execution. It comes into effect, unless challenged by referendum, on the date fixed in the original Bill, or if no date is mentioned within five days after publication.

**Deadlock between the Councils.** The possibilities of a serious deadlock between the Council of States and National Council are rare indeed. But it does happen; the Law on the Relations between Councils, 1902, as amended in 1939, sets forth the procedure to be followed. If the second House disagrees with the decision of the first, the Bill is sent to the former for another deliberation. Only the points of difference are discussed, unless the changes are of such a nature as to necessitate a debate on the Bill as a whole. This procedure continues until agreement is reached, or "until the two bodies agree to disagree." In that event, the points of difference are submitted to a Joint Conference Committee presided over by a member of the House which had originally rejected the Bill or expressed disagreement thereupon. If the Joint Conference Committee fail to reach an acceptable alternative, or if their proposals are refused, the Bill in question is dropped.

25. Coddington, G.A., *The Federal Government of Switzerland*, p. 83.

**POWERS OF THE FEDERAL ASSEMBLY**

There are few constitutional limitations on the powers of the Federal Assembly within its own sphere of jurisdiction. Article 84 distinctly specifies that the National Council and the Council of States "shall handle all business which the present Constitution places within the competence of the Confederation, and which is not allotted to another Federal authority." The framers of the Constitution did not deem it necessary to impose specific limitations on the powers of the Assembly, as the power of the people can be invoked at a referendum to overrule the Assembly. Moreover, in a small country, like Switzerland, where the strength of the legislative bodies is small and the politicians are judged by the traditionally strict standard of honesty, the need for constitutional limitations does not arise as "public opinion would at once check any attempt by the Councils to extend their powers beyond the limits the Constitution prescribes."

Another peculiarity of the Swiss legislature is that both the Chambers are co-ordinate in all respects of their powers and functions. Legislative measures can be initiated in either Chamber and neither possesses the power to veto the other. The Federal Councillors, though members of neither Chamber, are required to appear and answer questions put to them equally in both. For certain purposes, like the selection of the Federal Councillors, its President and Vice-President, for decisions on conflict of jurisdiction between the Federal authorities, and for the granting of pardon, the two Chambers sit together and vote as one Chamber. Besides, the Constitution can be amended, subject to certain other provisions, by the equal participation and agreement of the National Council and the Council of States. Finally, the makers of the Swiss Constitution did not pay much attention to the orthodox doctrine of the Separation of Powers. They vested the Assembly with all kinds of authority, legislative, executive and judicial. In Switzerland, there is a government by Assembly.

**Legislative Powers.** Federal Assembly is competent to enact all laws and decrees dealing with matters which the Constitution assigns to federal authorities, and make laws dealing with the organization and mode of the election of the federal authorities. It determines and enacts necessary measures to ensure the due observance of the Federal Constitution; the guarantees of Cantonal Constitutions; the fulfilment of Federal obligations; adopts measures ensuring the external safety of the country, her independence and neutrality; authorises measures to guarantee the territorial integrity of the Cantons and their Constitutions; the internal safety of Switzerland, and the maintenance of peace and good order; enacts the annual budget of the Confederation, approves State accounts and decrees authorising loans. Finally, the Assembly can demand all kinds of information, which it deems necessary, on the administration of the Confederation and directs questions to the Federal Councillors. The Federal Council presents an annual report to the Assembly upon the internal conditions and foreign relations of the Confederation. It may also be required to make special report whenever either House of the Assembly demands.

The Swiss Constitution provides that all laws passed and resolutions adopted by the Assembly must be submitted to the people for their ac-

acceptance or rejection, if a demand to that effect is made within 90 days by 30,000 Swiss citizens or eight Cantons provided it has not been declared urgent by the Assembly. If a referendum is held and a majority of the people vote against the law, it becomes void. Before 1939, Federal decrees which were not general in character and which were declared urgent could not be submitted to referendum. The amendment of January 22, 1939 restricted the application of the urgency clause to only such decrees as were passed by a majority of all members of each of the two Chambers and had their duration definitely fixed. Article 89 was amended again in 1949 and the present position is that 30,000 voters or 8 Cantons may demand referendum on a federal decree, whether declared urgent or not. Such a decree will become inoperative one year after its adoption by the Assembly, if it is not approved by the people within this period. **Such a decree cannot be re-enacted.**

The Federal Assembly is the judge and determines what laws or resolutions are urgent. Dr. Zellweger accuses the Assembly of not using this discretion impartially in order to prevent popular action upon its measures. Two points may, however, be noted in this connection. First, the referendum for ordinary laws in the Confederation is optional or facultative. Second, there does not exist popular initiative on legislative measures in the Confederation.

**Executive Powers.** The Council of States and the National Council, at their joint sitting, elect the seven members of the Federal Council, its President and Vice-President, appoint judges of the Federal Tribunal, the members of the Federal Insurance Court and the Commander-in-Chief. The right of election or confirmation in respect of other offices may be vested in the Assembly by federal legislation. Assembly supervises the activities of the civil service, and even decides administrative disputes and conflicts of jurisdiction between federal officials. It determines salaries and allowances of members of federal departments and of the federal chancellorry, as also the establishment of permanent federal offices and the salaries in connection therewith.

The control of the federal army, too, is vested in the Assembly. It declares war and concludes peace, ratifies alliances and treaties. All treaties concluded by the Cantons between themselves or with foreign States must be confirmed by the Federal Assembly, provided that such Cantonal treaties are submitted to it only on appeal either by the Federal Council or another Canton. If the Cantons fail to execute federal laws or obligations, the Federal Assembly decides on the nature of intervention against the recalcitrant Canton or Cantons.

The Constitutional Amendment of January 30, 1931 provides that international treaties concluded for a period of indeterminate duration or for more than fifteen years should also be submitted to the people for acceptance or rejection on demand of 30,000 Swiss citizens entitled to vote or of eight Cantons. The entry of Switzerland into the League of Nations was, accordingly, decided by referendum on May 16, 1920.

**Judicial Functions.** The Federal Assembly grants pardon in joint

session whereas amnesty is granted by two Chambers separately. It also hears appeals against the decisions of the Federal Council relating to administrative disputes.

**Constitution amending power.** The method and procedure of amending the Constitution has already been discussed. When both the Chambers agree to revise the Constitution, either wholly or partially, the proposed revision is submitted to the people for their acceptance or rejection. In case one of the Chambers does not agree to the proposed revision, the matter is then referred to the people for their decision whether they need such a revision or not. If the majority of people vote for revision, new elections of the Federal Assembly are held to effect the revision. After having passed through the Assembly, it is submitted at the referendum of the people and the Cantons.

The Swiss Constitution also provides for constitutional initiative and here, too, the Assembly plays its due part, though the final arbiters are the people.

### THE DECLINE OF LEGISLATIVE SUPREMACY

The Constitution vests the supreme authority of the Confederation in the Federal Assembly subject to the rights of the people and of the Cantons. It is both a legislative and Constituent Assembly and its laws can neither be vetoed by the President of the Confederation nor can these be declared unconstitutional by any Swiss Court. Its supremacy is further established by the fact that other organs of the Federal Government are subordinate to its authority. The performance of the Assembly is also impressive and the Swiss people, throughout its career, have not shown any real discontent over its working. "It provides a national forum for the expression of differing points of view, it works quietly and without undue haste, and its cost is not excessive." Much contrary to the expectations of the Constitution-makers, the history of bicameralism is eminently admirable. The two Houses have shown more harmony and the friction has been rare. "In fact, seldom does one House seriously attempt to overthrow the decisions of the other on matters of national importance." And both have attracted highly talented statesmen and election to either of the two Houses is deemed a great honour.

It cannot, however, be denied that there has been a steady decline in the prestige of the Federal Assembly as a body. This is due to important reasons. In the first place, the process of direct legislation has considerably contributed towards the decline of its legislative supremacy. When the Deputies know that ultimately authority vests in the people to accept or reject the laws they make, they take very little interest in the performance of their legislative duties. There is neither initiative nor the ambition to venture it. If the measure passed by the Assembly succeeds at a referendum, the credit for it goes to the people and not to the legislature. If it does not succeed, the blame goes to the legislature. Such a feeling of frustration reduces the sense of responsibility and the legislature, as Bryce says, may be disposed to pass "measures its judgment



disapproves, coming on the people to reject them, or may tend to pass laws which they would not have received without the popular vote. The history of popular voting discloses a variety of means to reject measures that are in any way undesirable. The Swiss have adopted elected Juries, laws that are too cumbersome to implement or mean to effect too much at once. They know that they have the right of constitutional initiative and referendum, though the means to see the Constitution amended. His term expires, so pressure on the legislators, a cloud of doubt or indecision, if not a feeling of the coming

The result is that the Assembly has room to limit its responsibility and the lead is taken by the Federal Council. The Federal Council has now become the centre of legislative process. It not only introduces legislation but initiates it too. The Council gives its opinion by the Article 102, Section 4 of the Constitution which reads: "The Federal Council shall submit to the Federal Assembly drafts of laws and decrees and shall give its opinion on proposals submitted to it by the Cantons or the Cantons." The bulk of the work of the executive resides from the Federal Council. When the Federal Assembly makes a request to the Federal Council to initiate legislation on an important subject it drafts the Bill with the help of the expert staff at its disposal and forwards it on to the Assembly along with a well-reasoned report presenting the merits of the proposed legislation and the reasons why it should or should not be enacted. Even in the cases where the Assembly has requested the Federal Council to draft a piece of legislation it usually does not enact the draft law when the Council's report is unfavourable.<sup>28</sup>

The members of the Federal Council also present the Bills in the Assembly through all the states of the legislative process. The Council member who is assigned the Bill, gives his advice and comments in the Committee and his role is significant there. "It is not necessary," remarks Prof. Rappard, "to have attended many such meetings to understand why the principal actors are rarely the legislative members."<sup>29</sup> On the floor of the House of the Assembly which gets the priority to discuss it, the Council member again explains, elaborates, elucidates and defends or opposes, if necessary, the Bill. The Assembly has as Coddington remarks, been reduced, to a certain extent to the position of an advisory body with the electorate exercising the real decision-making power.<sup>30</sup> If a system of legislative initiative should also be adopted, as is being suggested, he further remarks, "there is little doubt that the prestige of the legislature would be even further lowered."<sup>31</sup>

28. Coddington, G.A., *The Federal Government of Switzerland*, p. 92.

29. Rappard, W.E., *The Government of Switzerland*, p. 85.

30. Coddington, G.A., *The Federal Government of Switzerland*, p. 85.

## CHAPTER VI

# THE FRAME OF NATIONAL GOVERNMENT (Contd.)

### THE FEDERAL JUDICIARY

**The Federal Tribunal.** The creation of a Federal Tribunal was the chief institutional innovation of 1874. The Constitution of 1848, no doubt, provided for a court "for the administration of justice in the Federal sphere," but it had no jurisdiction over conflicts of law between the Confederation and the Cantons or between the Cantons themselves. Such cases were heard and decided by the Federal Council and the Federal Assembly. Even cases relating to the rights of the citizens could not be heard by the Federal Court unless they were referred to it by the Federal Council or the Federal Assembly. The Constitution of 1874 does not make any radical change with regard to its powers and jurisdiction, but in practice its authority has considerably expanded. Article 106 merely says, "There shall be Federal Tribunal for the administration of justice in so far as this is within the Federal competence." The Tribunal, as at present constituted, first assembled in 1875 and "since then its jurisdiction has been enlarged several times, chiefly at the expense of the Federal Council."<sup>1</sup>

**Composition and Organisation of the Federal Tribunal.** The Constitution provides that a "law shall provide for the method of organisation of the Federal Tribunal and the sections thereof, the number of its members and Deputy members, their terms of office and pay"<sup>2</sup>. The Judges and Deputy Judges are elected at a joint session of the Federal Assembly.<sup>3</sup> The Constitution does not prescribe any qualifications for the judges. It only says that any Swiss citizen eligible to the National Council may be appointed to the Federal Tribunal.<sup>4</sup> But members of the Federal Assembly and of the Federal Council, and the officials elected by these authorities, may not, at the same time, be members of the Federal Tribunal. The only condition which the Constitution imposes is that the Federal Assembly, while appointing judges and Deputy judges, shall see that the three official languages of the Confederation are represented upon it.<sup>5</sup> Due care, however, is taken to select men of legal learning

1. Hughes, C., *The Federal Constitution of Switzerland*, p. 119.

2. Article 107, Section 2.

3. Article 92.

4. Article 108.

5. Before 1874 membership of the Federal Tribunal was not incompatible with that of the Federal Assembly nor with following another employment, and in fact was normally combined with one or both of these.

6. Article 107, Section 1.



amount involved in the dispute is 8,000 francs or more, also lie with the Tribunal. Similarly, it decides cases between a Canton on one side and a corporation or private persons on the other, at the instance of one or other of the parties and when the amount of the suit exceeds 8,000 francs. The Tribunal also decides cases between individuals where the amount in litigation exceeds 10,000 francs and when the two parties request to take jurisdiction. The Federal Tribunal further decides cases concerning loss of nationality and disputes upon citizenship between communes of different Cantons.

The civil jurisdiction of the Tribunal expressly conferred by the Constitution has further been much extended by virtue of the provision of Article 114 which authorises the Confederation to place "other matters" within the competence of the court. The same Article further confers on the Tribunal powers to ensure the uniform application of laws relating to commerce and transactions affecting movable property (law of obligation including commercial law and the law of exchange), suits for debt and bankruptcy, protection of copyrights, and industrial inventions. Finally, the Assembly has made the Federal Tribunal virtually a general Court of appeal from the Cantonal courts in all cases arising under federal laws,<sup>9</sup> where the amount in dispute exceeds 8,000 francs.

(ii) **Criminal Jurisdiction.** On the criminal side, the Tribunal has original and exclusive jurisdiction in:

- (a) Cases of high treason against the Confederation and revolt and violence against the federal authorities;
- (b) Crimes and offences against the Law of Nations;
- (c) Political crimes and misdemeanours which are either the cause or consequence of disorders and disturbances necessitating armed federal intervention;
- (d) Offences committed by officials appointed by a Federal authority when brought before the Tribunal by that authority.

The Tribunal also has original jurisdiction over other serious crimes such as counterfeiting and voting frauds. Cases of original jurisdiction, however, make up a very small proportion of the work load of the Federal Tribunal.

Article 64(1) empowers the Confederation to legislate in regard to criminal law. In criminal cases, as stated before, the Tribunal holds assizes from time to time at fixed centres in which the country is divided for this purpose. In these assizes a section of the Tribunal sits with a jury chosen by lot from the neighbouring villages. Concurrence of five-sixths of the jury is necessary to convict an accused person.

The Tribunal sits in four Chambers for exercising its criminal jurisdiction: The Federal Criminal Court; the Court of Accusation -this prepares business for the Federal Criminal Court and decides if there is a *prima facie* case, and decides as to the place of criminal jurisdiction, i.e., in which Canton. Then, there is the Court of Cassation, and finally is the extraordinary Court of Cassation of seven judges.

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9. Article 111.

(iii) **Constitutional Jurisdiction.** The Federal Tribunal has a limited constitutional jurisdiction. It takes cognisance of

- (a) Conflict of competence between Federal authorities on one side and Cantonal authorities on the other side
- (b) Disputes in public law between Cantons and
- (c) Appeals against violation of constitutional rights of citizens and appeals of private persons against violation of international agreements or treaties.

The provision relating to the constitutional rights of citizens has been constructed by statute to include rights guaranteed by Cantonal as well as by Federal Constitutions. In all such cases of conflict of competence it is the duty of the Federal Tribunal to uphold the Federal Constitution against the Cantonal, and the Cantonal Constitution against ordinary laws and decrees of the Cantons. The Federal Tribunal can invalidate Cantonal laws and it can inquire into the constitutionality of actions of Cantonal executive officials. In practice, there are a great number of such appeals brought before the Federal Tribunal each year and the great majority of such appeals concern the guarantees of equality before the law as provided for in Article 4 of the Constitution.

(iv) **Administrative Jurisdiction.** Finally, it has a limited administrative jurisdiction too. It decides disputes relating to the legal competence of public officials, hears many classes of railway suits and administrative disputes in matters of taxation. The Federal Tribunal also shares certain restricted areas of judicial power with the Federal Insurance Tribunal and the military authorities.

**Comparison with the Federal Judiciary of United States.** The nature of the Swiss Federal Judiciary was discussed in Chapter II, and it was pointed out that it differs materially from the Federal Judiciary in the United States. The Swiss Federal Tribunal, though a national court, stands alone. It has not, like the American Supreme Court, subordinate courts spread over the whole country. Nor has it its separate officials to execute its judgments. The Tribunal relies upon the Federal Council, acting through the Cantonal governments, for the enforcement of its decisions. But the real difference is between the powers of the two. The Federal Tribunal is bound by an express provision of the Constitution to apply every law passed by the Federal Assembly. Article 113 provides, "in all the above cases the Federal Tribunal shall apply the Laws passed by the Federal Assembly and the universally binding decrees passed by the Federal Assembly, and the treaties which it has ratified." The Swiss Tribunal has, accordingly, no power to ascertain the constitutionality of Federal statutes and such decrees of the Federal Assembly as are of general application. The Constitution has reserved for the Federal Assembly the right to interpret the Constitution and all laws passed thereunder. The Assembly can put its own construction on every law which it has passed without the interference of any judicial authority to correct it. This is, of course, unpalatable to American lawyers who hold that the powers of a legislature cannot go beyond those which the Constitution has conferred upon it. There cannot be security, the voice of America



further contends, for the due observance of the Constitution, if its interpretation is left to be determined by the legislature which might have infringed its provisions. It would be tantamount to make the violating body the judge in its own case.

The Continental theory, on the other hand, subordinates the judiciary to the executive and the legislature. Some of the eminent Swiss Jurists, no doubt, regard the American system as more rational, still Switzerland has clung to the Continental tradition and there is no apparent likelihood of a change. Even if it may be conceded that the power of judicial review inheres in the Federal Tribunal, it would hardly serve as an effective instrument since the sovereign people in Switzerland have the direct means of expressing their will at a referendum. A judicial decision declaring a law unconstitutional would interfere with their cherished constitutional right of accepting or defeating legislation passed by the Assembly. Finally, the Federal Tribunal, as it has already been pointed out, has less authority over the public officials than the Supreme Court of the United States. Many important matters are beyond the competence of the Tribunal. It may further be added that although conflicts of jurisdiction between the Federal authorities and Cantonal authorities are decided by the Federal Tribunal, but conflicts of jurisdiction between the Tribunal and the Federal Council are decided by the Assembly. The Federal Tribunal has, therefore, no power, like the Supreme Court, to decide upon the question of its own competence. The Federal Tribunal, in brief, since its establishment at Lausanne in 1875, has never enjoyed the prestige and independence of the American Supreme Court. "To endow it with the right of disavowing federal statutes would therefore be to impose on a much weaker court a much heavier burden than that under the American judiciary sometimes seems to be staggering today."

### THE FEDERAL ADMINISTRATIVE COURT

The Federal Administrative Court was provided for in 1914 by an Amendment of the Constitution.<sup>11</sup> It gave to the Administrative Court jurisdiction to hear administrative disputes and disciplinary cases within the federal sphere, and Cantonal administrative cases, provided the Cantons had invested the Court with such a jurisdiction. In 1925, the Federal Assembly by a resolution decided that the duties of this Court were to be exercised by the Federal Tribunal. The Administrative Court is, therefore, not a separate Court like the Swiss Insurance Tribunal or like the Administrative Courts in France and other Continental countries. It is a section of the Federal Tribunal and, accordingly, a part of the ordinary courts, except that the Administrative Courts use a different type of procedure from that used in the Federal Tribunal.

1. Rappard, W.E., *The Government of Switzerland*, op. cit., p. 91.

11. Article 114.

## CHAPTER VII

# THE REFERENDUM AND THE INITIATIVE

**Direct Legislation.** The institution of direct legislation is a distinctive feature of Swiss democracy. The method of popular legislation, i.e., law-making by the citizens themselves and not by their representatives, is as old as Swiss history and it finds its fullest expression in the **Landsgemeinde**, the mass meetings of all citizens. The **Landsgemeinde** is still kept alive with its ancient traditions and practices in the Cantons of Appenzell, Unterwalden and Glaris. In the remaining Cantons the referendum and the initiative represent an effort to extend the idea of direct democracy in order to uphold the cherished conviction of the Swiss people that they are sovereign and they can assert their right by taking a direct part in the determination of the affairs of the State. Such an attitude of mind of the people has profoundly modified Swiss mechanism of Government and influenced the world opinion in favour of these institutions.

"Nothing in Swiss arrangements," writes Bryce, "is more instructive to the student of democracy, for it opens a window into the soul of the multitude. Their thoughts and feelings are seen directly, not refracted through the medium of elected bodies." Switzerland is really speaking a type of "mixed democracy," wherein "the legislative will of the people is expressed both through legislatures and through direct popular votes in the form of the referendum and the initiative."

**The Referendum.** Literally the word referendum means "must be referred." As a concept of Political Science, it means the process by which the verdict of the people is sought on a proposed law, fundamental or ordinary, and on which the legislature has already expressed its opinion. If it is approved by the majority of the voters voting, the law stands adopted. If it is rejected, it is given up. Referendum is, thus, really a consultation of the people on a law passed by the Legislature before its final enactment.

The referendum may be of two kinds: **optional** or **facultative**, and **compulsory** or **obligatory**. When a law, after it has passed through the legislature, is submitted to the people for their acceptance or rejection on a petition from the specified number of citizens, it is known as the optional or facultative referendum. In the case of compulsory or obligatory referendum all measures of a specified type must necessarily be referred to the people for their acceptance or rejection before they can become laws. The obligatory form is obviously more democratic, for

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1 *Modern Democracies*, Vol. I, p. 415.

2. Marx, M., *Foreign Governments* (2nd ed.), p. 390.

3. *Ibid.*

it requires expression of popular opinion on every law. The Swiss, too, consider it preferable on practical grounds, because it "avoids the agitation necessarily involved in the effort to collect signatures to the petition for a referendum." And laws so approved by the people have a great stabilising effect as they have the impress of popular will.

**Forms of the Referendum.** All amendments to the Federal and Cantonal Constitutions are subject to obligatory referendum and without such a process no constitutional change becomes final. The obligatory referendum for all changes in the Federal Constitution was introduced in 1848, and this provision has been continued in the Constitution of 1874. The prevailing Constitution also includes the provision that Cantonal Constitutions must be similarly adopted in order to be guaranteed by the Federal government.<sup>4</sup>

The procedure applied in the Confederation for constitutional referendum has already been discussed.<sup>5</sup> To recapitulate it, proposed amendments for partial or total revision of the Constitution are usually passed first by the Federal Assembly in the same way as ordinary laws. Then, they are submitted at a referendum of the people and become valid only after having been approved by a majority of the popular votes cast in a referendum, and by a majority of the Cantons. The vote of each Canton or half-Canton is determined by its popular vote.

If one of the Councils of the Assembly does not agree to the proposed amendment or revision, the matter whether such an amendment is necessary or not, is referred to the people at a referendum. If the majority vote is in the affirmative, then, fresh elections of the Assembly are held. The newly elected Assembly undertakes the proposed revision and after duly passing it, it is submitted to the referendum of the people and Cantons for their acceptance or rejection.

The national legislative referendum is applicable to federal laws—except budgets and decrees—and since 1921 to international treaties concluded for an indeterminate period or for more than fifteen years. Every federal law after having been passed by the Assembly is published in the Federal Official Journal and sent to the Cantons to be circulated through the Communes. Within ninety days of its circulation either eight Cantons or 30,000 citizens may demand its submission to a referendum. Similarly, 30,000 citizens may demand international treaties concluded for an indefinite period or for more than fifteen years their submission to a referendum. Federal decrees which come into force immediately can also be demanded for approval at a referendum. All these are examples of the optional referendum.

The Cantons have never demanded referendum. The citizens do usually demand it. The opponents of the measures excite popular interest and secure the requisite number of signatures. The signatures are now often collected by sending reply-paid cards through the post to voters, who merely need to sign and drop the card into a letter box.<sup>6</sup>

4. Article 6.

5. Chapter II.

6. Hughes, C., *The Federal Constitution of Switzerland*, op. cit., p. 101.

When the number of signatures sent in has been recognised by the Federal Council to be sufficient, it publishes the law to be circulated among the people all over the country and fixes a day for voting, not before four weeks after the publication and distribution of the law. Meetings are held at which members of the Assembly and others advocate or oppose it. Articles on the main provisions of the law appear in the press. The arrangements for voting are made by the Cantonal authorities, but ballot papers are supplied by the Federal government. The voting is held on a Sunday and takes place on the same day over the whole country. The polling is usually quiet and orderly and complaints of bribery and impersonation are seldom heard.

All Cantons, except those retaining the **Landsgemeinde**, provide for the legislative referendum. In some it is obligatory, in others it is optional, where it is optional it depends upon a petition by a specified number of citizens, the number varying from Canton to Canton. In still other Cantons the referendum is obligatory for important financial laws only and optional for others.

**Forms of the Initiative.** The referendum has purely negative effect as it merely enables the people to reject measures passed by their representatives. The advocates of direct legislation, and more particularly the Swiss plead that the legislature ought not to have the exclusive right to originate legislation. It ought to be, it is asserted, an inherent right of the citizens to propose legislation and when ratified by the popular vote, it must become law no matter even if it has been disapproved by the legislature. Such a device of popular legislation is called **initiative**. By means of the initiative the voter can make his influence felt in those cases where the legislature may not want to adopt a constitutional amendment or a law.

The initiative is very often erroneously likened to a petition. But both essentially differ from one another. A petition is a mere popular submission made to the legislature suggesting the need for making a particular legislation. The legislature may or may not act upon it. But the initiative is the vindication of the sovereign power of the people as it takes effect without regard to the opinion of the legislature, and even against its wishes.

The initiative may also take two forms: **formulative**, and in **general terms**. When the demand is couched in general terms, it is the obligation of the legislature to draft, consider and pass the laws as desired by the required number of citizens, subject to the ratification of the people. If the proposal is formulated, in the form of a Bill complete in all respects, it is the duty of the legislature to consider the measure as it is and the vote has to be taken on that text.

The right of constitutional initiative exists both in the Confederation and in the Cantons. Under it a minimum of 50,000 voters may petition for an amendment to the Federal Constitution, either in the form of a request in general terms or formulated in the complete and final form of a Bill. If the Assembly approves a proposal submitted in general terms, it, then, proceeds immediately to draw up the amendment and submit it to the popular and Cantonal vote. If, however, the Assembly votes

against it, the question is referred to the people whether or not the initiative proposal will be proceeded with. If it wins the majority of the popular vote, it becomes the duty of the Assembly, although it has already expressed its disapproval of the proposal, to put the amendment in form and submit it to the verdict of the people and Cantons. An unfavourable popular vote kills it.

If the initiative is formulated in specific terms, and if the Assembly accepts it, the proposal is at once submitted for popular and Cantonal action in the usual manner. If the Assembly does not agree to the formulated proposal, they may either advise the voters to reject the initiative or submit a counter-proposal along with the original one.

If the initiative contains a proposal for a complete revision of the Constitution, then the procedure is identical to the one explained previously,<sup>7</sup> when one Chamber of the Federal Assembly proposes the revision and the other opposes it.

Since there is no federal legislative initiative, the constitutional initiative has been used to place all kinds of matters in the Federal Constitution, for instance, the prohibition against Kosher slaughtering. "The Constitutional initiative, on the other hand, has also been used for such politically significant purposes as the introduction of proportional representation and of the referendum on certain international treaties. Dr. Finer says, that the "constitutional initiative (in Switzerland) is wide enough to include ordinary legislation when proposed in a constitutional amendment and, thus, which is found in some States of United States also, is a defect rather than a merit—to put ordinary laws into the Constitution."<sup>8</sup> There is, indeed, no recognised criterion for determining whether a proposed measure is a constitutional amendment or an ordinary law.

In the Cantons, however, there is legislative initiative. In all Cantons, except where laws are made in the *Landsgemeinde*, a prescribed number of citizens may either propose a new law or submit to the Cantonal Council the principle on which they desire a new law to be based. In the latter case, the Council refers the question to the vote of the people. If the people approve it, then, the Cantonal Council prepares the law and it is submitted to the people for their acceptance or rejection. If the proposal is formulated, it goes straight to the people. But the Cantonal Council may suggest counter-proposals and refer them to people for their decision along with the original popularly initiated proposal.

**Working of the Referendum and the Initiative.** The Swiss people are constantly being called upon to express their opinion either by referendum or by initiative. From 1848 to 1965, the Swiss went to the polls for more than a hundred times for revision of the Federal Constitution. There have been two proposals for total revision—in 1880 and 1935—and both were rejected. The partial revisions have been numerous, but comparatively few of these have altered the constitutive parts of the Constitution. The vast majority have extended the competence of the Central Government. Between 1874 and 1950, "620 Legislative Acts have been liable or subjected to referendum—the figure includes constitutional amend-

7. Chapter II.

8. *The Theory and Practice of Modern Government*, p. 761.



ments subject to the compulsory referendum, and all Acts and treaties liable to the facultative referendum, including in both cases those accepted and rejected." Since then the number has still more increased.

Between 1891, when the popular initiative was first introduced, and 1960, some forty-five proposals originated with the people, twelve of them in the twelve years between 1935 and 1947. Seven of these popularly initiated proposals were finally adopted by the people.

In the Cantons the consultation of the people is more frequent. But its frequency is more in the German-speaking Cantons. In the German-speaking Cantons there is more jealousy and distrust of the Government and more confidence in the action of the people. Hence the referendum and the initiative are peculiarly German institutions. The French, on the other hand, are less democratic in the Swiss sense of the term. They are by nature more inclined to follow the lead of the Government and although they have adopted the referendum, it is most exclusively optional and for that, too, they have made little use of it.

**Character of the Laws rejected.** From the above survey of the working of direct legislation in Switzerland it will be clear that the Swiss are asked to pronounce their judgment on a variety of problems including the highly technical. From the list of the measures rejected, a few inferences may be made. First, the history of popular voting reveals a marked tendency to reject measures that are in any way radical. It implies that the Swiss people by themselves are really more conservative than their representatives. But the conservatism of the people does not manifest itself so much in the Confederation as in some of the Cantons. The people also reject those laws that are too comprehensive, or complicated, or mean to effect too much at once. This tendency has one good result, for it shows that the Swiss want to understand the laws they are required to enact. Finally, the Swiss have rejected measures which involve spending of money. This tendency, which seems to be universal, applies especially to proposals "for increasing the salaries of public officers, and in fact, the largest number of negative votes ever cast in a federal law were thrown against the Bill for pensioning officials." But whenever the government has appealed to the spirit of patriotic sacrifice, when the interest of national security seemed to justify such appeals, as it happened during the two World Wars, and in the period of economic depression, the people had readily responded to the needs of the nation and readily enhanced their personal and financial burdens.

Direct legislation, it was remarked in the beginning of the present Chapter is almost peculiar to Switzerland and it has profoundly modified the character of the Swiss Government. Its institutions were planted in some other countries after World War I as a result of the peoples' reaction against representative democracy. Whatever be the degree of success there, it cannot be denied that the mechanism of direct democracy is a difficult operative ideal. It demands certain inherent qualities in the people where it is desired to be made operative. The success which popular legislation has achieved in Switzerland is due to the historical antecedents of the Swiss people, to their long practice of self-government

in small communities, to social equality, and to the pervading spirit of patriotism and sense of public duty in them. Similar success cannot be expected in countries where similar conditions are not obtainable. In Switzerland direct legislation has a natural growth, or as Bryce says, it is "racy of the soil. There are institutions which, like plants, flourish only on their hill side and under their own sunshine."

Independence is the first quality which a Swiss citizen exhibits. Democracy without political parties is unthinkable and voting of any kind closely follows party lines. But in Switzerland party sentiments seldom dominate the minds of the Swiss citizens, particularly when they are required to give their final judgment on legislation. The Swiss Constitution does not provide for the dramatic clashes of political parties and forces common in other countries. There have been instances when a displeasure at the conduct of a party created a prejudice against the measures it had put through the legislature, as it happened in 1884 when the people rejected all the four Bills due to the irritation caused among the minority parties in the Assembly. But this is a rare phenomenon in Swiss politics. "The Swiss voter, always independent, is most independent when he has to review the action of his Legislature." Each proposal is generally dealt with on its merits. Party affiliations do not count when the Swiss dislike changing their members even when they championed the measures which they have rejected. "As a general rule the Swiss tend to re-elect representatives whom they have disavowed, unless they have reason to suspect their patriotism."<sup>10</sup>

Another quality in the Swiss is parsimony. Like the Scotch, they are thrifty, and "in public matters positively penurious." A Swiss is averse to anything which can increase taxation, and, as previously stated, he cannot understand "why officials should be paid on a scale exceeding what he earns by his own toil." With this attitude the Swiss examine all their political problems and institutions. As a corollary, it follows that they like their administrative machinery to be simple. And through all these ages the Swiss have jealously guarded their local sovereignty and have always resented the interference of the Central Government, although there has been a marked evolution in the popular mind towards centralization.

But the quality most important "in a legislating nation as in a legislating assembly," says Bryce, "is compounded of two things: judgment and cool-headedness, the absence of passion and presence of intelligence."<sup>11</sup> The Swiss are the embodiment of this quality which we may call a "good sense." They are neither an emotional nor a passionate people. They are an educated nation and "their best minds are more sagacious than imaginative." Having a long experience with the methods of direct democracy and its successful operation, the Swiss have formed the habit of voting in a calm spirit. They are cautious in their judgment and the great majority of the nation have always shown resolute hostility to extreme demagogic spirit.

10. *Modern Democracies*, Vol. I, pp. 453-54.

11. *Ibid.*, p. 433.

12. Rappard, W.E., *The Government of Switzerland*, p. 72.

13. *Modern Democracies*, Vol. I, p. 435.

Compromise and tolerance, indeed, are essentially elements in the Swiss system of government. "A people more given to absolutes or inclined to engage in extremist debates over abstract principles would find the Swiss system unworkable."<sup>14</sup>

**Arguments in favour of Referendum.** The principle of popular sovereignty, it is asserted, finds its real expression in direct legislation rather than in a representative system. In a representative system genuine public opinion is unobtainable, for it is moulded and shaped by the partisan influences of the press, the platform and the propaganda. The referendum upholds the sovereignty of the people and is the surest method of discovering the real wishes of the people. It is, therefore, an excellent barometer of public opinion. Moreover, a citizen knows better than his representatives what can serve him the best and enhance his interests. A law which comes direct and straight from the people carries with it fuller moral authority and commands more unquestioning obedience than a law made for them by the representatives.

The referendum, its advocates further maintain, minimises the importance of political parties and discourages partisan spirit. Then, it is a popular check on the vagaries of the legislature and the political machine. The frequent rejection by the people of measures passed by the legislature shows that the latter does not always know or give effect to the real will of the people. The referendum also ensures that laws opposed to the popular will have no chance of being enacted. It puts, as a matter of fact, a veto in the hands of the people.

The referendum reduces the political high-handedness of the majority party. Under the representative system a law is usually what the parliamentary majority wishes it to be. It does not represent the will of the minorities. If, however, it is referred to the people before it can be finally enacted, the minorities do get an opportunity to adequately express their opinion and to muster strong their opposition, and if possible, to negative it. This is real democracy. Then, there is no time lag. Direct legislation, remarks Bryce, "helps the legislature to keep in touch with the people at other times than at general election and in some respects a better touch, for it gives the voters an opportunity of declaring their views on serious issues, apart from the destructive or distorting influence of party spirit."

When the people feel and realize that they are the real legislators, their patriotism and their sense of responsibility are fully stimulated. Realisation of this fact is also the real political education of the citizens. This is the true price of democracy. Moreover, the process of direct legislation is conservative in character. The people will seldom introduce radical changes when they know that they are the arbiters on legislation. They realise, that if need be, they themselves can easily adjust laws to fulfil their needs. They do not, accordingly, press for sweeping changes.

The Referendum is the best means of resolving deadlocks between the two Chambers of the Assembly. It is, again, a check on the powers of the legislature. In Switzerland the executive does not exercise a veto

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14. Buell, B.L., *Democratic Governments in Europe*, p. 583.

on legislation. Nor does one Chamber override the other. They are co-equal in powers. The only check available, therefore, is the popular vote. Finally, as Bryce says, "There must somewhere in every government be a power which can say the last word, can deliver a decision from which there is no appeal. In a democracy it is only the people who can thus put an end to controversy."

**Arguments against Referendum.** One of the chief objections against the referendum is that it has undermined the prestige of the legislative assemblies and has adversely reacted on the quality of membership. When the representatives know that ultimately their efforts may be reversed, they will take little interest in the discharge of their legislative duties. Moreover, it erodes responsibility by making the people, "an anonymous shifting abstraction," responsible. If the measure succeeds at the popular vote, the credit for it goes to the people and not to the legislature. If it does not succeed, the blame goes to the legislature. The status and authority of the legislature must, accordingly, suffer and the result is that the people become less deferential towards it. "Its sense of responsibility," says Bryce, "is reduced" and it may be disposed to pass "measures its judgment disapproves, counting on the people to reject them, or may fear to pass laws it thinks needed lest it should receive a buffet from the popular vote."

The man in the street is not adequately qualified to form and deliver any opinion upon many subjects of legislation particularly when legislation has become so highly technical and complicated. A simple 'Yes' or 'No' does not indicate the real will of the people and their comprehension of the legislation which they accept or reject. The making of laws or their ratification demands from the people a great moral standard and it is this moral value which is first and last for the referendum's main justification. The people may be ever so shrewd and ever so willing to do their duty in accordance with the strict code of morality, but they have not, and cannot have, the knowledge needed to enable them to judge the implications of the proposed legislation. Nor can the pamphlets distributed and speeches made by the supporters and opponents of the measure convey to them the requisite knowledge. The interests of the people, the critics of direct legislation maintain, are really safer in the hands of representatives chosen for their talent and mature judgment than when submitted to the hazards of the popular vote. Then, the people must accept or reject the Bill, no amendments are possible. The vote must be given for the whole Bill. In fact, no amendments can be possible when the Legislative Assembly consists of the whole public.

Another criticism and, indeed, a really cogent one relates to the small size of the votes cast at a referendum. It is asserted that the result of the ballot does not fairly represent popular opinion, because in most cases the opponents of the measure go to the polls in larger proportion than its supporters. The number of large abstentions at referendum also proves that many a voter either cares little for his civic duties, or knows his unfitness to perform them. Moreover, when people are frequently asked to cast their votes, they develop what may be called

an "electoral fatigue." The net result is that the decision arrived at is invariably that of a minority of the citizens, and it becomes difficult, under the circumstances, to know whether there is any public opinion at all on the question. Furthermore, the referendum sometimes involves unnecessary and harmful delay in passing many laws of vital national importance. All this takes away the educative value of the referendum. When citizens do not interest themselves in public affairs, direct legislation becomes a farce pure and simple.

When a law is accepted at the referendum by a small majority, as it happened on the question of the Swiss Federal Penal Code and on the Federal Economic Articles in 1938 and 1947 respectively with a majority of only 53 per cent in both the cases, its moral authority would suffer more than it would be the case had opinion been nearly equally divided in the representative legislature. In countries where direct legislation does not exist a law passed by representative legislatures is accepted and no one cares to enquire what was the majority that passed it. It comes in the regular way from the usual organ of the people's will and it is accepted by the people in the usual way. But when it goes to the people for their acceptance every one is keen to know the minority that passed it. Those who opposed it carry on their opposition ceaselessly and openly, because they feel aggrieved to have been overridden by a negligible majority.

There is also no justification to hold that direct legislation lessens the evils of party system. As a matter of fact, political parties become more active when frequent votes are to be taken. The referendum accentuates political rivalry and partisan spirit, though this tendency has not been so prominent in Switzerland because of the habits of the people. The high cost per signature of securing the petition of 30,000 citizens for a challenge confines its use to corporate bodies—political parties, trade unions, pressure groups, etc., and increases their already strong influence on policies. "The vitality and influence of the non-public-law bodies," observes Christopher Hughes, "appears to a foreigner the most helpful sign in Swiss democracy, but the Swiss themselves are unanimous in deploing it; perhaps that is because they have deprived themselves of the counter-weight of strong political parties divided on issues of policy."<sup>15</sup>

One obvious result of the referendum is the movement of the centre of gravity from the legislature to the executive. In the first place, the Assembly prefers to delegate legislative powers to the Federal Council than to legislate itself, "for less surface is thereby exposed to criticism: laws are drafted to avoid referendums. And secondly, the *Arretes* of the Federal Council not being exposed to challenge like those of the Assembly, in times of emergency the Federal Council has to do all the legislating."<sup>16</sup> The will of the people finds no adequate channel of expression and effectiveness. Direct democracy and its often acclaimed advantages disappear. An executive which is neither responsible nor responsive and is, in fact, the servant becomes the master.

15. *The Federal Constitution of Switzerland*, op. cit., p. 102.

16. *Ibid.*, p. 101.



Finally, "the most comprehensive but also the vaguest argument," says Bryce, "adduced against the referendum is that it retards political, social and economic progress." Sir Henry Maine developed this point in his book, **The Popular Government**, in 1885, and it particularly impressed Englishmen who had associated masses with conservatism. But this argument is not supported by Swiss experience. It is true that prejudice or undue caution has in some cases delayed the progress of economic or social reforms which the Assembly proposed, but no general harm has followed in Switzerland from that conservatism.

**Arguments in favour of the Initiative.** Arguments in favour of the referendum and the initiative are more or less identical. But as the conditions of the latter's application are different, it needs, therefore, to be considered separately.

The initiative is claimed to be the necessary development of the concept of popular sovereignty. The people, it is argued, cannot really be sovereign, if they act through representatives. Howsoever politically virtuous and best intentioned the representatives may be, they must act according to the party programme and the party whip which may even lead to misrepresentation of the people's will. It is, accordingly, claimed that there is no better means of adequately and genuinely expressing their will, except by their own voice and vote. The referendum gives, to the people only a negative right of either accepting or rejecting the legislation on which they are required to express their opinion. But the initiative gives them the positive right of framing the laws which they feel they actually need. If the referendum "protects the people against the legislature's sins of commission so the initiative is a remedy for their omissions."

Next, if the legislatures are apathetic to the needs of the people, lag behind public opinion, and primarily concern themselves to push through party programmes, then, "why should a body of persons chosen by the people close the door against the people themselves allowing only such proposals as take their fancy to pass through so that the people can deal with them?" A law initiated by the people is the expression of their experiences and the manifestation of their own will. There is spontaneity in obeying such laws and obedience to authority is **ipso facto**. Such political behaviour on the part of the citizens adds to the stature and stability of the government and all round reverence for the institutions of the country. Finally, the initiative minimises the possibility of political upheavals as there is no indefinite postponement of legislation which the people deem essential for their welfare. They act immediately and on their own initiative rather than to depend upon their representatives to feel their pulse and wait for the legislature to pass it.

**Arguments against the Initiative.** But the initiative, like the referendum, reduces the authority and responsibility of the legislature. Making of laws, especially drafting of Bills, is not the job of a man in the street. It is an arduous task which requires specialized knowledge and mature judgment which only experts connected with the work and members of the legislature acquire by long experience. An average man cannot and does not know the technicalities required in drafting Bills.

The result is that popularly initiated Bills are often "crude in conception, unskilful in form marred by obscurities and omission." The language used in such Bills is usually seriously defective and liable to many interpretations. In the Cantons where the legislative initiative has been much freely used, it has not been the parent of any reforms which might not have been obtained through the legislature. The people, on the other hand, have sometimes placed unwise laws on the statute books. "Sometimes the prudence of the Cantonal Councils," maintains Bryce, "dissuading the people from the particular plan proposed and substituting a better one, averted unfortunate results, while in the case of an ill-considered banking law the Federal authorities annulled the law as inconsistent with the Constitution. Several times the people have shown their good sense in rejecting mischievous schemes proposed by this method." The much acclaimed advantages of initiative, therefore, are actually negated by the practical results.

**Conclusion.** In Switzerland, the opinion both of scholars and statesmen on the value of direct legislation are most divergent. Some extol it as the most perfect institution, in theory and practice, so far devised. There are others who deery it on the ground that people are consulted on matters which they do not understand and assert that the actual working of the system has been bad. Some reformers resent the delays and checks inherent in the referendum and some voters complain of the excessive demands made on their spare time. All the same, no one in Switzerland would now be seriously in favour of giving it up. If one were to ask, writes Rappard, the man in the street in Switzerland "whether his country was on the whole satisfied with the results of her experiments with direct democracy, the answer would undoubtedly be in the affirmative. Indeed, he might take exception to the term of experiments in this connection. The experimental stage is over and with it have gone as well the misgivings of the early enemies of the initiative and referendum as the blind enthusiasm of its first friends."

The people as a whole value the privilege. "The people of modern democracies," writes Bonjour, "is no longer the irresponsible **demos** which Aristophanes pilloried with his mordent pen in the **Knights**—a brutal, elderly and irascible epicure, a willing prey to the basest flattery. Today, it is usually clear-sighted and obedient to its best impulses when its leaders know how to enlighten it by appealing to them...." The political party which holds the majority in the legislature, though sometimes annoyed at the results, has never tried to withdraw it. The Radicals deem it to be a necessary feature of democracy. The Conservatives and the Clericals consider it a necessary drag on hasty legislation. The institution has, thus, become permanent, "not only because the people as a whole are not disposed to resign any function they have assumed, but also because it is entirely comfortable to their ideas and has worked in practice at least as well as a purely representative system worked before or would be like to work now." The institutions of the referendum and the initiative are the pivot upon which hinges the entire Swiss

17. *The Government of Switzerland*, op. cit., pp. 74-75.

18. Bonjour, F., *Real Democracy in Operation*, pp. 115-16.

governmental system. If they are abolished, "certainly the present relations among the executive, the legislature and the judiciary will have to be altered and either the American or the British system of Government adopted."

The Radical Party has constantly advocated the introduction of the legislative initiative for federal laws and recently it has been joined by the Socialists. Various arguments are used and repeated for the institution of the legislative initiative and one of a more practical nature is that it would eliminate the practice of using constitutional initiative to insert into the Constitution provisions that should ordinarily be drafted as laws. Various arguments against this institution are also offered and the most familiar argument is that it would further reduce the importance of the Cantons and their protection against the encroachment of the Federal Government."<sup>10</sup> There may be practical reasons to block the introduction of legislative initiative, but as an institution of direct democracy it is highly valued. The majority of the Cantons have the institution of the legislative initiative. Some of the American States introduced non-constitutional initiative simultaneously with the referendum on the Swiss model. Twenty States of the Middle and Far West already have the right of initiative. Whatever be the verdict on the initiative, the Swiss people, as Hans Huber has said, "as a whole and in the Cantons have, by and large, given proof of great political maturity in referendum voting."

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10. Rappard also points out that if a majority of the voters and Cantons should be required for approval of a legislative initiative, "the only distinction still existing between constitutional and ordinary legislative measures would disappear." *The Government of Switzerland*, p. 70.

## CHAPTER VIII

# POLITICAL PARTIES

**Nature of Political Parties.** Switzerland is a democracy, but even in democracy the individual alone is inevitably impotent unless he joins others with "similarly minded fellow-individuals" to exercise his political authority. When he does so, it is the emergence of a political party, which is a necessary tool of democratic government.

In spite of the inevitability of political parties in the Swiss system of government, the Swiss Constitution, like that of the United States, contains no express mention of this instrument of democracy. Political parties in Switzerland have extra-constitutional growth. There is, however, an indirect reference to political parties in the Swiss Constitution since the introduction of proportional representation for the election of the National Council. Article 73 as amended on October 13, 1918 specifies, "Elections for the National Council are direct. They follow the principle of proportionality, each Canton or half-Canton forming an electoral district." The "principle of proportionality" would be meaningless if it did not refer to the parties between whose elected representatives a proportion, similar to that prevailing between their electors, was to be established.

Switzerland, too, like other Continental democratic States, relies upon a variety of political parties to organize and promote national opinion. In fact, nowhere else in Europe there are more chances of having political parties than in Switzerland. The suffrage is wide and the people have to vote upon public affairs very often. Then, there are so many diversities of racial character, of religion, of speech, of forms of industry, and of conflicting economic interests. All these diversities are a breeding ground for multiplicity of parties and their frequent regroupings. But it is fortunate for Switzerland that the lines of party do not coincide with those of race and language and nowhere else "has the ship of the State been so little tossed by party oscillations." There are three major political parties and there do not exist extreme differences in their political philosophy and social composition. As the Swiss love for "order and compromise is as strong in politics as it is elsewhere," the multiple-party system has not led to the instability that is found among two of Switzerland's close neighbours.

**History of Political Parties.** The political history of the present Confederation begins with the overthrow of the *Sonderbund* to which a reference has been made earlier,<sup>1</sup> and the adoption of the Constitution of 1848. This Constitution sealed the re-union of all the Cantons and created closer ties between them. At that time, federal affairs were dominated by two groups of politicians whose principal support came

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1. See ante, Chap. I.

from the Protestant German Cantons and from Protestant French Cantons. These groups subsequently became known respectively as the Liberals and the Radicals. The former group, the Liberals, consisted of older men who advocated a liberal political philosophy of the traditional *laissez-faire* type, moral and cultural freedom for all, and republican political institutions. The Radicals were younger and progressive people and they were inclined towards a liberalism of more advanced type. They sought to extend political democracy through the institutions of the initiative and the referendum, and advocated a policy of economic liberty with a certain degree of State intervention. Despite their difference the Liberals and the Radicals actively collaborated in bringing into being the Federal Constitution of 1874, and this document incorporates the philosophies of these parties and presents "centralistic, liberal, secular and democratic features."

Opposed to them was the Catholic Conservative People's Party. It consisted mainly of those elements which had formed the **Sonderbund** in 1846, and brought in the War of Secession in 1848. The Clericals were ultramontane in their views and were the champions of the Cantonal rights. The party paid, according to Zurcher, "only grudging allegiance to the Constitutional settlement of 1848, into the acceptance of which it had been virtually coerced." This party now draws its members mainly from the Cantons where the Catholic majority is overwhelming. It is the most ardent, the most compact, and the best organised of the Swiss political parties. The party still opposes certain provisions of the Federal Constitution that they regard as anti-Catholic or as anti-Clericals. It rejects all powerful State and espouses rights of the individuals in regard to family, school, and church. In general, it is hostile to centralisation.

Thus, at the advent of 1874, there were three political parties. The Liberals and the Radicals governed the country from 1848 to 1890 while the Catholic Conservatives remained in the Opposition. They commanded a large majority in the Assembly and all the seven seats in the Federal Council belonged to them. An important feature of this period is that the Liberal Party's electoral strength decreased considerably whereas that of the Radicals increased enormously. In time, the Radicals commanded a decided majority both in the Council of States and the National Council, but not in the Federal Council because of the Swiss habit of re-electing the Councillors as long as they wished to serve. With their retirement, however, they were replaced by the Radicals and by 1890, the Federal Council's membership came to include a single Liberal Member.

When the only Liberal member of the Federal Council retired in 1891, the Assembly which was then manned by the Radicals, elected in his place a representative of the Catholic Conservative Party. The Liberal Party became the Opposition. The Radical Conservative Coalition begun in 1891, continued till 1943, when a Socialist found his way. With the resignation of Dr. Max Weber, the Socialist member of the Council, the Socialist Party decided not to put forward another candidate. The vacated seat was given to the Catholic Party. In 1954, the Federal Council was made up of three Radicals, three Catholics, and one Farmers. But the withdrawal by the Socialist Party was temporary. In 1959, it



put up two candidates and secured both the seats. The Federal Council then reflected for the first time the true party strength.

After 1880, Switzerland witnessed the rise of the Swiss Social Democratic Party. The Socialists, as their name suggests, were the followers of Karl Marx. The development of industrialization, and the growth of such industrial centres as Zurich, Winterthur, and Basel together with the large immigration of German workmen, offered the best opportunity for propagating the socialist doctrines, and the party grew apace. At the end of the First World War, it claimed 41 seats and in the elections of 1935 it secured 50 seats in the National Council and, thus, became in the next four years the dominant party: the Radical Liberals and Catholic Conservatives having 48 and 42 seats respectively. In 1939 its number fell to 45 as a group of Left-Wing Radicals broke away from the party. In 1943, it again went up to 56, but fell down to 48 in 1947 and in the elections of 1951 its strength stood at 49, and in 1959 at 51. It keeps close to this number and as at present, it is the biggest party. Like the two other big parties, it has two seats in the Federal Council.

An important feature of the party system in Switzerland is that a certain conservatism governs the development of parties and none of them is extremist. The socialist of the Swiss Social Democratic Party is essentially practical and not revolutionary, although in the early days of its career it believed in the collective ownership of all the means of production, in an inevitable class struggle and, consequently, in violent and unconstitutional methods. But as Switzerland is a mountainous country of small holdings and the peasantry wedded to the soil with strong patriotic sentiments, the revolutionary aspect of socialism did not have much appeal for the people. Moreover, the communal and Cantonal public enterprise, the nationalisation of rails and roads, forests, water, power, etc., make the programme of the Socialists less attractive. They were, accordingly, compelled to make their programme less militant as compared with those of the socialist parties in certain other countries. The Swiss Socialist Democratic Party, therefore, reconciled itself to the democratic and constitutional principles. The Party has now openly declared its faith in an evolutionary form of socialism.

The Socialist Democratic Party is the most highly organised political party in Switzerland and it has its branches in all the Cantons. It stands for nationalization of industries and of all private monopolies, higher wages, social security, compulsory liquidation of agricultural debts, unemployment relief, recognition of the right to work, and suffrage for women.

**Other Parties.** With the introduction of proportional representation in national elections in 1918, many more parties emerged in. The Farmers, Workers and Middle Class Party was organised in 1918 as a result of split from the Radicals because of dissatisfaction with the latter's agrarian policy. In 1929, the Radical Conservative coalition was broadened to include a representative of the Farmers Party which claimed 31 seats in the National Council. In 1935, the Party could command only 21 seats and this number continues since then with a seat fluctuating this or that way. This fall off was primarily due to the coming into existence

of another agrarian party called the Young Farmers who secured four seats in 1935, 6 in 1943, 5 in 1947, 4 in 1951 in the National Council. The Farmers Party is intensely patriotic and vigorously favours measures for adequate national defence. Its programme is decidedly for the protection of agricultural interests and advocates a policy of advancement of agricultural interests by means of federal subventions.

Other minor parties, at present, represented in the National Council include the Independence Party formed in 1935, the Independent Social Democrats, the Nicole group which seceded from the Socialists in 1939, and the Communists. The Communists, who now call themselves the Labour Party, have increased their following, but their success in the stable political conditions of Switzerland can never be phenomenal.

**Features of the Swiss Party System.** The Swiss party system is now more akin to the French rather than the Anglo-American system. The reasons for multiplicity of parties in Switzerland are obvious. It is a country of diversities, more communal and Cantonal rather than federal in its political outlook and consequently the political parties, too, are not nationally organized. Switzerland, unlike other democracies, has not in any true sense a party government. There are no nation-wide elections for a national office, such as that of a President. Elections to the Federal Assembly have a strong local colour. National party organizations are maintained now, but really their practice is to constitute mere alliances for common nation-wide purposes with otherwise independent Cantonal parties; the only exception being the Social Democratic Party.

Switzerland also disproves the contention that democratic government cannot work unless there is a definite majority party or a coalition of parties. Minority parties find representation in the Federal Council and in the Executive Councils of almost all the Cantons. This enables them to exert a direct influence on the conduct of public affairs. Thoroughly partisan administration is, therefore, out of question in Switzerland. There is also absence of strict party control in the Assembly. Party lines are rarely drawn, except on measures that have an immediate bearing on party interests or on religion. The result is that there is the absence of party machinery. There are no national committees, no elaborate system of party caucuses and general conventions. The Radicals and the Clericals, and so do the Socialists, do occasionally hold their Congresses, but they can have no resemblance with party meetings in the United Kingdom, India, and other countries.

Another feature of the Swiss party system is that there are no party leaders. The absence of party leaders is partly due to the non-party executive at the centre as well as in the Cantons, and partly because the parties are divided on local rather than on national issues. Lowell aptly says that it would be "more accurate to say that federal representatives are chosen by the Cantonal parties." The influence of the leaders consequently finds expression in their own Cantons and their power is local rather than national. Another reason is that there is no opportunity for anyone in Switzerland to extend patronage and distribute spoils. Finally, there is neither professionalism in politics nor party funds. Administration has attained in Switzerland a stage of businesslike efficiency. Demagogues do not find favour with the Swiss people. Nor do the repre-

representatives find time, during the short sitting of Swiss Parliament of ten to twelve weeks in a year, to permit "talkers and fighters." The Assembly is the most business-like body in the world and it does its work quietly. Obstruction in the conduct of business is unknown and divisions are much less frequent.

Politics is run in Switzerland more cheaply than anywhere else in the world. Money for party purposes is needed only when the party requires scientific organization meetings to be held for naming the constituencies and diffusing literature. All parties, including the Socialists, agree on three fundamentals: Swiss independence, Swiss neutrality, and Swiss trade. They may disagree on details and on the best method of achieving the objectives, but on the importance of the three-fold goal there can be no difference of opinion. Then, there is no bid to capture the government. The defeat of a party leader in the elections is neither desired nor it is manipulated. In fact, pains are taken "to provide against such a contingency." Politics, therefore, in Switzerland is unadorned and a game of the veterans who play it in a sportsman spirit. There is complete absence of the motive of personal profit. "It is not worth anybody's while," writes Bryce, "to spend money on party work except for some definite public purpose. Nobody in Switzerland has anything to gain for his own pocket by the victory of a party, for places are poorly paid. Federal places do not change hands after an election. Cantonal places are not important enough to deserve a costly fight, nor could the expenditure of money at an election escape notice in these small communities."

The spirit of political parties is, thus, weaker in Switzerland than in most other democracies of the world. The political organizations are less tightly knit and less actively worked. In the mountainous and agricultural regions, there are only local questions that occupy the people. In the industrial parts of the country, political parties are more active, but their issues are so diverse and their problems so numerous, because of natural diversities, that it is impossible to give a general description of Cantonal politics. The result is that the parties in the Cantons are not necessarily the same as in the Confederation. They do not always even bear the same names. The Cantonal elections are usually fought on Cantonal and not on national issues. The Swiss, while electing their representatives, respect ability and trust those whom they have long known as honest and courageous. Party enthusiasm and hero-worship seem foreign to their nature.

**Good effects of such a Party System.** Such a party system, as is obtainable in Switzerland, has a tranquillizing, stabilizing and ennobling influence. There is no incentive to party organization and chances of a party warfare are reduced to a minimum. The extreme stability of the parties is the most remarkable peculiarity of the Swiss political life. The majority parties are not obliged to make any great effort to retain their positions. The minority parties become passive by the consciousness that they have no chance of getting control of the government. Moreover, politics in Switzerland is conducted almost without regard to party leanings. When one party has the stable support of a large part of the nation and

its supremacy is, thus, firmly established, its members are not rigidly compelled to stand together for all intents and purposes.

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The Government of  
Union of Soviet Socialist Republics



## CHAPTER I

# THE REVOLUTION AND AFTER

**The World War.** On the eve of the First World War Russia was still ruled by a Tsar Emperor. The foundations of his autocratic power had, no doubt, been rudely shaken, but the more his moral authority was undermined the more insistently he clung to the substance as well as to the semblance to his power. Still all parties in the country except the Social Democrats, enthusiastically responded to the government's call for mobilization. There were two reasons for this popular support. The action of the Central Powers in attacking Serbia and Belgium was regarded by the Russians as unwarranted and flagrantly aggressive. Secondly, Russia's alliance with Great Britain and France was considered a happy augury for the future of the country. But all hopes were falsified by the subsequent events and the co-operation anticipated between the government and the people could not materialise. As the war progressed the entire machinery of government disintegrated until it fell into a state of complete collapse.

**Factors responsible for the Downfall of Government.** The war began and continued with military disasters and serious food scarcities at home. The general mobilization increased the size of the army to the staggering figure of fifteen million strong. The government had to face the bewildering problem of equipping and provisioning these men. The national resources of the country had not so far been fully exploited to meet such an unprecedented demand and the acute shortage of labour due to mobilization further aggravated the situation. The blockade of the Baltic Sea isolated Russia from the rest of the world and there could not be import of food supplies in the country. Starvation, thus, haunted the country in the midst of war. Profiteering and black-marketing flourished unchecked. The inefficiency and corruption both in the military and civil supply departments were almost unbelievable.

Then, there were the financial embarrassments of the government inherent in wartime conditions. In the whirlpool of financial difficulties, the government adopted the stupid policy of prohibition in the country and suspended the operation of State Monopoly of Liquor which annually brought to the exchequer more than a quarter of the State revenue. The policy of inflation created its own vicious circle. Soaring prices and shortage of foodstuffs accompanied by the military reverses in the different theatres of war cooled down the enthusiasm of the people of winning the War.

**The Tsar and the Tsarina.** The country under these circumstances was inevitably heading towards a national crisis. Only a sagacious ruler could save the country. But Nicholas II "was far from being super-

humanly clever, and, with a few exceptions, the people who surrounded and influenced him, whether the ministers who passed in dreary succession across the political stage, the members of his immediate household, or hangers-on at the Court were stupid, corrupt and revolutionary." Unfortunately autocracy had the unswerving and bitterly determined support of the Tsarina, a neurotic and unbalanced woman who herself was under the influence of Grigori Rasputin, "an uneducated, coarse, and licentious peasant." In Rasputin, the Empress had implicit faith and regarded him as the "man of God." Ministers and high officials of Government were appointed or dismissed at Rasputin's bidding, and his power was really enormous. Under his influence Russia received one of her least capable Prime Ministers, Boris Sturmer who with A. Protopopov, the Minister of the Interior, acted practically as Rasputin's Secretary.

The Empress under the influence of Rasputin prompted the Tsar to assume in person the command of the army. The Emperor sent the Grand Duke Nicholas Nikolaevich, who was appointed the Commander-in-Chief at the outbreak of the war, to Caucasus, and assumed the command of the army himself. With the departure of the Tsar, at the end of August 1915, began the personal rule of the Empress and Rasputin. The ministers, who protested to the Sovereign that he should not assume command of the army, were replaced by those who had the blessings of Rasputin. The frequent ministerial changes accompanied by reshuffling of the permanent heads of the departments shook the bureaucratic pyramid, the mainstay of Imperial Russia. In 1916, Rasputin became the undisputed master of the country. Public resentment spread throughout Russia and even the arch conservatives sent to Tsar warnings of the impending catastrophe. In return, the Emperor gave rebukes and reprisals to all those who had wished to forewarn him. On December 30, 1916, Rasputin was assassinated by Prince Yusupov and other conservatives. But that was not the end of the drama. The year 1917 began with a great foreboding. A few weeks later came the Revolution which swept away the Tsar and his regime.

## THE REVOLUTION

**The "February" Revolution.** The Bolsheviks all through this time had worked for a defeat of Russia in war so as to promote revolution. The strikes and hunger marches had become numerous and although they were still suppressed, but the attitude of the troops sent against strikers and bread demonstrators showed that their loyalty to the Tsar had begun to waver. The political police, which was ubiquitous in Russia, had also become susceptible to the imminence of the revolution. The smouldering fire flared up early in 1917. The striking workmen, who numbered some seventy or eighty thousands and the hungry people of Petrograd<sup>2</sup> demonstrated in the streets of the capital demanding food. The troops of the Petrograd garrisons were summoned to quell the demonstrators. But the soldiers refused to obey orders and instead joined the revolutionary populace. The Government unable to offer any real resistance succumb-

1. According to the Julian Calendar which was in force in Russia.

2. St. Petersburg had been renamed Petrograd.

COLE, D. L., and J. L. COLE. 1982. The North American Great Lakes as a cold water refuge for the American brook stickleback, *Culaea inconstans*, and its relationship to the European stickleback, *Euplaciodium septentrionale*. *Journal of Great Lakes Research* 8:103-112.

**The Provisional Government.**—The Provisional Government, created at the Paris Peace Conference, was composed of representatives of each of the principal belligerent countries, and was organized on the basis of equality. The Provisional Government was created by the Treaty of Versailles, which provided that the Provisional Government should be composed of representatives of each of the principal belligerent countries, and should be organized on the basis of equality. The Provisional Government was created by the Treaty of Versailles, which provided that the Provisional Government should be composed of representatives of each of the principal belligerent countries, and should be organized on the basis of equality.

But the Pakistani Government has adopted more radical policies in education. The main aim has been to develop a comprehensive programme. The national culture and the Islamic spirit is to be revived and used as a guide for the entire development of the country. Moreover, the aim is to develop the Islamic spirit of the people. The Government has decided to make education free of cost for all. The aim is to provide a good education for all persons who wish to receive it.

The influence of the Government was further weakened by the Petrograd Soviet of Workers' and Soldiers' Deputies, which came into being in February 1917. It acted as a counterweight to the authority of the Provisional Government and was often in direct contact with the masses of the Petrograd Soviet. Soviets were simultaneously established in other parts of the country and in the army. These Soviets were manned by the Social Revolutionaries and the Social Democrats who had long before anticipated a situation in which they could act. Their activities in fact paralysed the Provisional Government, but also paralysed the Provisional Government thus preparing the way for the October Revolution.

By this time Lenin and other Bolshevik leaders, Kamenev, Radek, Zinoviev, and others, had come into Russia. They went to work immediately. With the freedom of the press, speech, assembly, and organization, which the February Revolution had secured, the Bolsheviks got the opportunity to agitate for their program in the streets. Lenin and his associates were successful in creating great demonstrations on May 3 and 4 against certain members of the Provisional Government. Bolshevik agitation was stepped up under the slogan "All powers to the Soviets."

The "October" Revolution. In the meantime Left groups within the Government became active. Prince Lvov resigned on July 20, 1917, and was succeeded by Kerenski. Kerenski made a valiant effort to win the War and brought a new fighting spirit to the troops. But the offensive met with disaster, the rest the Bolsheviks did. They had been agitating among the soldiers and peasants for an immediate cessation of hostilities and for the immediate seizure of all land by the peasants. Their programme synchronised with the aspirations of the masses, who had clamoured

3. According to the Jullian Calendar in Russia.

ed for bread and peace all these years. At last on November 5, the Government decided to take determined action against the Bolsheviks. But the Government was repulsed everywhere. On November 7, 1917, the Bolsheviks seized power. The Congress of the Soviets which was in session declared itself to be the repository of all power and established a government called Council of People's Commissars, composed solely of Bolsheviks, headed by Lenin. Its most important members were Rykov, Trotsky, Stalin, and Lunacharsky.

Immediately on coming to power, the Bolsheviks did two important things. First, they renamed themselves Communists and, thus, "finalised the separation between themselves and the more moderate Socialist elements." Second, they shifted the seat of government from Petrograd to Moscow.

### CONSOLIDATION OF THE COMMUNIST REGIME

**War Communism.** The Communist Government pursued a forceful and direct policy of establishing a one-party State, and suppressing all opposition. Its early decrees were, as Trotsky described, "in the language of power." It successfully concluded peace with the Central Powers and was able to drive out of the country the so-called White Armies organised by Anti-Bolshevik Russians. To save the country from the threat of famine and economic collapse, the government embarked on a policy of wholesale nationalisation of the means of production, regimentation of agriculture and private trade was forbidden. The peasants were ordered to turn over to the Government all the produce less what they needed for their living. A system of rationing was introduced for the urban population and an attempt was also made to eliminate money economy and substitute it by State-organised barter.

The period from the middle of 1918 until the spring of 1921 is described in the Soviet History as the period of War Communism. It is true that the revolutionary policy of the Communist government was partly responsible for the economic collapse of Russia during this period, but it was consistent with and in vindication of the Marxian-Lenin doctrines. The Left-Wing Communists saw in these measures the dawn of integral communism. Lenin justified it as the "direct assault on the citadel of capitalism." But the peasants and workers could not reconcile themselves to the new socialist order. Seeing the impending dangers, Lenin commanded a halt to further extension of the revolution in the economy and on March 21, 1921, inaugurated the New Economic Policy, the N.E.P.

**The New Economic Policy.** The N.E.P. period extended up to 1927 and in many respects it was the negation of the socialist principles. It conceded in the economic field the individual ownership of the means of production and individual profits therefrom, without disturbing the nationalised character of large-scale industries. The peasants were free to dispose of the surplus of their produce after paying a heavy tax. The scheme for the elimination of money economy was abandoned and effective steps were taken to stabilise the value of money. The banking and credit institutions were simply put under the State control. Trade treaties with foreign countries followed and some foreign capitalists were admitted in

Russia to manage a certain amount of business. In fact, the concessions which the N.E.P. made were essentially the same against which the "October" Revolution was directed.

But the most astounding departure was in the international field. Russian delegates appeared again at international conferences culminating in the treaty of Rapallo in 1922. Soviet Government first having been recognised by Germany, the recognition by Great Britain, Italy and France came in 1924. The N.E.P., thus, marked the abandonment for the time being of plans for imminent world revolution. The survival of Russian Soviet Government had become an established fact. But it led to a sharp controversy and with the death of Lenin in 1924, the differences within the Communist Party became more acute. Trotsky was a strong supporter of world revolution and he considered its promotion as the most essential object of the Russian Soviet Government. Stalin, who had till then unflinchingly supported that view, came forward with his new theory of "Socialism in a single country." Though the controversy between Stalin and Trotsky was personal motivated by the bid for power, but it centred on a fundamental issue of Communism. The victory was for Stalin and his doctrine of "Socialism in a single country" and the new doctrine became the official policy of the Soviet Government. Apparently, the dogma of world revolution had never been given up, but, in practice, it ceased to influence the policies of the Russian Government. The Soviet Union sought international amity and co-operation with the capitalist countries. In domestic policies, too, it was the triumph of nationalism over internationalism. All efforts were concentrated on the reconstruction of Russia and building up of the Communist State.

**The period of Socialistic Reconstruction.** The N.E.P. was a make-shift affair and Lenin called it "a strategic retreat." After Stalin had consolidated his position, he proceeded to direct and adopt long-range policies to make the country strong. And to be strong meant to be industrialized. This was to be accomplished by a series of Five-Year Plans. The period of planned economy manifested in a phenomenally rapid industrialisation of the country and collectivization of agriculture. In 1936, Soviet democracy was established with the new Constitution which was the third in the Soviet series of governmental structure. The Stalin Constitution, as it had been popularly called, was the embodiment of the First and Second Five-Year Plans.

**Early Constitutions.** The Stalin Constitution was preceded by two earlier Constitutions in 1918 and 1924. The Constitution of 1918 was drawn up by a Commission set up by the Central Executive Committee of the Communist Party under the direct guidance of Lenin and Stalin and ratified by the Fifth All Russian Congress of Soviets on July 10, 1918. The State which it created came to be known as the Russian Socialist Federated Soviet Republic and it comprised about three-quarters of the old Tsarist Empire.

The Constitution was imbued with the militant spirit of the newly established dictatorship of the proletariat and embodied essentially the series of declarations, rules and decrees issued between the October Revolution 1917, and the Summer of 1918. It aimed at a complete suppression of capitalism and the capitalist structure of society. Land, natural re-



sources, and industries were transferred to the people as their common property and the power of the State was vested in the Soviets and Russia became a "Republic of Soviets of Workers', Soldiers' and Peasants' Deputies."

The Constitution was federal in character. But it presented a novel specimen of federalism. The authors of the Constitution, consistent with the Marxian principles, conceived of establishing at no distant date a world federation consisting of diverse nationalities and scattered territories. To make it attractive for the sovereign States, after the world revolution, the architects of the Constitution provided for free and voluntary association of the component units with an option to secede.

The Soviet Constitution of 1918 applied to the area of Russia proper in Europe. In 1923, it was named the Union of Soviet Socialist Republics (USSR) comprising of four constituent republics; the Russian Socialist Federated Soviet Republic, the Ukraine, White Russia and Transcaucasia. The Uzbek and Turkmen constituent Republics were carved out in 1924, and the Tadzhik Republic in 1929, raising the number of the constituent republics to seven.

The Constitution of 1924 was the replica of the previous Constitution, except that three new bodies were created—All Union Congress of Soviets, All Union Central Committee, and All Union Presidium. The division of powers between the federal government and the units resembled in many respects the division of powers in the United States. Specified powers were given to the centre while residuary powers rested with the constituent republics. But the powers assigned to the Union Government were so wide that they embraced the whole economic system of the USSR. The cardinal principle of the Soviet system of government was the relationship between economic and political structure; the authority of the Union Government superseded that of the constituent republics. The Union Government was also given the power of vetoing any law or decree of a constituent republic, if it was in conflict with the Constitution. Finally, the Union Congress was empowered to lay down "general principles to be followed by the constituent republics in the matter of civil and criminal law, judicial procedure, labour legislation and schools."

The administrative structure of the USSR consisted of a pyramid of Soviets. At the bottom were the village Soviets and at the top, the Union Congress of Soviets, the supreme political authority in the Union. In between the base and the apex came the county and city Soviets, Soviets of the territories, provinces, and the constituent republics. Early in 1919, Lenin said, "Soviets had become the permanent and sole foundation of all State power" in Russia. Soviets are, today, the "genuine popular government" in the USSR and "are of the flesh and bone of the people."

## THE SOVIETS

**Origin of the Soviets.** The origin of the idea of Soviets may be traced to the early nineteenth century in Britain where a follower of Robert Owen propounded a plan to do away with the House of Com-

rooms and to organise a government based on a council representing the various trade unions. Soviet is a Russian word for 'council' and the first appearance of a Soviet in Russia was in 1905, when a strike committee was set up in St. Petersburg to carry on the general strike. At first, like labour unions and strikes were forbidden in Russia. The strikers, therefore, had to work under disabilities and to achieve their end they were constrained to direct their activities not only against the employers, but also against the State. So the Soviet of 1905 was militant in character and it forced the Tsar to grant the Manifesto of 1905, granting to the people the immutable guarantees of civil liberty upon the basis of real inviolability of person, liberty of conscience, of speech, of assembly, and of association.

The Soviets were, however, suppressed by the end of 1905 and Russia did not know anything about them till the "February" Revolution of 1917 when they reappeared first in Petrograd and then in the other Russian cities. This time the Soviets became the organs of rebellion and defied at every step the authority of the Provisional Government. The Petrograd Soviet very often issued decrees at variance with the official decrees, thus, paralysing the government. Lenin's slogan: 'All power to the Soviets' materialised. The Soviets became the organs of State power.

### SOVIETS BEFORE 1936

(i) **Village and factory Soviets.** The primary unit of administration was the village or the factory. Each village or factory had its own Soviet or Council and it was entrusted with the performance of all matters of local importance. Elections to the unit Soviet were direct. But villages with a population of less than 300 either governed themselves directly by forming assemblies of all adults, or combined with other villages of the same character forming a small group and each group elected its own Soviet. Similarly, factories employing less than 100 operatives combined with three or four others and elected a common factory Soviet. The main functions of the factory Soviet were to look after the social life of the workers, the factory, kitchen, the club, and the education of the factory children.

(ii) **District Soviets.** The next higher administrative unit was the district Soviet. It consisted of the representatives of the village Soviets and the factory Soviets within the district boundaries. The representatives to the District Soviet were elected not by the people directly, but by the village Soviets and factory Soviets. The District Soviet performed all local functions concerning the district, subject to the orders and functions received from the higher unit. Each District Soviet had its own Executive Committee which was entrusted with the work of general administration, control, and co-ordination of all Soviets within its area.

(iii) **Regional Soviet.** Each constituent republic of the USSR was divided into several regions for purpose of administration. Each region had its own Soviet consisting of the representatives of various district, town and factory Soviets within the region. The representatives were elected

indirectly. Village Soviets had no direct representation in the Republic Soviet.

**Autonomous Republic Soviet.** The USSR was divided into 15 Autonomous Republics. Each of these Republics was a sovereign state and previously consisted of seven constituent republics. The Republic Soviets of a republic elected representatives to the Congress of the Republic. The Republic Congress had jurisdiction over all subjects not assigned to the Union Government by the Constitution. In contrast to the other Republics, they possessed a large measure of autonomy in their cultural, political and economic development. They had also the right to secede.

The Republic Congress was a numerous body which met once or twice a year. It elected its Central Executive Committee, exercising legislative powers. The Executive Committee was accountable to its parent body, the Republic Congress. The Executive Committee, too, was a numerous body and it met generally once every three months. It therefore elected a smaller body called the Presidium and acted on behalf of the Executive Committee whenever the latter was not in session. Then there was the Council of Peoples' Commissars or the Council of Ministers. Each Commissar was head of some particular branch of administration.

**All-Union Congress of Soviets.** At the top of the pyramid was the All-Union Congress of Soviets consisting of the representatives of the Town Soviets and Rural Soviets. The representation given to the urban Soviets was at the ratio of one representative for 25,000 workers whereas the rural Soviet had one representative for every 125,000 peasants. The All-Union Congress of Soviets was the basic law-making authority. Being enormous in size, with more than 2,000 members and since it met too infrequently, it could not be expected to satisfactorily carry out its functions. It delegated its powers, therefore, to the Central Executive Committee.

The All-Union Central Executive Committee was composed of two bodies: the Soviet of the Union consisting of 600 members elected on the basis of population, and the Soviet of Nationalities, numbering 150 members—5 members from each of the territorial sub-divisions of the Union.

The All-Union Central Executive Committee, too, was unwieldy in size and it met only four times a year and that also for short sessions. It, accordingly, delegated its functions to the Union Presidium consisting of 27 members. The All-Union Central Executive Committee also elected All-Union Council of Peoples' Commissars. They were 17 in number and in functions were akin to ministers under a parliamentary system of government.

### SOVIETS AFTER 1936

Article 2 of the Stalin Constitution provides that "The Soviets of the Working Peoples' Deputies, which grew and attained strength as a result of the overthrow of landlords and capitalists and the achievement of the dictatorship of the proletariat, constitute the political foundation of the USSR." At all levels, village, city, district, area, Autonomous Re-



wants and the meeting simply endorses the name. When or if there is other than the Party also propose names, then internal committees, committees are appointed to make the choice to one candidate. It is at this stage that the Communist Party intervenes and plays the role of leadership and guides the choice which will finally be made. The Communist Party is the only political organisation listed in Article 141 as having the right to participate in Soviet elections. The Constitution of course, permits other organisations and societies to exist and participate in elections, but all such organisations, like trade unions, co-operative societies, youth organisations, cultural, technical and scientific societies, are of non-political character. They are organised to promote the interests of common welfare and material advancement towards the realisation of the socialistic goal of society. The Communist Party being the vanguard of the proletariat, consisting of the most active and politically conscious citizens, as a rule, it is closely connected with all these non-party organisations, and its members are the real force behind them. Not all candidates for elections to the Soviets are Communist Party members, but those who are not must be persons devoted to the cause of Communism. It is useless to suppose that one who is opposed to the regime, or even a slightly dissident person is likely to be nominated.

Thus, on the election day, the voter has no choice. He has only one candidate on the "List of Communists and Non-party People." Yet election campaigns are carried to the full pitch. All the vehicles of propaganda are geared up to educate the voters in the aims and achievements of the government both in the domestic and foreign policy. Meetings are arranged and speeches of prominent party leaders are broadcast and reprinted in millions of pamphlets. House to house canvassing takes place and on the election day every one is on the move to vote. Cars carry invalids to the polls and "precincts are set up on trains, ships, in hospitals and homes for the aged, so that every one may vote." The **Soviet Information Bulletin** rightly explains that "No country in the world has known such election activity on the part of the voters as is maintained in the Soviet Union." The problem is that of getting out the vote and that the vote be unanimous. A 100 per cent record is the goal and in Stalin's district in Moscow it was regularly achieved. In the 1950 election to the Supreme Soviet 99.6 per cent votes were cast and in the elections held on March 14, 1954, 99.98 per cent of the eligible voters cast their ballots. In subsequent elections, too, the percentage has veered round the same point. Unanimity evinces solidarity of the nation and it strengthens the prestige of government and the cause for which it stands. Molotov's pre-election speech in 1946 is pregnant of the meaning of elections in the USSR. He said, "In its policy the Party sets us the correct course for our work. And we in authority in local and central organizations must prove by our deeds that we know how to work.... We have every ground to expect that at the elections to the Supreme Soviet, our people will again show confidence in the Bolshevik Party and will unanimously support the candidates of the Stalin Bloc of Communist and non-party workers, peasants and intellectuals.... So let the new elections serve to cement our people's unity still further and to promote our further advance under the tried leadership of the Bolshevik Party and our great beloved Stalin." The Party and its leadership have ever remained



the ruling party, the Communist Party. I cannot see that it is any more difficult to do so in the USSR than it is in any other country.

There is not the least similarity between the Soviet Union and England in other respects. In the USSR there is no class rule of capitalists, there is no private ownership and only one economic system, that of the USSR, the Communist one, the planned system. There are no classes, there is no bourgeoisie, there is no ruling party, there is no government, there is no State in the USSR. In fact there is no choice for the ruling Party, no economic system, no State in the USSR. Soviet leaders have never said that they are going to put the Soviet election system, which is a model of the best system of the further development of the country, the system which is the basis of strengthening the economic and social system, and the system of improving the State mechanism and making it the basis of the future of the country. Election reform is a question of the party, of the people, with the aim of socialism. I cannot see that there is any other possible conclusion and the party, the people, the country. In fact, the only conclusion is that the results of the election, the results, are foregone conclusions.

Article 147 of the Constitution provides: "It is the duty of every Deputy to report to his electors on his work and on the work of the Soviet Working People's Deputies and to this end he shall be free, they, upon decision of a majority of the electors in the district, established by law. This provision gives a concrete basis to the system of demand from their Deputy an examination of his work in the Soviet and if he is deemed to have not meted his duty he may be recalled and another Deputy elected in his place. According to the text of the law a Deputy is a mere delegate or agent of his constituents. But is this a matter of reality in the context of what has been said above?

## CHAPTER II

# THE NATURE OF THE SOVIET STATE

**Basic elements of Marxism.** The Bolsheviks who succeeded the Provisional Government belonged to the Second International and they fanatically believed in the doctrine of Revolutionary Socialism founded on the writings of Karl Marx and Friedrich Engels. For them the February Revolution was a prelude to the proletarian revolution and the October Revolution was a proletarian seizure of power. "We shall now proceed to construct the socialist order," declared Lenin as he appeared on the rostrum of the Second Congress of the Soviets. The nature of the Soviet State was, therefore, to be an embodiment of a direct revolutionary action which would ultimately pave the way for a classless and stateless society. The revolutionary action aimed at smashing the old ruling machine and creating a new state, a state of the proletariat. It directed its endeavours at establishing new production relations designed to lead to Socialism and educating citizens of the proletarian State to discard bourgeois ideology and accept the ideology of Socialism as a step towards Communism.

**Historical Materialism.** A basic element in the Marxian theory is the economic interpretation of history which teaches that the political, social, religious and other institutions of any given historical era are determined by economic factors, by the mode of production. "Legal relations as well as forms of the State," said Marx, "could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but they are rooted in the material conditions of life. . . . The mode of production in material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness." Thus, to each stage of economic production there corresponds an appropriate political form and an appropriate class structure.

**Theory of Surplus Value.** Starting with this fundamental proposition and operating with a theory of value Marx explains the actual mechanism of capitalist exploitation. In the analysis of his theory of surplus value, Marx derives his inspiration from the classical economists and held that labour in the long run is the sole source of value. Marx defined commodities as "congelations" of labour and regarded value as "crystallised labour." Labour, says Karl Marx, is a commodity and its value, too, is determined like any other commodity, that is, its value in exchange is fixed by the labour needed to produce and maintain it. The worker must get wages sufficient enough to cover his expenses of maintaining himself and his family. But actually this does not happen in a capitalist society and the wages paid to workers bear no proportion

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Marx applied the principle of the law of concentration of capital not only to industry, but also to agriculture. He predicted that owners of land would become fewer in number while their estates grew larger and larger. This process, he maintained, makes more glaring the class differences of the capitalist system and consequently strengthens the power of the opposition.

**The doctrine of class war.** From this analysis K. A. Marx reached the conclusion that the history of the human race must be told in terms of class struggle. Every system of production has given rise to two opposing economic classes, the exploiters and the exploited, the owners and the toilers. "Freeman and slave, patrician and plebeian, baron and serf, guildmaster and journeyman in one word, oppressor and oppressed standing constantly in opposition to each other, carried on an uninterupted warfare, now open now concealed." Just as in the ancient world the interest of the slave owners was opposed to that of the slaves, and in the Mediaeval Europe the interest of the feudal lords was opposed to that of the serfs, so in our own times the two classes confronting one another are the employers and the workers, the exploiters and the exploited. Division of society into distinct economic groups creates within each group special group consciousness which gives rise to class struggle.

The existence of a class war is, accordingly, nothing new. But it was not so intense before the Industrial Revolution. With the growth of complexity of industrial technique and the concentration of capital in the hands of fewer capitalists the condition of the workers has been rendered hopelessly precarious and it is here that the mechanics of capitalism and its inner contradictions prepare the way for the inevitable downfall of the capitalist system. Marx developed this prognosis in concrete detail and showed how a violent proletarian revolution would overthrow the capitalist class first locally, then nationally, and at last internationally. The victory of the proletariat will change the social order and the emerging society will be a classless society preparing the way for the Communist Commonwealth of the future. "Though the revolution itself," asserted Marx, "is carried out in a class basis, the state of society which follows the revolution will be based on the abolition of classes." All land and capital shall be owned in common, exploitation will cease, the tyranny of the owners of wealth will no longer be possible, and all men will be free. The Communist Manifesto ends with an appeal to the wage-earners of the world to rise on behalf of Communism. It reads, "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution. The proletarians have nothing to lose but their chains. They have a world to win. Working men of all countries, unite."

**The Communist theory of the State.** According to the Communist doctrine the State is inevitably and solely the instrument of class domination, that is, the instrument by which the exploiters keep the exploited in subjugation and obedience. It is always, in the phrase of Engels, "a force of suppression," the dictatorship of the ruling class which under capitalism is the bourgeoisie. The fact that many of the modern capitalist States appear in the guise of democracies changes nothing in their nature as they still remain class dominated. The capitalists man the entire machinery of the State and occupy all key positions in government. The laws of the State are so made and its policies so formulated as to protect and perpetuate the vested interests of the capitalists as a class. The Communists, accordingly, consider it idle to expect that the capitalists who run the "bourgeois democracies" will ever voluntarily relinquish their privileged position. The downfall of capitalism can be brought about only by the forcible overthrow of the oppressors. They, however, point out one redeeming feature of the "bourgeois democracies." While preserving all the inner contradictions inherent in capitalism, "bourgeois democracies" offer important advantages to the proletariat which provide them the opportunity to organise for the coming struggle. The industrial proletariat, thus, led by the resolute and enlightened leadership of a well-organised and disciplined revolutionary party would strike at the proper moment and carry a successful revolution for the ultimate triumph of Communism.

**Dictatorship of the Proletariat.** Although the ultimate goal of the Communists is the emancipation of humanity by creating a classless and stateless society, but its realisation will take some time. The revolution

paves the way for a Communist revolution. It does not, however, bring it into being. The proletarian dictatorship is the first step towards the final stage of the proletarian revolution, the Communist State, described by the Communist Manifesto as a State in which the Communist class is the only ruling class, and the State will disappear.

Definite measures and removal of obstacles are necessary according to K. Marx to bring about the proletarian dictatorship of socialism. For the overthrow of the rule of the bourgeoisie. During this transitional period later to be called the dictatorship of the proletariat, the class to be substituted for a revolutionary dictatorship of the bourgeoisie. In order to break down the resistance of the bourgeoisie against K. Marx, "the workers invade the State with a revolutionary spirit. It follows that the machinery of the State is seized by the workers and autocratic powers, because as Engels says, "Since the State is a temporary institution which is to be made use of in the revolution in order forcibly to suppress the opponents, it is perfectly free to take such measures as free popular state so long as the proletarian rule, the State, is not in the interests of freedom, but in order to suppress its enemies, and when it becomes possible to speak of freedom, the state must cease to exist. The Communist manifesto and the theory that the bourgeoisie, though dispossessed by a sudden proletarian revolution, will still make frantic effort to regain their lost economic and political power. In any and every serious revolution, says Lenin, a long and desperate resistance of the exploiters who for many years will enjoy great advantages over the exploited constitutes the rule.

The first stage therefore in the realisation of the Communist society is the one in which the State continues to exist, but its machinery is substituted by the dictatorship of the proletariat. For Marx and Engels dictatorship of the proletariat is only democratic as compared with the bourgeois democracies, because the former is ruled by a majority while the latter is ruled by minority, a small minority of the population constituting the capitalist class.

The proletarian State so created immediately will take to the task of construction of socialism and destruction of capitalism. As destruction of capitalism will not be accomplished in one comprehensive stroke, the transfer from capitalism to socialism will be made by degrees. The first step in this direction will be to raise the proletariat to the position of the ruling class and thereby win the battle of democracy. The proletariat, thus, raised to the position of rulers will use its political supremacy in wresting, by degrees, all capital from the bourgeoisie and centralising all instruments of production in the hands of the State. It will simultaneously devise means to increase the total of productive forces as rapidly as possible. The immediate measures to be adopted are outlined in the Communist Manifesto: abolition of private ownership of land, nationalisation of the means of communication and transport, taking over by the State of credit and banking, regulation of commerce, abrogation of the rights of inheritance, imposition of heavily progressive taxation, prohibition of child labour in factories, and an enforcement of an equal liability to work, thereby taking away all privileges. These



measures are to be followed by a gradual extension of public ownership in other fields of production. The construction of capitalism is in fact the construction of socialism ultimately leading to a Communist, i.e., classless and stateless.

**"Withering away" of the State.** Once the bourgeoisie has been suppressed and all remnants of the capitalist system have been removed the necessity of the State ceases to exist. It becomes a superfluous institution and must, accordingly, wither away. The State, from its origin and justification in the class struggle, can exist only so long as there are classes. Classes under capitalism are the product of economic inequality and privileges especially of the private ownership of the means of production. The dictatorship of the proletariat observes the revolutionary policy of destroying economic inequalities and privileges and constructing a socialistic society. "When collective capital will replace private capital, both capitalists and wage earners disappear, and all persons become co-operating producers." When the whole society comes down to one level everyone will be able to contribute his best to the social whole, and freely satisfy his needs. The State gives place to a free society of voluntary associations formed for the transaction of common business. The advent of such a society bears witness to the fact that the revolutionary era has terminated and it is the climax of Marx's socialism. When socialism is achieved mankind will make the ascent, according to Engels, "from the kingdom of necessity to the kingdom of freedom." The whole process of development from the conditions of socialism to the "withering away of the State" and, thus, making room for a classless and stateless society, has been described in the Communist Manifesto. It reads, "The proletariat seizes State power, and then transforms the means of production into State property. But in doing this, it puts an end to itself as the proletariat: it puts an end to all class differences and class antagonism, it puts an end to the State as the State.... As soon as there is no longer any class of society to be held in subjection, as soon as, along with class domination and the struggle for individual existence based on the former anarchy of production, the collisions and excesses arising from these have also been abolished, there is nothing more to be repressed and the special repressive force, a State, is no longer necessary."

Thus, the State "wither away." The end of the State ushers in a society without antagonism, without exploitation, in which, as Lenin says, "people will become gradually accustomed to the observance of the elementary rules of social life...without compulsion, without subordination, without the special apparatus for compulsion which is called the State."

**Lenin's doctrine—"Leninism."** Vladimir Lenin was the most ardent follower of Karl Marx and the most famous of the revolutionaries who carried the banner of Marxian socialism to its successful achievement in Russia and strived for the proletarian revolution. Lenin was not himself a workman, but a member of the middle class intelligentsia who had become interested in the revolutionary movement and Marxism when still very young. The execution of his elder brother for his part in the attempt to assassinate Alexander III in 1887 influenced Lenin deeply. The ostrac-

On the other hand, the fact that the observed frequency of the  $\alpha$  allele is 0.50 in the population is not sufficient to conclude that the population is in Hardy-Weinberg equilibrium. If the observed frequency of the  $\alpha$  allele is 0.50, the observed frequency of the  $\beta$  allele is 0.50, and the observed frequency of the  $\gamma$  allele is 0.50, the population is in Hardy-Weinberg equilibrium. If the observed frequency of the  $\alpha$  allele is 0.50, the observed frequency of the  $\beta$  allele is 0.50, and the observed frequency of the  $\gamma$  allele is 0.50, the population is in Hardy-Weinberg equilibrium.

The first commercial telephone exchange was set up in 1876 in New York City. By 1890, the Western Union Telegraph Company had established the first long-distance telephone line between New York and Chicago. The telephone revolutionized communication, allowing for instant voice transmission across vast distances. This technology paved the way for the development of modern telecommunications networks, including the Internet and mobile phones.

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In the midst of these engagements on the 22nd and 23rd of the First Congress of the Russian Social Democratic Party was called at Brussels on Jan. 3, 1903. The Congress started off to London because of the police surveillance and eventually met in the Second Congress of the Party. There was a great deal of opposition to Lenin's ideas about the revolution and the dictatorship of the proletariat. Leon Bronstein known in the party and later to the world as Leon Trotsky argued that the dictatorship of the proletariat could be accomplished only when the working class had become the majority of the population and had joined the party almost in its entirety. Lenin's views ultimately prevailed. But he lost out on the rules to be adopted for membership. Lenin held the firm conviction that the party should be "a militant, disciplined, centralised organisation," and it should be limited to "a disciplined small group of schooled revolutionaries." Sympathisers were to be barred from becoming members. Trotsky and many

others, who won on the rules, secured the vote of the Congress that anyone, who accepted the programme of the party and promised to render all possible aid in the realisation of that programme, could become a member. This created a definite cleavage and some of the moderates, who had helped to carry the vote over Lenin's group on the issue of membership, walked out of the Congress. This left Lenin's group in majority and the two factions in the party earned the names the **Bolsheviks** and the **Mensheviks**, the former meaning **majority** and the latter **minority**.

The differences between the two factions became wide and the Mensheviks did not participate in the Third Congress of the Party. The Bolsheviks utilised the opportunity to annul the previous rules of membership adopted in 1903. The new rules permitted membership to a small group of revolutionaries only dropping out the sympathisers. A plan was also adopted for armed uprising and the political strikes in the country were to be used as the springboard of the uprising. It was decided that the leadership of the planned uprising should be in the hands of a provisional revolutionary group. The Bolsheviks, thus, took an active and direct part in the barricade fighting later known as the Revolution of 1905. The Revolution did not succeed and from its failure Lenin drew the conclusion that "the offensive against the enemy must be most energetic; attack and not defence must be the slogan of the masses."

There was no guide book for the revolution; Marxism provided only an ideological guidance. Lenin attempted to provide one while awaiting his opportunity to lead it. But hardly had he finished the first part of the celebrated volume **The State and the Revolution**, which did not even cover the analysis of the events of 1905, that he ran back to Russia from exile to lead the revolution. The military disintegration provided a new opportunity for the revolutionaries. Lenin was determined to act quickly, no matter what the cost. He caused the Bolsheviks to break with the Mensheviks and to form a separate party. This enabled the Bolsheviks to gain control of the Petrograd Soviet and with his new slogan, "All power to the Soviets" the rest followed in rapid succession and the first Socialist State came into being.

**Lenin and the theory of Imperialism.** Lenin was an ardent advocate of world revolution. He emphasised the theory that imperialism was the highest stage of capitalism. The era of imperialism, he maintained, was characterised by two important tendencies: (1) The export of finance capital and the control of the banks over industry; and (2) the growth of gigantic monopolies. The "inevitable" economic forces, Lenin said, would throw these monopolies into a savage struggle to find new markets culminating in war between the imperialist countries. Such a war, according to Lenin, is a war between trusts in which workers have no stake. Lenin admitted that certain parts of the proletariat, specially the skilled workers, profit from this imperialistic development. But he appealed to the workers to seize the opportunity by turning the imperialist war into a civil war. Class loyalty, Lenin emphasised, must be above national loyalty.

**Abolition of the Army and the Bureaucracy.** Lenin had the deepest contempt for armies in general and for the Russian Socialists in particular. He would seldom venture to forecast future developments except in broadest terms. But with regard to the process of 'withering away of the state' he was amazingly precise and concrete and it caused considerable contrast to his successors. He maintained that the toilers need a State merely for the suppression of the resistance of the exploiters, and since the latter would in any case be breaking down of their resistance anyway to him as a matter of fact, 'easy, easy, simple' and natural. The proletarian State once established will immediately begin to 'wither away' because in a society free from class contradictions the State is both impossible and impossible. Lenin outlined a number of steps by which the process of 'withering away of the State' was to be brought about. The first step was in the words of Marx, the abolition of the permanent army and its replacement by the 'armed people' a popular militia. But even as Lenin regarded as a dangerous inheritance from the bourgeois regime and the victorious proletariat, he asserted, must not only be content to take over the machinery of government, but it should be broken and destroyed altogether to get rid of all bureaucratic elements.

The second step in the process of 'withering away of the State' should be the complete abolition of bureaucracy. 'Capitalist culture,' Lenin wrote, 'has created large-scale production, factories, railways, the post, telegraph and telephone service, and so on and on this basis the immense majority of the functions of the old State authority' have been so simplified and can be reduced to such elementary operations as registration, book-keeping and control, that the performance of these functions will be perfectly accessible to all literate people, that it will be perfectly feasible to perform these functions for the wage of a workman, that one can deprive these functions of even a shadow of something privileged, 'authoritarian'. Civil servants in the Socialist State, therefore, will be mere 'supervisors and book-keepers' recruitment to government service will be by election and the tenure of office of all offices, without exception, subject to recall. Lenin indeed, demanded the immediate 'introduction of a system' under which 'all should fulfil the functions of control and supervision, all should be 'bureaucrats' for a time and therefore no one could be a 'bureaucrat'.' Finally, Lenin would retain the elected representative institutions in the new set up of the Socialist government. But he would forthwith scrap 'parliamentarianism' as a system. By 'parliamentarianism' Lenin meant the doctrine of the separation of legislative from the executive power. Referring to the doctrine of the separation of powers Vyshinsky writes, "... From top to bottom the Soviet social order is penetrated by the single general spirit of the oneness of authority of the toilers." The proletarian representative assemblies, according to Lenin, must be a place of work, not for idle talk. He characterised parliaments of bourgeois democracies as 'talking shops'. Lenin also advocated the abolishing of the immunities of the Deputies.

**World Revolution.** Marxian Socialism, as interpreted by Lenin, is primarily a doctrine of revolution. Lenin had an unflinching belief in the inevitability of the proletarian revolution originating in one of the more

advanced industrial countries spreading the spark to other similar countries. For the establishment of Socialism a national revolution was not by itself considered sufficient. It required the concerted effort of at least several advanced countries and the process, as envisaged by Lenin, was the merging of the national revolutions into a world revolution. The establishment of a Socialist State in one single country had never been given any serious consideration. In fact, the idea was usually rejected as un-Marxian and utopian. The occurrence of the first proletarian revolution in Russia, which was a backward agricultural country, was something of a shock to the more orthodox Marxists. But they found solace in the belief prevailing among the Russian revolutionaries that the example of Russia was to be followed ere long by other European countries and even the United States would not be able to resist the proletarian revolution. The policy pursued by the Revolutionary Government in Russia was, thus, aimed at the advancement of world revolution. War-weary countries in the midst of economic distress provided a good opportunity to the Communist cause and political revolutions had actually occurred in many European countries, notably in Germany and Austria-Hungary.

But the revolutionary movement collapsed in its incipient stage. The Executive Committee of the Workers' and Soldiers' Soviet of Great Berlin, which seized power on November 11, 1918, was just short-lived. The Soviet Republics that declared themselves in some other areas of Germany, notably in Munich from April 7 to May 1, 1919, were suppressed by Government troops. The Soviets that emerged in Austria in 1918 could not stabilise their existence and had no voice in national affairs. The Soviet Republic established in Hungary could survive only for near-about four months.

The failure of the revolution in Europe and the economic collapse of Russia itself embarrassed the Russian revolutionaries. Lenin was a practical man and though he looked forward to complete success only after revolution had come to Western Europe, he was frank enough to tell his followers that the revolutionary parties must complete their education. Having learnt how to attack, they must now understand how to retreat. He followed the same line of thought which he had set forth in 1918: "It is in our interest to do all that is possible to take advantage of the slightest opportunity to postpone the decisive battle until the moment the revolutionary ranks of the single, great, international army have been united." But Lenin's colleagues did not all agree with him. They felt that Soviet Russia must support the revolutionary German proletariat or it would itself go down in defeat. The Communist Party accepted Lenin's principle. It did not, however, mean that Lenin had abandoned faith in the world revolution. He had simply called for the postponement of the direct support of revolutionary movements in Western Europe till conditions could be found favourable. Efforts to bring about world revolution were never relaxed and Lenin sponsored the creation of a third International to organise and direct the proletariat of other lands. For some years it even pressed militantly for world revolution.

**"Socialism in a Single Country."** Lenin's death in January 1924 was followed by a bitter struggle within the Communist Party, and it centred



toured the issue of world revolution. Even Trotsky, along with many others who held strong views during the lifetime of Lenin, concurred the promotion of world revolution, but not the claim that the sole object of the Soviet Union. He held that the construction of Socialism and the consolidation of the leadership of the proletariat were impossible in Russia without the direct support of the proletariat of Europe. Stalin, who held different views, held in April 1924, suddenly reversed his position and adopted the principle of Socialism in a single country. He proved the correctness of this position by the fact that in the period from the founding of the Soviet Union to the end of the Second World War, the USSR had not only survived but had emerged as a great power. The Twentieth Congress in December 1928 endorsed Stalin's doctrine and the decision that the USSR was able to build Socialism even if it was surrounded by capitalist countries became the official creed of the Communist Party. The kind of social revolution was not retarded, and it could be said to be a revolution in Soviet power, both in terms of the international relations and in domestic relations. USSR sought co-operation with the capitalist States and at home it embarked on vast schemes of economic reconstruction embodied in the Five Year Plans. Stalin attached so much importance to his doctrine of "Socialism in a single country" that in his report to the Fifteenth Congress in 1926, as well as on different other occasions, he unequivocally declared that without full assurance that Socialism could be built within the Soviet Union the industrial programme would have been futile. At the Seventeenth Congress in 1937 he made his effort to complete the construction of "Socialism in a single country" as successful.

Yet the opposition to Stalin's doctrine could not be silenced for four or five years after Lenin's death. Trotsky and others of his views, never felt satisfied with the new policy of Soviet Russia. Trotsky was expelled from the party, deprived of his various offices and deported first to Central Asia and in 1929 to Turkey, and was finally murdered in Mexico in 1940. The rest met their fate in the historic purges of the thirties. Khrushchev, while justifying the fate that the Trotskyite opposition met, gave at the Twentieth Congress an outright appraisal of Stalin's methods. He said: "We have to consider seriously and analyse correctly this matter in order that we may preclude any possibility of a repetition in any form whatever of what took place during the life of Stalin, who absolutely did not tolerate collegiality in leadership and in work, and who practised brutal violence towards everything which opposed him, but also toward that which seemed to his capricious and despotic character contrary to his concepts."

**Revision of the theory of the State.** The doctrine of "Socialism in a single country" was a distinct departure from the Marxian theory and consequently it entailed a revision in the theory of the State. According to the official view, the State, having its origin and justification in the class struggle, can exist only so long as there are classes. With the elimination of private ownership of the means of production class distinctions disappear and simultaneously the State should begin to wither away. To quote Lenin again, "In a society free from class contradictions the State is both unnecessary and impossible." Disappearance of the army and elimination of bureaucracy were the principal ramifications of the withering of the State.

But Stalin proved otherwise. He held that the withering of the State can be accomplished not through the weakening of the State power, but through the maximum increase of its strength. In his report to the Eighteenth Congress Stalin explained the reasons why Soviet Communism differs from the norm set by Marx and Lenin. His explanation was really the vindication of his doctrine of "Socialism in a single country." He said that the contradiction between the Socialist Commonwealth envisaged by Marx and Lenin and the Soviet Union as it existed was due to the capitalist environment and especially due to the activities of "foreign spies, assassins and wreckers" sent to Russia by foreign intelligence services. Stalin pointed out that Engels never discussed the position of a single socialist State encircled by hostile capitalist nations. Engels, Stalin argued, either was concerned with the inner process of development of the future socialist State, irrespective of the international situation, or proceeded on the assumption that Socialism will be victorious in all or in the majority of the countries. "But it follows from this," Stalin said, "that Engels' general formula about the destiny of the socialist state in general cannot be extended to the partial and specific case of the victory of Socialism in one country alone, a country which is surrounded by capitalist world, is subject to the menace of the foreign military attack, cannot therefore abstract itself from the international situation, and must have at its disposal a well-trained army, well-organised punitive organs, and a strong intelligence service—consequently must have its own State, strong enough to defend the conquests of Socialism from foreign attacks."

Stalin could not say about Lenin what he had said about Engels. He admitted that Lenin would not have overlooked such a contingency, but he had no time to discuss the behaviour of the Soviet State as the writing of his **State and the Revolution** was interrupted by the events of the autumn of 1917. The only inference which can be drawn from this is that what Lenin would have done is being done now by his disciples.

Stalin divided the history of Soviet Russia into two stages. The first stage lasted from the advent of the Bolsheviks to power to the liquidating of the exploiting classes. During this period the State performed two principal functions: suppression of the exploiters at home, and defence of the Soviet Union from foreign aggression. The second stage is the period from the liquidation of the capitalist elements to the construction of Socialism and consequently the adoption of the new Constitution which registered and gave legislative embodiment to what had been actually achieved. The triumph of the socialist economy has changed the character of the State, Stalin asserted. He said: "The function of military suppression at home has been dropped, has withered away because exploitation has been abolished, there are no more exploiters and there is no one to suppress. Instead of the function of suppression the State has assumed the new function of protecting Socialist property against thieves and embezzlers of the people's wealth. The function of military defence from foreign aggression has been fully preserved and, therefore, there are maintained the Red Army, the Navy, as well as the penal agencies and intelligence service necessary to catch and punish the spies, assassins and 'wreckers' sent into our country by

foreign intelligence services. The functions of economic construction and the cultural, educational activities of the Soviet regime have been maintained and have not been interrupted. Now the principal domestic task of the State consists in the execution of economic construction and cultural and educational measures. As to our foreign policy measures and the intelligence services, in part of them which are now being directed mainly at the economic and cultural spheres of the world. As you see we have now no serious danger against Soviet domination in Europe. A State that directs its policy mainly in foreign and domestic terms is the Socialist State of the first period.

But progress cannot be stopped here. We must go further, further toward Communism. Shall we abandon the State under Communism?

Yes, it could be liquidated, unless the capitalist environment has been liquidated, unless the danger of capitalist aggression from the outside has been removed. It is evident that the nature of our State will be altered again according to the new situation at the domestic and foreign situation.

"No, it will not be liquidated and will continue to exist if the capitalist environment has been removed, if its place has been taken by a Socialist environment."

To sum up, the State according to Stalin will not wither away unless capitalist environment has been destroyed. The immediate cause of the withering of the State is the existence of socialist environment. So long as the Soviet State is encircled by capitalist countries, it should be strong enough to consolidate socialist economy and to resist international aggression.

**The Stalin Cult.** Stalin's doctrine of "Socialism in a single country," and the policies of the Soviet Government in pursuance of that doctrine had been opposed, as said before, in the different bodies of the Communist Party. Stalin, Khrushchev said at the Twentieth Congress of the Party, acted not through persuasion, explanation and patient co-operation with people, but by imposing his concepts and demanding absolute submission to his opinion. Whoever opposed his concept or tried to prove his viewpoint and the correctness of his position was doomed to removal from the leading collective and to subsequent moral and physical annihilation. This was especially true during the period following the Seventeenth Party Congress, when many prominent party leaders and rank-and-file party workers honest and dedicated to the cause of Communism, fell victim to Stalin's despotism." Even Lenin was cited by Khrushchev, in his speech at the Twentieth Congress, to have described Stalin as "excessively rude" and did not have a proper attitude towards his comrades and that he was capricious and had abused his power.

The whole indictment of Stalin reads like the story of the primitive times when tyrants used to devastate lands to satisfy their lust for blood and to promote their inordinate ambitions. And no impartial student of contemporary history can disagree that Stalin was a monstrous tyrant with domineering habits, diabolical cunning, and ruthlessness.

He committed several incredible blunders and atrocities which gravely weakened the cause of Communism, caused unnecessary sufferings and misery among the people and produced fierce resentment in the non-Communist world against the USSR culminating in the cold war of today. Stalin originated the concept of the "enemy of the people" and "this term automatically rendered." Khrushchev observed in his report, "it unnecessary that the ideological errors of a man or men engaged in a controversy be proven, this term made possible the usage of the most cruel repression, violating all norms of revolutionary legality, against anyone who in any way disagreed with Stalin, against those who were only suspected of hostile intent, against those who had bad reputations."

Stalin not only controlled the Government but also the Party machine. He became the First Secretary of the Communist Party on April 3, 1922, and this office, which he never relinquished, assured Stalin the extraordinary position he held for nearly thirty years. He had shunned public office up to 1941 when he unexpectedly became the Chairman of the People's Commissars and in the years to come other public offices and titles followed one another in rapid succession. Power accumulated in the hands of one person resulted into Stalin's worship. No other public figure had been driven, during his lifetime, to such incredible lengths of adulation as Stalin. He was described as the "greatest genius on earth;" "greatest architect of Communism;" "wise teacher and leader;" "inspirer of our glorious victories;" "foremost authority on science, literature, linguistics, music;" etc. In 1952, Mikoyan said in his speech at the Nineteenth Congress, "At the present stage in world history and the history of our motherland, it is unthinkable to live, build, fight without thorough mastery of all the new concepts Comrade Stalin has contributed to the Marxist-Leninist science ... After the 19th Party Congress our Party will go forward still more calmly and confidently to the victory of Communism, under the guidance of our leader and teacher, the brilliant architect of Communism, our own beloved Comrade Stalin: Glory to the great Stalin." The text of the national anthem of the Soviet Union contained not a word about the Communist Party. It contained the following unprecedented praise for Stalin:

"Stalin brought us up in loyalty to the people. He inspires us to great toils and acts."

The same men who shouted themselves hoarse in proclaiming Comrade Stalin's imperishable glory subjected him to extreme denigration at the Twentieth Congress. Indeed, it may be said that denigration of Stalin had begun with the funeral oration delivered over his bier. At the Twentieth Congress Khrushchev said, "The Central Committee adopted measures for wide-scale enlightenment on Marxist-Leninist position of the role of personality in history. The Central Committee resolutely opposes the cult of personality alien to the spirit of Marxism and Leninism, which turns one or another leader into a miracle-performing hero, and, at the same time, minimises the role of the party and the popular masses." Khrushchev did not mention here names, but when this part is read with the opening part of Khrushchev's speech, "the miracle-performing hero" could be none other than Joseph Stalin. Khrushchev said, "After Stalin's





internal affair of the people in each country." Finally, it denounced Stalinism and condemned the cult of the individual as alien to Marxism-Leninism and called for a revival of intra-democracy and a return to Leninism.

The modifications of doctrine presented at the Twentieth Congress are thus:

- (i) the non-inevitability of war;
- (ii) the sanctioning of different paths to Socialism;
- (iii) the acceptance of the possibility of Socialism coming to power by parliamentary means;
- (iv) the possibility of co-operation with Social Democrats.

The Congress claimed that its resolution embodying the means of realising a socialist society represents merely a return to Leninism. But whether it is a return to Leninism or whether it represents a new approach to the problem of socialist transformation is really debatable. But no one can deny that the resolution of the Twentieth Congress throws overboard the concepts of inevitability of war between capitalist and Communist States, class conflict, and the identification of democratic Socialism with Capitalism. All the same, the new approach of the Communist Party is more realistic and the restatement of the doctrine of peaceful co-existence reflects the awareness of the dangers of thermonuclear warfare and of the realities of atomic stalemate.

But how can the theory of peaceful co-existence be reconciled with the Leninist thesis that wars are inevitable in the era of imperialism? "We are living," Lenin wrote, "not merely in a State but in a system of states, and the existence of the Soviet Republic side by side with imperialist states for a long time is unthinkable. One or the other must triumph in the end. And before that end supervenes, a series of frightful collisions between the Soviet Republic and the bourgeois states will be inevitable." Even Mikoyan said at the Twentieth Congress, "The danger that the imperialist States will attack the countries of Socialism... will continue to exist until Socialism has attained an overwhelming superiority over Capitalism throughout the world." It is explained that the Leninist thesis was correct until the outbreak of World War II and it is no longer applicable now because of the changed correlation of forces between Socialism and Capitalism. But something more can be read in between the lines. The Soviet State does not consider the possibility of a foreign aggression and if it comes at all the Soviet Union is strong enough to combat the forces of aggression. It is important to note that while pledging the Soviet Union to peace the party leadership makes it clear that they still retain their faith in the ultimate triumph of world Communism and propose to wage an ideological struggle against Capitalism "with the utmost vigour and consistency."

The statement of Khrushchev at the Twentieth Congress that it is not true that the Communists "regard violence and civil war as the only way to remake society" has two implications. In the first place, the theory of separate paths to Socialism has been made acceptable from the Marxist-

Leninist point of view and secondly, it endeavours to dispel the idea, which is generally held in the capitalist countries, that the Communists are blood-thirsty people, advocates of an armed insurrection and civil war regardless of the conditions and of the situations. According to the new version of the Communist History, Lenin sincerely hoped to win power by peaceful means and was forced to resort to violence because of the violence of the bourgeoisie. This new version of the Soviet History throws the responsibility of the civil war in Russia on the interventionist armies and the counter-revolutionaries. The Bolsheviks themselves had determined "a path of peaceful revolution."

Khrushchev summed up the new directive for Communist parties abroad in these words: "The present situation offers the working class in a number of capitalist countries a real opportunity to unite the overwhelming majority of the people under its leadership and to secure the transfer of the basic means of production into the hands of the people. . . . The working class, by rallying around itself the toiling peasantry, the intelligentsia, all patriotic forces . . . is in a position to defeat the reactionary forces opposed to the popular interest, to capture a stable majority in Parliament, and to transform the latter from an organ of bourgeois democracy into a genuine instrument of the people's will. . . ." It means that Parliaments, which according to Lenin were to be utilised for the express purpose of their eventual destruction, are now recognised as organs of genuine democracy for the working people and that parliamentary collaboration with Social Democrats and other progressive parties is permissible to defeat the reactionary forces opposed to the popular interest. The letter of the new policy is being most sincerely implemented by encouraging series of visits by prominent socialists to Moscow and by visits of top Communist leaders abroad.

**The New Revolution.** In the Twenty-third CPSU Congress held in December 1966, were outlined, "on the basis of a profound scientific analysis," the main tasks of the present stage in Communist construction. The Party worked out and is implementing the most important "measures on establishing and developing the Leninist norms of party and state life," perfecting the principles of collectivity in work, developing inner-party democracy, promoting criticism and self-criticism and improving methods of running the national economy. The tasks and plans "for the coming years," says the Report of the Decision of the CPSU Central Committee, "mapped out by the 23rd Congress give birth to new forces and new energy of the Soviet people."

The Report on the decision of the Central Committee admits the failure of the national economy. It really echoes the resolution of the Central Committee carried in the autumn of 1965. The resolution noted "that the existing organizational structure of management, the methods of planning and economic stimuli in industry do not correspond to modern conditions or to the level of development of productive forces. . . . Cost accounting at enterprises in many respects is formal; the powers of enterprises in the economic activity are restricted." In his report to the

1. Dated January 4, 1967.

2. *Soviet Review*, January 28, 1967, p. 16.

Central Committee. A.N. Kosygin said that "we are not satisfied with the results achieved in particular in such branches as light industry, foodstuffs, chemicals, timber, paper and building material." He said agriculture "lagged behind," and that there were "great shortcomings in capital construction" linked with "the unsatisfactory state of planning." The resolution of the Central Committee, in order to remedy the grave shortcomings, said, "It is essential to improve planning methods, to reinforce economic stimuli to industrial production, and to increase the material incentives to workers."

Two significant changes the resolution of the Central Committee introduced. The first is the adoption of the profit motive, and the encouragement of individual enterprise. Kosygin in his report made the Government's attitude to the profit motive even clearer. He said, "If the purpose of production plans is to link production closer with consumption, then the index of profit and return is the best way to increase efficiency.... Profit, as distinct from prime costs, is a better indicator. Individual enterprises are to have wages funds, which will be given part of the profits. As Kosygin said, "out of these profits workers and employers will have to be paid not only bonuses for high work indices during the year but also non-recurring bonuses at the end of the year." In short, every Soviet enterprise is now committed to working to make a profit and establish national incentive fund for its employees. Report by N.K. Balieakov, Vice-Chairman of the USSR Council of Ministers and Chairman of the USSR State Planning Committee, to the Supreme Soviet, stated that the Government recently examined the results of the work of the industrial enterprises which have already "gone over to the new system of planning and economic incentives, and mapped out the ways for the further implementation of this vital undertaking." The Report emphasised that it was "very important to get enterprises entrusted in expanding their output and in increasing not only the grand total of profits, but also the amount of profits obtained per rouble of production assets allocated them. The work being done in our country in changing industry to the new system of planning and economic incentives is helping to boost the efficiency of social production."

This is, indeed, abandonment of some hitherto sacred Communist principles. There is also a strong impression in Moscow among foreign observers and many Russians as well that the pioneering zeal which swept communism from one end of Russia to the other has largely gone. The old Communists still feel it, but many of the younger ones seem to be disillusioned. When Khrushchev was in power there went round the story that "Khrushchev was a miracle man. He plants wheat in Russia and harvests it in Canada." The people demand and the Government feels that they should have sufficient and better things to eat, wear and read, to ride in, to live in, to sit in, and to sleep in. And these are the shortcomings which the State Plan for 1967, with increased economic incentives, plans to offer.

With these obvious changes, which are revolutionary in their charac-

3. USSR State Plan for 1967, *Soviet Review*, January 10, 1967, p. 22.

4. *Ibid.*

ter there is a marked effect on the Soviet foreign policy too. 'The Soviet State produced and is continuing in practice new principles in relation between people and countries: principles of equality, sovereignty and non-interference in domestic affairs. Soviet Russia accepts the existence of a Sovereign State and claims to respect its sovereignty both internally as well as externally. The report of the Central Committee in 1966 said: co-operation and solidarity is one of the main sources of strength of the socialist system. The development and deepening of this co-operation meets the best interests of each country in particular and the world socialist system as a whole and promotes the work of our work in the struggle against imperialism. Mutual visits, talks and conferences of Communist leaders, heads of the parties and governments of socialist countries are important means of shaping and coordinating the policy, working terms of co-operation and the necessary instruments of implementing the Soviet Union foreign policy decision of the CPSU Central Committee says that this is a policy of ensuring favorable conditions of building socialism and communism of strengthening the unity and cohesion of the socialist countries of rendering aid and support to the struggle of the peoples of national and social liberation of co-operation with the young developing countries of consistently carrying out the principles of peaceful co-existence of states with different social systems of waging the struggle for ridding mankind of a new World War.

5. Towards the 50th Anniversary of the Great October Socialist Revolution, *Soviet Review*, January 28, 1967, p. 12.

6. Leninist International Policy of the CPSU, *Soviet Review*, January 3, 1967, p. 15.

7. *Soviet Review*, January 28, 1967, p. 12.

## CHAPTER III

# THE STALIN CONSTITUTION

**The Constitution of 1936.** In 1936, Russia had a new Constitution, third in the Soviet series. It was referred to, at first in popular use and, then, almost officially, as the "Stalin Constitution," as Stalin was its principal architect. After Stalin's death it began to be referred to as the Soviet Constitution. The Constitutions of 1918 and 1924 contained nothing concerning the embodiment of socialist system. In his report to the fifth All-Russian Congress of Soviets, Lenin said, "...We do not yet know of Socialism that can be put into paragraphs of law." The period between 1918 and 1928 was really one of struggle and privation in the Russian history. But towards the end of the period of N.E.P. conditions had greatly improved. Then, came the first Five-Year Plan. It aimed at socialist reconstruction and elimination of all capitalist elements in the economic and political structure of the USSR. By 1932, Russia had witnessed a phenomenally rapid industrialization under a most extensive programme of construction and exploitation of natural resources. In agriculture the process of collectivization had achieved certain tangible results. About 60 per cent of the former individual Kulak households, numbering 60 million, were brought together in 220,000 units. The process of collectivization was accelerated in 1930, when the "grand offensive" took place which involved the liquidation of the rich peasants. One million peasants, according to the official figures, who had opposed the policy of collectivization were expropriated and transported to Siberia. This pace of collectivization was three times ahead of the original schedule of the Plan and it was regarded as the most revolutionary feature as it pulled capitalism out by roots.

Private trade was also substituted by co-operative trade and distribution. Even in the field of literature and science complete regimentation of opinion had been achieved. A neutral attitude towards the programme of building Socialism was no longer permitted. Nor could any opposition be tolerated as for the success of the Five-Year Plan a "monolithic iron-disciplined party" was most essential. The press and the radio became State organizations and vehicles of propaganda and agitation behind the drive for Socialism. Even the programmes of educational institutions, the theatre and the movie were co-ordinated with the Plan.

The Second Five-Year Plan (1933-38) undertook to eliminate completely all capitalist elements in the economic structure and in the thinking of the people. "The basic political aim of the Second Five-Year Plan," according to the resolution of the Seventeenth Conference of the Communist Party, "is the final liquidation of the capitalist elements and of classes in general, the complete elimination of causes that lead to class distinctions and exploitation, and the overcoming of the survival





own republican military formations, to enter into direct relations with foreign States, to conclude agreements and exchange diplomatic representatives. Most of these constitutional amendments were necessitated by altered conditions after the termination of the Second World War.

The Constitution is arranged in 13 chapters covering 146 Articles. The Constitution of 1936, is a lengthy document as compared with the Constitutions of 1918 and 1924. Chapter I sets forth the foundations of the "Socialist State of Workers and Peasants," attributing all power to "the working people of town and country as represented by Soviets of working people's Deputies." Chapter II outlines the system of Federalism. Chapter III deals with the "Supreme Organs of State Power" in the Union, and Chapter IV with Supreme Organs in the Republics. Chapter V and VI deal with the administrative machinery of the Union and Constituent Republic. Chapters VIII and IX with Local Government and Judiciary respectively. Chapter X contains the "Basic Rights and Duties of Citizens." Chapter XI outlines the scheme of nomination and Elections and Chapter XII with Arms, Flag, and Capital. Finally, Chapter XIII specifies the procedure for Amending the Constitution.

**Soviet Plan for New Constitution.** The Supreme Soviet in April 1964, approved N. Khrushchev's proposal and decided to draft a new Constitution. The Prime Minister told the Supreme Soviet that the old Basic Law adopted in 1936 had outlived its usefulness. "It is quite natural," he maintained, "to consider it too old," as "Socialism has won the victory and is developing into Communism." He also emphasised that the Stalin Constitution was not suited to meet the new foreign policy demands of the Soviet Union. Khrushchev declared that the new Constitution was needed to permit the Soviet Union, among other things, "to form new relations with those countries which have been freed from colonialism." The old Basic Laws for the conduct of foreign relations, he asserted, were suitable "only for making war and not for planning peace." The new Constitution should embody Leninist principles of "peace, labour, freedom, equality and fraternity."

The Supreme Soviet, accordingly, appointed a 97-man Commission, with N. Khrushchev at its head, to draft a new Constitution. What has happened to this Commission after the exit of N. Khrushchev in 1964 from the body politic of the country, nothing is known with authenticity. The motive for replacing the Stalin Constitution is there and how does the new Constitution shape itself, time alone will show. For the present, the Stalin Constitution, now thirty-four years old, is still operative.

**Procedure for amending the Constitution.** The procedure for amending the Constitution is rather simple. Article 146 prescribes a matter of fact procedure. The Constitution can be amended by a decision of the Supreme Soviet adopted by a majority of not less than two-thirds of votes cast in each of its Chambers. That is to say, all constitutional amendments must be passed by a two-thirds majority in the Soviet of the Union and the Soviet of Nationalities, the two Chambers of the Supreme Soviet, separately. These need not be ratified by the Constituent Republics. Nor do amendments emanate from them. The procedure adopted is the one that is used in ordinary legislation, except for a two-thirds

majority of votes. The Constituent Republics are, therefore, not equal participants in amending the Constitution and this is not in accord with the well-accepted principles of federalism. It does not also establish supremacy of the Constitution.

**Scope of the Constitution.** The Union of Soviet Socialist Republics is a federal State with fifteen Constituent Republics, namely: Russian Soviet Federated Socialist Republic, Ukrainian Soviet Socialist Republic, Kazakh Soviet Socialist Republic, Uzbek Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, Georgian Soviet Socialist Republic, Azerbaijan Soviet Socialist Republic, Moldavian Soviet Socialist Republic, Lithuanian Soviet Socialist Republic, Latvian Soviet Socialist Republic, Kirghiz Soviet Socialist Republic, Tadzhik Soviet Socialist Republic, Armenian Soviet Socialist Republic, Turkmen Soviet Socialist Republic and Estonian Soviet Socialist Republic.

The Union Republics are sub-divided into Territories, Regions, Autonomous Republics, Autonomous Regions and National Areas. But not all Union Republics have all such subdivisions. Federal relationship extends only from the Union to the Union Republics and at lower units are the creations of the Union Republics.

The Union of Soviet Socialist Republics, with Moscow as its capital, measures 8,599,776 square miles and is the largest country in the world. It occupies 15 per cent of the earth's inhabited land area, is two-and-a-quarter times the size of China; nearly two-and-a-half times as big as the United States, almost eight times as large as India, and more than ninety times as big as the United Kingdom. Twelve countries border on the Soviet Union, Norway, Finland, Poland, Czechoslovakia, Hungary, Romania, Turkey, Iran, Afghanistan, China, Mongolia, and North Korea.

One hundred and nine nationalities inhabit the USSR, eleven small national groups related to other nationalities apart. It is instructive to note that forests cover nearly half the Soviet Union and deserts occupy one-sixth. The USSR has deposits of all the minerals to be found in the earth's crust and ranks first for known reserves of 13 out of 16 most important minerals. It also holds a leading place in reserves of oil and natural gas.

## FEATURES OF THE CONSTITUTION

**A Socialist State of Workers and Peasants.** Article I of the Constitution reads: "The Union of Soviet Socialist Republics is a Socialist State of Workers and Peasants." The Stalin Constitution sets forth the fundamental principles of the new Socialist system of society and the Soviet structure of the State. The Constitution of 1918 and 1924 said nothing about recording of the establishment of a Socialist system. At that time Socialism was still in the making. In 1936, it was an accomplished fact and in practice. Socialism in practice means, in the words of Stalin, "our mills and factories are being run without capitalists. The work is directed by men and women of the people. That is what we call Socialism in practice. In our fields the tillers of the land work without landlords and

with Kulaks. The work is directed by men and women of the people. This is what we call socialism in daily life, that is what we call a free, social life." All land, its natural deposits and principal means of production are owned by the State and operated by the people on behalf of the State. There is absence of exploitation and oppression of man by man, the characteristics of a capitalist society. Socialism, thus, implies the new relations that have emerged in a socialist society. These relations are based not on individual interests, but on co-operation and mutual assistance among people free from exploitation. All are workers and everyone works for himself and for a society composed of workers. Distribution of what is produced in the USSR is carried out in accordance with the principle: From each according to his ability, to each according to his work.

**Forms of Socialist Property.** The Soviet Constitution recognises two forms of Socialist property—State property and Co-operative and Collective-farm property. The land, its mineral wealth, waters, forests, mills, factories, mines, rail, water and air transport, banks, communications facilities, large State organised enterprises (State farms, machine and tractor stations, and the like), and also municipal enterprises and the bulk of the dwelling houses in the cities and industrial localities, are State property.

A collective farm is a voluntary union of members to whom land, which is a national property, is allotted in perpetuity by deed papers for being exploited by the common labour of the members assisted by the large-scale machinery and necessary credit facilities provided by the State. The peasants own a farm collectively and its affairs are managed by a Committee elected by the peasant members of the farm. The Committee is responsible for farm management, allocation of work, distribution of income in kind and money, and disposal of surpluses. The peasant members receive their share on the basis of labour days worked and quality of work. The system of remuneration in the USSR is based on the principle "from each according to his ability, to each according to his work." Differences in skill or special efficiency are remunerated by grading up some jobs to a higher equivalent in 'work day' units.

The collective farm has some obligations to the State. It must pay necessary taxes<sup>1</sup> and deliver, at a fixed price, to the State such part of the produce as is prescribed by law. It must also pay, both in cash and kind, to the State-owned machine and tractor station for work done.

**A Planned National Economy.** Article 11 of the Constitution reads: "The economic life of the USSR is determined and directed by the State national economic plan, with the aim of increasing the public wealth, of steadily raising the material and cultural standards of the working people, of consolidating the independence of the USSR and strengthening its defensive capacity." Under a socialist system of State structure unified planning of the national economy is a necessity. The economy of the country is not split up in separate sectors, but is almost entirely concentrated in the State thereby constituting a unified system of many enter-

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1. Arkhangelsky, N., *Land of the Soviet* (1962), p. 1.

2. Taxes have been abolished for factory and office workers. As per speech of Khrushchev in the Supreme Soviet on May 4, 1960.

prises and industries which are closely connected with each other and depending on each other.

The State national-economic plans are compiled for yearly and five yearly periods, and quarterly and monthly plans are worked out with them as a basis. In 1959, a Seven-Year Plan was adopted, but when it ended in 1965, the old practice of Five-Year Plans was reviewed. The Five-Year Plan is considered and approved by the Supreme Soviet of the USSR and the yearly plans by the Council of Ministers of the USSR. The plans for the economic development of the individual republics, territories, regions, districts and enterprises are integrated in the plans for national economic development of the USSR. The central planning bodies are the State Commission for Long-term Planning and the State Commission for Current Planning, both Commissioners operating under the USSR Council of Ministers.

The decisive factor in the fulfilment of the Plan "is the activity—productive as well as political activity—of the working people who are vitally interested in the fulfilment and overfulfilment of the national economic plans, since they are themselves masters of their State." This brings into prominence the importance of work in USSR.

**Importance of Work.** Article 12 of the Constitution reads: "He who does not work, neither shall he eat." In 1930, Stalin pointed out that "work is a matter of honour, a matter of glory, a matter of valour and heroism." The Constitution, too, regards work as a duty and a matter of honour for every able-bodied citizen. In capitalist countries work is a matter of private decision and choice. In the Soviet Union it is a matter of public concern. All must work and work honestly for the benefit of the society. There is no place for slackers, loafers and those who live on the labour of others. Knowledge and work have won for the Soviet Union the reputation of being advanced and highly developed country. Soviet industry today accounts for nearly 20 per cent of world industrial output, or more than what Britain, France, Italy, Canada, Japan, Belgium and the Netherlands produce together. In the course of its economic development whereas Russia in 1913 ranked fifth in the world in industrial production, the Soviet Union today holds second place, next to the United States.<sup>3</sup>

If the Constitution enjoins work on every able-bodied citizen, it also grants to him the right to guaranteed employment. Article 118 grants to citizens the right to work, that is, they are guaranteed the right to employment and payment for their work in accordance with its quantity and quality. Everyone has work in the USSR and is sure of tomorrow. There is no unemployment anywhere, either in the towns or the rural areas. It is a unique feature of the Soviet Constitution as in no other country of the world full employment is constitutionally guaranteed.

**Existence of Private Property and Wage-earners.** Two important results follow from the nature of Socialist property in the USSR. First, the persistence of private property and private ownership no matter in what form, secondly, the existence of the wage-earning class. Article

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3. Sokolov, I., *Soviet-Indian Economic Co-operation*, 1955-65, p. 3.



9 of the Constitution permits individual peasants and handicraftsmen to have a small private establishment of their own, provided it is operated by their own labour and is not pursued to exploit the labour of others. The Constitution, thus, specifically provides for small scale private enterprise. Article 10 likewise recognises the right of personal property of citizens "in their incomes from work and of their savings, of their dwelling houses and subsidiary household economy; their household furniture and utensils and articles of personal use and convenience," as well as the rights of inheritance of personal property of citizens are protected by law.

A worker who wishes to build his own house is given a plot of land by the State free of charge. On application, endorsed by the Trade Union and the management of his place of work, the State Bank grants a loan of 5,000 to 10,000 roubles, payable over five to ten years on easy terms. Interest is charged at the low rate of 2 per cent per annum. In addition, the State provides building materials and free technical advice.

It is, however, against Soviet Law to derive unearned income from one's savings or other personal property. Speculation, usury, etc., are criminal offences punishable by law. A citizen has the right to bequeath his personal property, i.e., savings from work, house, personal effects, copyrights and patents.

The number of wage and salaried workers is increasing all the time. At the end of 1950 the national economy of the USSR counted 8,300,000 more workers than at the end of 1940. Another 8,000,000 were added during the Fifth Five-Year Plan period, bringing the total by the close of 1955 to 47,900,000 exclusive of members of producers' co-operatives, who numbered 1,800,000 in 1955. In 1967, there were 80 million factory and office workers, almost 27 million collective farmers, millions of teachers, scientists, physicians and surgeons and in the cultural field.<sup>4</sup>

The wage-system in the USSR is based on the Socialist principle, "from each according to his ability, to each according to his work." In addition to the wages, each worker receives from the State a number of allowances and other benefits, e.g., allowances and benefits from State Social Insurance Funds, pay for holidays, money grants to mothers of large families and unmarried mothers, tuition at State expense in all educational establishments, free medical service, premiums and benefits of many kinds, etc. In pursuance of the resolution of the Central Committee every enterprise is now committed to working to make a profit and establish a material incentives fund for its employees. Speaking to the representatives of the working people of the Frunze constituency of Moscow, Alexie Kosygin, Chairman of the Council of Ministers, observed on March 6, 1967, "The economic reform will be introduced with persistency, systematically and consistently so that the system of new economic relations would gradually spread to the entire national economy. The new system of planning opens great vistas for the initiative of local party and government organs, executive and collectives of all enterprises without exception. The task is to support and encourage in every way this

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4. Speech by Leonid Brezhnev, March 10, 1967. Along Leninist Line, *Soviet Review*, March 18, 1967, p. 16.

initiative and bring into play not only the material but also the moral stimuli as well as the great organisational force—the movement of socialist emulation.” The Soviet Government’s policy of complete reorganization of industry and agriculture involves the abandonment of some hitherto sacred Communist principles.

**Inequality of Income.** The principle “from each according to his ability, to each according to his work” recognises presence of inequality of income. The inequality of income in the USSR is undoubtedly, less pronounced than in the capitalist countries. It is, at the same time, not negligible. In 1950, the monthly pay of a skilled worker averaged about 900 roubles while Directors and Managers received 9,000 to 16,000 roubles a month. The inequalities in money incomes have been supplemented by other privileges such as better housing facilities, the use of a car, and many other luxuries enjoyed by officials in receipt of higher salaries and the incentives now the reorganization schemes offer. These privileges are regarded as one of the prerequisites of the position of responsible workers. The most numerous and significant groups that come under this category are the Managers and government officials.

This is a complete departure from the original programme of the Revolution. The Bolsheviks had thrived on the principle of equal wages regardless of the quantity and quality of work. Lenin unequivocally declared on the eve of the “October” Revolution that the administrator was no longer to receive more than the skilled workman. This principle was followed to a certain extent in the period of War Communism. In the period of N.E.P. the differentiation in remuneration assumed wider application. When the First Five-Year Plan came in there was a positive drive against the principle of “equalised wage” and Stalin denounced it as a “vulgarised conception of Socialism.” It was another feather in the cap of Stalin.

**Not a Classless Society.** The liquidation of the capitalist system of economy does not mean that a classless society has been created there. The society in the USSR consists of workers, peasants, and intelligentsia. By change in the class structure Stalin meant elimination of antagonism which is the *sine qua non* of exploitation. While reporting on the Draft Constitution in 1936, Stalin declared, “. . . The class structure of our society has also changed. . . . Thus, all the exploiting classes have now been eliminated. There remains the intelligentsia.” There remains the peasant class. There remains the intelligentsia.” All of them are “toilers” and hence there is no antagonism between them. They belong to different but friendly classes, although it is admitted officially that the working class is the foremost and the leading class. Really the idea of a class society in the USSR was perpetuated by N. Khrushchev’s speech in the Supreme Soviet on May 4, 1960 that taxes were to be abolished for factory and office workers. The announcement of Khrushchev was characterised as a message of “springtime uplift and joy.”

The importance and the privileges which the higher levels of the intelligentsia enjoy raises the question whether they may be a new, and

5. *Ibid.*, p. 12.

6. As reported in the *Hindustan Times*, New Delhi, May 6, 1960, p. 1.

perhaps self-perpetuating elite. There is some support about it and it comes from the educational regulations introduced in 1940 and the Congress Directives on the Sixth Five-Year Plan. Under the educational regulations of 1940 children of skilled workmen and of the intelligentsia can easily secure those opportunities for education which are essential for higher posts. The decision on education, announced at the 20th Congress by N. Khrushchev, is the Government's intention to build a number of "boarding schools" of top-level standard. The purpose of these schools, according to Khrushchev, is to produce the "builders of a new society, persons of great heart and high ideals, who are selflessly serving the people." These schools become elite institutions and the students admitted in them acquire a preferential status and consequently help to create another class in a classless State.

### SOVIET FEDERALISM

On the side of the governmental organisation, USSR is a federation with fifteen constituent Republics. The Union was formed on the basis of voluntary association of the Soviet Socialist Republics all enjoying equal rights. Each Union Republic has its own Constitution and it exercises its authority through its own organs of "State power and State administration, which exercise legislative, executive and administrative authority on its territory." Its territory cannot be altered except with its consent. There is a specified division of powers and the subjects assigned to the Central Government are enumerated in Article 14. Residuary powers rest with the Constituent Republics and the Constitution guarantees the protection of their sovereign rights, freedom and independence.

The jurisdiction of the USSR extends to:

- (a) Representation of the USSR in international relations, conclusion, ratification, and denunciation of treaties of the USSR with other States, establishment of general procedure governing the relations of Union Republics with foreign States;
- (b) Questions of war and peace;
- (c) Admission of new Republics into the USSR;
- (d) Control over the observance of the Constitution of the USSR, and ensuring conformity of the Constitution of the Union Republics with the Constitution of the USSR;
- (e) Confirmation of alterations of boundaries between Union Republics;
- (f) Confirmation of the formation of new Territories and Regions and also of new Autonomous Republics and Autonomous Regions within Union Republics;
- (g) Organisation of the defence of the USSR, direction of all the Armed Forces of the USSR, the establishment of the directing principles of the organisation of military formation of the Union Republics;
- (h) Foreign trade on the basis of State monopoly;
- (i) Safeguarding the security of the State;

- (j) Establishment of the national-economic plans of the USSR;
- (k) Approval of the single State budget of the USSR as well as of the taxes and revenues which go to the All-Union Republican and the local budget;
- (l) Administration of the banks, industrial and agricultural establishments and enterprises and trading enterprises of All-Union importance;
- (m) Administration of transport and communications;
- (n) Direction of the monetary and credit system;
- (o) Organisation of State insurance;
- (p) Raising and granting of loans;
- (q) Establishment of the basic principles for the use of land as well as for the use of natural deposits, forests and waters;
- (r) Establishment of the basic principles in the sphere of education and public health;
- (s) Organisation of a uniform system of national economic statistics;
- (t) Establishment of the principle of labour legislation;
- (u) Legislation on the judicial system and judicial procedure, criminal and civil codes;
- (v) Laws on citizenship of the Union; laws on the rights of foreigners;
- (w) Issuing of All-Union acts of amnesty.

**Some Features of Soviet Federalism.** All these are the features of a federal polity and bear a striking resemblance to other federations. There are, however, certain significant peculiarities which are incompatible with the basic federal principles and consequently give to the Soviet federation a distinct character of its own. "The Union of Soviet Socialist Republics," writes Dr. Finer, "pretends to be a 'multinational' State or Federal union. In reality, it is a highly unitary State, tending strongly to obliterate the national features of its national minorities after having liquidated their independent government and economy." There is not a fair statement, though there is much truth in what Professor Wheare says that though the Constitution of the Soviet Union is "quasi-federal," but it is not "a working example of a Federal Government."<sup>7</sup>

(i) The USSR is a multinational State and there are 109 nationalities plus 11 small national groups related to other nationalities. All of them differ from each other in language, customs, history, and their level of culture. The Bolshevik Party was originally a staunch advocate of the principle of self-determination, but political expediency demanded that they should be banded together in a federal polity. In fact, the authors of the first Soviet Constitution of 1918 had conceived of establishing a world federation consisting of diverse nations and nationalities and scat-

7. *Governments of Greater European Powers*, op. cit., p. 817.

8. Wheare, K.C., *Federal Government*, pp. 27-28.

tered territories welded in the Soviet system of a socialist organisation. The association of all such units was to be free and voluntary with the option to secede. This political concession continued to be retained in the subsequent Constitutions, although the possibilities of a world revolution and the option to secede had become obsolete with Stalin's theory of "socialism in a single country" having been fully entrenched.

The Stalin Constitution, accordingly, possesses the unique feature of giving to the Soviet people full and free opportunity to develop their culture and to determine for themselves their political future. The right of self-determination is unprecedented in the history of federalism. The aim of a federation is to produce a unified nation. Federation, in the words of Professor Dicey, is a "political contrivance intended to reconcile national unity with the maintenance of State rights," that is, the desire for national unity and determination of each individual unit to maintain its identity and independence. When the different "nations and nationalities" composing the Union are given the right to self-determination, it is sure to destroy the unity of the country and negate the aim of a federation. But the right to self-determination is only a constitutional provision and there is no sanctity about it. Stalin himself declared that "There are instances when the right of self-determination comes into conflict with another, higher right—the right of the working class...to fortify its power." Even Lenin characterised federalism as a step towards "the most solid unification of the different nationalities into a single, democratic centralized Soviet State." All attempts to secede have been, therefore, ruthlessly suppressed and today this right has only an ideological appeal. Many of those who were charged with treason and counter-revolutions in the purges of 1937-38 were accused of working to dismember the Soviet State. The word "Union" signifies "that the peoples inhabiting the USSR have voluntarily united into a State and have agreed among themselves that they will live together in peace and work together to build a happy new life for themselves."

(ii) The Constitution is supreme in a federal polity and the constitutional law carries with it a special sanctity and all other kinds of law are subordinate to the fundamental law. In the USSR the concept of constitutionalism is entirely different. Vyshinsky maintains that "the dictatorship of the proletariat is authority unlimited by any statutes whatever." It means that it is not the Constitution which prescribes the course of the dictatorship of the proletariat, but it is the dictatorship of the proletariat which prescribes the legal forms of conduct of which the Constitution is the foremost but by no means the only expression. The Soviet Constitution is, thus, the tool of the dictatorship of the proletariat. It is limited and controlled by it; the Constitution neither limits nor controls the dictatorship of the proletariat. Stalin stated a simple truth when he said in 1936, that the Constitution is an expression of what has been achieved. It implies that further changes which take place in the USSR will be recorded therein and the Constitution cannot prevent those changes to occur. There is no question of constitutionality or otherwise and the acts of government cannot be questioned in a court of law. The Constitution stands changed whenever the acts of government and conditions demand it. "The



forms of our State will again change in conformity with the changes in the situation at home and abroad," said Stalin. Khrushchev planned for a new Constitution because he thought that the Stalin Constitution was not suited to meet the new foreign policy demands of the Soviet Union. But Molotov put it more bluntly when he said that the Communist Party was always "subordinating the forms of the State structure to fundamental interests of socialism and to the task of strengthening the proletarian dictatorship." The procedure for amending the Constitution is so simple and easy that whenever the government desires it can record the changes in the Constitution: only a two-thirds majority in each Chamber of the Supreme Soviet is needed. And as party discipline and national solidarity demand unanimity of votes there is never any doubt that amendments proposed by Government will not be adopted.

(iii) There is a federation within a federation in Soviet Russia. The Union Republics are divided into Autonomous Republics, Autonomous Regions and National Areas. All of them are represented in the Soviet of Nationalities at the rate of 25 Deputies for each Union Republic, 11 for each Autonomous Republic, 5 for each Autonomous Region and one for each National Area. But the status of all these units of the federation is not permanently fixed. As the basis of Soviet federalism is a Union of nationalities rather than territorial units, it is possible for a National Area to be promoted to an Autonomous Region or an Autonomous Region to an Autonomous Republic and so on subject to the fulfilment of prescribed conditions. Moldavia was originally established as a National Area. It was first promoted to an Autonomous Region and finally to a Union Republic.

(iv) The "Sovereign rights" of the Union Republics which the Constitution guarantees to protect are hedged by significant limitations and the administration of the USSR becomes in the last resort highly centralised, though some pretence towards decentralisation is claimed to be made now. The simple provisions of the Constitution confer upon the Union Government vast powers not only to control and regulate but also directly to administer the whole economic system of the country. Article 11 clearly states that the economic life of the USSR "is determined and directed by the State national economic plan, with the aim of increasing the public wealth, of steadily raising the material and cultural standards of the working people, of consolidating the independence of the USSR and strengthening its defensive capacity." Economic plans in the USSR embrace every aspect of the country life, and, thus, offer unlimited opportunities to the Union authorities for interference even in the day-to-day administration of the Republics. In addition, the Union Government has a monopoly of financial powers. Article 14 assigns to it "Approval of the single State budget of the USSR, as well as of the taxes and revenues which go to the All-Union, Republican and local budgets." In simple words, the finances of the Soviet Republics are under the complete control of the Central Government. And since power over a man's purse traditionally is power over his will, the autonomy of the federal areas is, in practice, severely limited.

(v) The jurisdiction of the Union Government is specified in Article 14. Outside these limits each Republic exercises authority independently.

But the independent authority of the Republic is qualified by the provisions of Article 20 which reads: "In the event of discrepancy between the law of the Union Republic and an All-Union law, the All-Union law prevails." This is the usual feature in every federation, but add to it the power of the Presidium of the Supreme Soviet to annul decisions and orders of the Council of Ministers of the Union Republics in case they do not conform to laws. The Soviet Council of Ministers is, therefore, the ultimate authority to determine whether the decisions and orders of the Council of Ministers of the constituent Republics should stand or they may be annulled. This is a veto which the Constitution confers on the Union Government and it is a complete departure from the theory and practice of federalism. This is, indeed, the way of a unitary government.

(vi) The peculiar centralistic position is that created by the institution of the Procurator-General of the USSR who supervises the strict execution of laws throughout the entire territory of the USSR. This means that the purpose of establishing the office of the Procurator-General is to exercise supervisory powers in order to ensure the correct application and strict execution of the Soviet laws by all ministries and other agencies subordinate to them as well as by all officials and citizens of the USSR. The powers of the Procurator-General are so extensive, his authority so pervasive and his secret organisation so ubiquitous that he constitutes an integral organ of the State power having no parallel in any federal scheme of government.

(vii) The Stalin Constitution distinguishes between the All-Union and Union Republican Ministries. The All-Union Ministries exercise their jurisdiction through the entire territory of the USSR, while the Union Republican Ministries direct the branches of the State administration entrusted to them through corresponding Ministries of the Union Republics. It means that the power of the Central Government reigns supreme in the spheres of both the All-Union and the Union Republican Ministries. And many Ministries which were previously Union Republican Ministries have since become All-Union Ministries thereby making the Republican governments entirely dependent upon the Union Government.

(viii) The Constitution-amending power solely rests with the Supreme Soviet. The constituent Republics have neither any initiative nor any power to ratify. The simple process for amending the Constitution and the centralist position of the Communist Party do not leave any margin for doubt that the policy of the Central Government will not be carried out. In fact, it is the Politburo of the Party which determines the policy of the Government.

(ix) Most important of all, however, is the all-pervasive position of the Communist Party, which is strictly speaking centralist. Since all policy emanates from the Communist Party, it matters little whether there exists a federal form of government or not. The Politburo of the Communist Party determines the policy of the USSR, as a whole, and that policy is carried by the authorities, Central or Republics.

Thus, the unified economy, the uniformity of political and administrative institutions, the monopoly of the Communist Party and the leading

role it plays in the determination of the national policy, presence of an integrated judicial system, lack of supremacy of the Constitution and absence of judicial review are all matters which seriously depart from the theory and practice of federalism. A federal structure, governed by a unitary, monolithic party provides merely a table of organisation of the distribution of work to be done.

### FUNDAMENTAL RIGHTS AND DUTIES

**Nature of Rights.** There is a separate Chapter in the Constitution on Fundamental Rights and Duties of Citizens and it is one of the most extraordinary Bill of Rights known to history. Five things in particular distinguish the Soviet Bill of Rights from similar provisions in other countries.

(1) According to the Soviet concept of rights, civil rights are secondary to social and economic rights. Soviet leaders had always asserted that the bourgeois democracy is a sham and an illusion as civil rights are meaningless without economic rights. Stalin, while elaborating this point, said, "What can be the 'personal freedom' of an unemployed person who goes hungry and finds no use for his toil? Only where exploitation is annihilated, where there is no oppression of some by others, no unemployment, no beggary, and no trembling for fear that a man may on the morrow lose his work, his habitation, his bread—only there is true freedom found." Economic rights, thus, must precede civil rights as real freedom is possible only when there is complete economic security and hunger, starvation and destitution do not stare man at every step. The Chapter on Fundamental Rights and Duties of Citizens in the Stalin Constitution, accordingly, opens with the right to work and continues with the right to rest and leisure, the right to maintenance in old age and also in case of sickness or loss of capacity to work.

(2) Civil rights in the USSR must be "in conformity with the interests of the working people, and in order to strengthen the socialist system." This provision in Article 125 has two implications: (i) that the freedom of speech, freedom of the press, freedom of assembly, including the holding of mass meetings, and freedom of speech, processions and demonstrations must be in conformity with the interests of the working people, and (ii) that they must be exercised in a manner which should be consistent with and in accordance to the socialist way of life thereby strengthening the socialist system of society. It means that no one in the USSR is constitutionally permitted to meet, to say, and to write anything which is deemed antagonistic to the interests of the workers, and the socialist society. Vyshinsky made this point clear in his book, **The Law of Soviet State**. He writes, "In our State, naturally there is, and can be no place for freedom of speech, press and so on for the foes of Socialism. Every sort of attempt on their part to utilise to the detriment of the state—that is to say, to the detriment of all the toilers—these freedoms granted to the toilers must be classified as counter-revolutionary crime to which Article 58, Paragraph 10, or one of the corresponding Articles of the Criminal Code is applicable."

A similar formula is used in introducing Article 126, the right to

unite in public organisations—trade unions, “co-operative associations, youth organisations, sports and defence organisations, cultural, technical and scientific societies. But in continuation of this provision Article 126 further reads, “and the most active and politically most conscious citizens in the ranks of the working-class and other sections of the working people unite in the ranks of the Communist Party of the Soviet Union, which is the vanguard of the working people in their struggle to strengthen and develop the socialist system and is the leading core of all organisations of the working people, both public and State.” It means that the only political organisation permitted to function in the U.S.S.R. is the Communist Party and the Communist Party is the vanguard of the working people in their struggle to strengthen and develop the socialist system. It is the leading core of all organisations to which the most active and politically most conscious citizens unite. Stalin explained at the time the Constitution was adopted that there would be no room for the organisation of rival political parties, and there exists none.

(3) The Soviet Bill of Rights emphasises all through that the interests of the individual and that of the society are not incompatible and it is only the Socialist State which amalgamates them with the interests of the collective.

(4) Another characteristic of the Soviet Bill of Rights is that it unites in one section and usually in the same articles both rights and corresponding duties and outlines the machinery through which they may be accomplished. There are no rights in the USSR without duties and the duties of Soviet citizens correspond to the rights they possess. Duties, like rights, are strictly in accordance with the Soviet view that the individual is the benefactor as well as the beneficiary of the State.

(5) Likewise, rights, especially economic rights, call for intervention on the part of the State and rendering of certain services on the part of the State. There is no concept of natural rights. All rights are, according to the Communist doctrine, the results of the economic and social order, and subordinated thereto. The nature of the duties obviously becomes clear.

**Some Important Rights.** (i) The Right to work is the most unique feature of the Soviet Constitution. Article 12 characterises work in the USSR as the duty and matter of honour for every able-bodied citizen, in accordance with the principle that “he who does not work, neither shall he eat.” When every citizen must work to earn his living, he must be provided with continuous and sufficient work to do. Article 118 guarantees to every citizen of the USSR the right to work, that is, the right to employment and payment for his work in accordance with his quantity and quality. The right to work is ensured by the socialist organisation of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment.

(ii) The Soviet citizens are guaranteed the right to rest and leisure. Article 119 of the Constitution ensures the right to rest and leisure by fixing a seven hour day for industrial office and professional workers. The working hours have now been reduced to six a day for arduous trades,



five for those who work underground and to four hours in shops where conditions of work are particularly arduous. The Constitution also provides for annual vacations<sup>10</sup> with full pay and a wide network of sanatoria, rest homes and clubs for the accommodation of the working people.

The Programme of CPSU envisaged the transition during 1961-70 to a six-hour working day with one day off a week, or to a 35-hour working week with two days off and in underground jobs and injurious trades, a five-hour working day or a 30-hour (five day) working week. During the second decade (1971-80) the transition to a still shorter working week will begin. "The Soviet Union will become the country with the shortest and the highest-paid working day. At the same time, the working people will have much leisure." Leisure, here, does not mean freedom from everything that constitutes activity. By leisure is meant the opportunity for all-round development of the abilities and talents of man. Marx and Engels "dreamed of the harmoniously developed man of Communist society, in whose life free and happy work, according to his own choice, will be combined with the all-round development of his abilities and physique, with sport and interests in science and art."<sup>11</sup>

(iii) Citizens of the USSR have the right to maintenance in old age and also in case of sickness or loss of capacity to work. The right is ensured by the extensive development of social insurance of workers and employees at State expense, free medical service for the working people and the provision of a wide network of health resorts for the use of the working people. Old age pensions are paid through the scheme of social insurance to male workers on reaching the age of 60 after 25 years of service, and women on reaching 55 after 20 years of service. The pension amounts to 100, 85, 75, 65, 55, 50 per cent of the monthly earnings, with those receiving low wages getting 100 per cent and those earning 1,000 roubles a month or more receiving 50 per cent. More favourable conditions have been fixed for wage and salaried workers employed underground, those engaged in unhealthy trades or working in hot shops. The minimum old age pension is fixed at 300 roubles a month and maximum at 1,200. It does not, however, deprive the pensioners of their right to work. On the death of a pensioner, if he was the only source of family income, pensions are paid to the members of his family unable to work or underage. Workers and employees who have been permanently disabled, either as a result of an industrial accident or while discharging military duties, receive pensions varying from 50 to 100 per cent of their average earnings. Those who are partially disabled and lose their capacity to work from other causes receive pensions equivalent to one-third to two-thirds of their average earnings. In case of temporary disability 50 to 100 per cent of average earnings are paid.

From January 1, 1965, the law introducing old-age pensions for farmers has become operative. A centralised fund, set up for the purpose,

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10. Some have holidays of 12 workdays, others of 25 workdays and still others of 36, depending on the kind of work they do.

11. The Soviet Union has about 4,000 holiday homes and health resort establishments.

12. *Looking Into the Future, op. cit., p. 21.*



is maintained by contributions from collective farms and annual state donations. This measure plus the existing system of state pensions to all employees, will mean an old-age pension coverage of all working people of the Soviet Union.

(iv) The right to education is ensured to all citizens by universal compulsory elementary education. It means all Soviet children attend school. Nowhere in the country is there a child who does not attend school. About 70 million people are now getting free education. Instruction is given in the native language of the pupils. During the Fifth Five-Year Plan period universal secondary education was put into effect in all large towns and industrial centres. During the Sixth Five-Year Plan period (1956-60) universal secondary education was put into effect everywhere. Another major measure taken is the introduction of polytechnical training in secondary schools. The aim is to acquaint school children with the theory and practice of modern industrial and agricultural production. All citizens between 17 and 35 years of age, who have completed a secondary education and passed entrance examination, are eligible for admission to schools of higher learning. Since September 1956 tuition fee is free in all higher schools. All students who do satisfactorily in their studies receive a monthly allowance throughout the course of their study.

(v) The Constitution guarantees to women equal rights with men in all spheres of economic, government, cultural, political, and other public activities. The Soviet women, accordingly, are given an equal right with men to work, payment for work, rest and leisure, social insurance and education. Article 122 also provides for the State protection of the interests of mother and child, State aid to mothers of large families<sup>13</sup> and unmarried mothers, maternity leave with full pay, and the establishment of a wide network of maternity homes, nurseries and kindergartens. Female labour is forbidden, particularly in hard work or in work injurious to their health. Nursing mothers are not allowed to work at night or overtime. Special intermission at work is allowed to mothers to feed their babies. The State aid to mothers of large families and unmarried mothers resembles what Hitler and Mussolini did in their countries. Mothers in the USSR now receive State benefits upon the birth of the third and every succeeding child. The honorary title of "Mother Heroine" is conferred on mothers who have borne or raised ten or more children. The constitutional guarantee of State aid to unmarried mothers remains unparalleled in the history of mankind. Unmarried mothers in the Soviet Union can entrust their children to the State to be fully maintained at its expense. Any child entrusted to the care of the State is to be returned to the mother on her request to be brought up by her.

(vi) The Constitution guarantees to all citizens equality, irrespective of their sex, race or nationality. Article 123 strictly prohibits any direct or indirect restriction of rights of citizens and unequivocally forbids the creation of privileges for citizens belonging to any particular nationality or race. In Soviet society position is determined not by property, status, sex or national origin, but by work and ability. Pisarzhevsky writes, "All citizens, men and women alike, enjoy equal rights and the happiness of a

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13. Grants were awarded to 7,500,000 women with large families.

man does not depend on the colour of his skin, the language he speaks, or the family he comes from but on how he works, what benefits his work brings to others." If any citizen advocates "racial or national exclusiveness or hatred and contempt" he "is punishable by law." These provisions may be explained in the words of Karpinsky: "If any one in our country should conceive the idea of propagating such profoundly anti-Soviet views as that citizens of some particular nation or race possess exceptional qualities and should therefore enjoy special rights and privileges, or if any one should manifest hatred or contempt for the members of any particular nation or race, he would soon enough find himself in the prisoner's dock. Any violation of the provision in the Constitution guaranteeing the equality of all citizens is punishable in our country as a grave political offence."

Equality of all Soviet citizens also means that all people are guaranteed the right to work, rest and leisure, education, material security in old age and in sickness or disablement. A Soviet citizen of any nationality, man or woman, "is eligible for election to any organ of government, or for appointment to any government post. All citizens receive equal pay for equal work."

(vii) Article 124 provides for the freedom of conscience, the separation of the Church from the State, and the freedom of both religious and anti-religious propaganda. But the Soviet State thrives on anti-religious propaganda. No teaching of religion is permitted in Soviet schools or to young people outside the schools. Anti-religious propaganda, on the other hand, is carried on with the active support of the State. Soviet Government, it is claimed, is conducted on scientific principles. "The Soviet authorities do all in their power to promote the enlightenment of the masses. They help them in every way to acquire a knowledge of the sciences, acquaint them with the scientific explanations on the phenomena of nature and of human society, introduce them to a knowledge of the origin of the world and of man, and of the origin and significance throughout the history of man. The youth are taught in the Soviet schools the external nature of matter, the evolution of plants and animals, the changes effected in social and political systems by means of the class struggle and revolution."

(viii) The Constitution guarantees freedom of speech, press and assembly, liberty to form trade unions, co-operative associations, youth organisations, sports and defence organisations, cultural, technical and scientific societies. Street processions and demonstrations are ensured by "placing at the disposal of the working people and their organisations, printing presses, stock of paper, public buildings, the streets, communication facilities, and other material requisites for the exercise of these rights." And these freedoms must be exercised "in conformity with the interests of the working people, and in order to strengthen the Socialist system." It would appear from the logical interpretation of these provisions that the freedoms referred to above cannot be exercised if the Government refuses

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14. More than 1,800,000, including more than half a million women, directly participate in government as elected deputies of the Soviets. 99.97 per cent of the entire population over 18 take part in the elections.

to place at the disposal of a group of citizens the "material requisites." Moreover, the Constitution definitely prohibits that nothing can be said or written which is against the Socialist System. Two illustrations abundantly make it clear. On June 22, 1936, ten days after the publication of the Draft Constitution, the *Pravda* wrote, "The cowardly bourgeois, Menshevists and counter-revolutionary press has been exterminated for ever in our Soviet country. . . . Whoever aims at overthrowing the Socialist regime and damaging the socialist property of the people is an enemy of the people. He will never receive so much as a scrap of paper in the Soviet Union or be able to cross the threshold of a single printing work in pursuit of his fell designs. He will never find a hall, a room, a corner in which to disseminate his poisonous doctrines."

The *Izvestia*, in its issue of August 6, 1936, wrote, "We can have no meetings of fools; and we can certainly have no meetings of criminals, monarchists, Menshevists, Social Revolutionaries and the like." And what happened to those who differed or expressed opinion against the "party line"? This can be well illustrated if we take only the ministerial ranks. Tuchachevsky of the Ministry of National Defence was sentenced to death in March 1937. Egorov, of the same Ministry, met the same fate in October of the same year. Yegov, Minister of the Interior, was executed, in November 1937, to make way for Beria and Beria's luck, too, was not different. Then followed Grinko, Tehubar, Tehernov, Aikhe, and scores of others not well known.

(ix) Citizens are guaranteed inviolability of person, home, and privacy and correspondence. No one may be arrested except by decision of a court or with the sanction of the procurator.

(x) The Constitution grants the right of asylum to foreign citizens persecuted for defending the interests of the working people, or for scientific activities, or for struggling for national liberation. It has been rightly remarked that Moscow is, indeed, the heaven of notable revolutionaries.

(xi) The right to private property is unequivocally conceded by the Stalin Constitution. Though it does not find a specific mention in the Chapter on the "Fundamental Rights and Duties of Citizens," yet the question of ownership of property is considered so important that almost the whole of the first Chapter of the Stalin Constitution is devoted to it. The Constitution recognises three forms of property in the Soviet Union. First, State property, and what it constitutes is covered by Article 6. Secondly, co-operative and collective-farm property and Articles 7 and 8 deal with this category of property. Finally, the personal property. Article 10 ensures to citizens the right to personal property in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and articles of personal use and convenience, as well as the rights of citizens to inherit personal property. Personal property embraces income from labour, savings deposited in State banks or invested in Government Bonds, dwelling houses occupied by their owners, motor cars maintained for personal use, tools, furnishings, and other personal belongings.

It follows that the Soviet people can acquire a large amount of pro-

perty, but it must be solely for their own use. No one is permitted to possess property which is to be used in the exploitation of others.

**Fundamental Duties.** The Stalin Constitution imposes upon the Soviet people definite duties to society and to the State. There are no rights in the USSR, as said before, without duties and the duties of Soviet citizens correspond to the rights they possess. Here are some of the duties which appear to be specially significant with the vital interests of the working people.

(1) **Observance of Soviet Constitution and Law.** The first commandment to the Soviet citizen is to faithfully abide by the Constitution of the Soviet Union and the Soviet laws. Strict observance of the Constitution and Soviet laws, it is enjoined, ensure the prosperity and might of the USSR and hence the personal welfare of Soviet citizens. It follows that the welfare of the people is obtained from the prosperity and might of the Soviet State. "There neither is nor should be," said Stalin, "an irreconcilable contrast between the individual and the collective." There should be none for as much as collectivism-socialism does not deny individual interests. It amalgamates them with the interests of the collective. The argument advanced is, of course, simple, but it savours of what Hitler and Mussolini used to say to their people. "The Soviet Socialist State," writes Karpinsky, "represents, expresses and defends the interests of the whole people. The interests of the Soviet State, of Soviet Society, and the interests of the people coincide. They are identical, inseparable."

(2) **To maintain labour discipline.** A socialist society cannot achieve the desired results unless labour is imbued with socialist ideas and a socialist mind. The workers must exhibit a sense of duty in their work. Each one should work diligently for the common benefit. "Without such free, conscious discipline, **Socialist emulation** aiming at the fulfilment and overfulfilment of production quotas in the shortest period of time would be impossible." Socialist emulation in the USSR is the mass movement of the working people for high productivity of labour, for the fulfilment and overfulfilment of production plans throughout the national economy. It is one of the main forces that ensured the successful fulfilment of the pre and post-war plans for the development of the national economy of the USSR. "Socialist emulation is one more illustration," writes the author of **USSR 100 Questions and Answers**, "of the fundamental principle that in the Soviet Union there can be no contradiction between personal interests and the state."<sup>15</sup>

Work, therefore, is a duty and a matter of honour for every able-bodied citizen. "He who does not work, neither shall he eat" is the constitutional maxim and an integral part of the labour discipline code in the USSR. Payment for work in accordance with the quantity and quality of work done by each is another important rule of labour discipline, for it increases the sense of responsibility of the workers and encourages them to work conscientiously.

(3) **Honesty to perform Public Duties.** Soviet citizens must be keen-

15. Pamphlet issued by the Information Department of the Embassy of the USSR in India, p. 93.



ly conscious of their duties to the State and to society. The public duty of a Soviet citizen demands honest compliance with the laws of the Soviet State. It is enjoined that performance of public duty should be regarded as "something broader than the direct mandates of law" and a public duty comprises all that "may be necessary and useful to consolidate and develop socialist society that may advance the welfare of the land of Soviets." Public duties in the USSR mean that every worker should fulfil the accepted standards of output, to promote the common welfare, give precedence to public interests over private interests, and combat whatever is antagonistic and harmful to the socialist society.

(4) **Respect for the Rules of Socialist Intercourse.** Every society has its own Rules of Conduct, and violation of these rules is regarded a social sin. The rules of the socialist society, however, are recorded in the Constitution and they govern the conduct of Soviet citizens in relation to society and to each other. These rules of Socialist intercourse refer to the duty to work, the prohibition of one man to exploit another, the inviolability of public, Socialist property, etc. The Constitution of the USSR, Kalinin said, is "the fundamental rule of social intercourse under Socialism." Violation of these rules is crime against the State and society, because socialist society demands of its members that in their "whole conduct they be governed above all by the interests of society, of the State."

(5) **Safeguarding Public, Socialist Property.** "It is the duty of every citizen of the USSR," says Article 131 of the Constitution, "to safeguard and fortify public socialist property as the sacred and inviolable foundation of the Soviet system, as the source of wealth and might of the country, as the source of the prosperity and culture of all the working people." It is further provided that "Persons committing offences against public, Socialist property are enemies of the people." The socialist property is the basis of the Soviet system of the State and society and on its proper protection depends the national welfare and might of the USSR. To safeguard and fortify public, socialist property means "managing State, co-operative and collective-farm enterprises economically, assiduously keeping strict and audited accounts of public property, of the distribution of socially-owned consumer goods, and of all public money, every kopek of it." It further means to steadily increase the productivity of labour, by scrupulous exercise of conscious labour discipline, by reduction in the costs of production and by improvement in the quality of the output. Finally, to safeguard and fortify public, socialist property means to extend and augment the Soviet Socialist economy. The decree of May 1961, now prescribes death penalty for large-scale embezzlers of Government property.

(6) **Universal Military Service.** Universal military service is the Soviet law and the Constitution regards military service in the Armed Forces as "an honourable duty of the citizens of the USSR." Lenin said, "In order to defend the power of the workers and peasants from the marauders, that is, from the landlords and capitalists, we need a powerful Red Army." What Lenin said his successors translated into a constitutional reality. The universal military service law was adopted on September 1, 1939. It provides that all male Soviet citizens, without any distinction of nationality, race, religion, education, social origin and status must



serve in the armed forces of the Soviet Union. The Ministry of the Armed Forces of the USSR is also authorised to enrol and accept, and in wartime to call up for auxiliary and special service women who are qualified in medical and veterinary sciences, or have received special technical training.

All male able-bodied citizens are called up for service at the age of 19 and those who have completed their secondary education at the age of 18. The period of active service is fixed at two to four years. Those who complete their active service are placed in the reserve until they reach the age of 50. The reasons for universal military service and its being characterised as an honourable duty of Soviet citizens are *inter alia*: "...And indeed, what duty can be more honourable than to defend with arms in hand our great Soviet country, the first socialist State of workers and peasants in the world, the hope, the bulwark of toiling humanity everywhere on the globe in its struggle for emancipation?"

(7) **Defence of the Country.** If military service is an honourable duty of the citizens, defence of the country is their sacred duty. Treason to Fatherland is punishable with all the severity of the law as the most heinous of crimes and is punishable with death. Treason also includes violation of the oath of allegiance, desertion from the army, impairing the military power of the State, espionage, etc. Capital punishment in peace time was abolished by a decree of the Presidium, dated May 26, 1947. But it amended that decree on January 13, 1950 and permitted the application of capital punishment as the supreme penalty in the case of traitors, spies and wreckers.

### SOME OTHER FEATURES OF THE CONSTITUTION

**Separation of Powers.** Dictatorship of the proletariat depends upon the unity and oneness of power and the Constitution apparently gives this power to the people, but in the last resort it really belongs to the Politburo of the Communist Party. Vyshinsky, accordingly, writes, "... From top to bottom the Soviet social order is penetrated by the single general spirit of the oneness of the authority of the toilers. The programme of the All-Union Communist Party (of Bolsheviks) rejects the *bourgeois* principle of the separation of powers." Soviet writers argue that Montesquieu developed his theory as a means of limiting the power of the King of France while in Soviet Russia there is no class conflict and hence there is no need to limit one branch of government by another. All organs of government have to work in the same interest. In the Constitution of 1918 and 1924 there was, therefore, no separation of powers and all functions of the Government were concentrated in the All-Union Congress of the Soviet and the agencies it appointed. The Stalin Constitution, too, confers all power on the working people of town and country as represented by the Soviet of Working People's Deputies. But it is based on the principle of separation of functions in the sense that distinct organs of Government have their own functions to perform. In fact, there was so much confusion of functions that Stalin in 1936 said, "It is time we put an end to situation in which not one but a number of

bodies legislate." Article 32 of the Stalin Constitution, accordingly, gives exclusive legislative power of the USSR to the Supreme Soviet of the USSR, the Council of Ministers is limited to action as the executive and administrative organ of State authority and Justice is administered by the Supreme Court.<sup>17</sup>

But in spite of this pretence of Separation of Powers, there is no separation of powers in the Soviet Union. This will be apparent from paragraph 5 of the Party Programme which says, "The Soviet Government, guaranteeing to the working masses incomparably more opportunity to vote and recall their delegates in the most easy and accessible manner, than they possessed under bourgeois democracy and parliamentarianism, at the same time abolishes all the negative features of parliamentarianism, especially the separation of legislative and executive powers, the isolation of the representative institutions from the masses, etc." The Judiciary is under the control of the Presidium and the Ministry of the Interior and Procurator-General. The interpretation of the laws and decrees, which in other countries is vested in the Judiciary, is vested in the Presidium in the USSR.

**Plural Executive.** No single head of the State has ever been provided by Soviet constitutional law. Some of the functions of the titular head of the State, such as receiving of ambassadors, are performed by the Chairman of the Presidium. But these are only formal functions. There is no President of the USSR and Stalin called the Presidium as the "collective Presidium of the USSR."

**The One-Party System.** The Soviet system permits of only one party. Nothing in the law established the Communist Party as the only legal political party until the enactment of the Constitution of 1936. Now the Communist Party has a constitutional sanction behind it. It is the leading and directing force in the Soviet Union and the Constitution prescribes that it is "the vanguard of the working people in their struggle to strengthen and develop the socialist system." The Constitution also records that it "is the leading core of all organisations of the working people, both public and State" and it is available to the "most active and politically conscious citizens in the ranks of the working class and other sections of the working people." As the Constitution explicitly omits the right to form other political parties, it has been taken to establish the legal monopoly of the Communist Party.

**The Masses and Legislation.** The Constitution provides for a nationwide poll or referendum on the initiative of the Presidium or on the demand of one of the Union Republics. In this way, the people of the USSR are given the right, in certain cases, to adopt or reject legislative measure involving important issues. But since the Stalin Constitution became operative no measure has so far been submitted to a referendum.

**Soviet Judiciary.** Judiciary in the USSR has certain peculiar features as distinguished from other countries. This aspect will be examined in one of the following Chapters. It is sufficient to mention here that Soviet

17. Article 64.

18. Article 102.

Courts are organs of the Soviet Socialist State. Their functions are: (1) to fight the enemies of the Soviet Government; and (2) to fight for the consolidation of the new Soviet system, and to bring about the new socialist discipline among the working people. The functions of the Soviet Courts are defined in the Law adopted by the Supreme Soviet in August 1938.

**Capital Punishment only for Political Offences.** In the Soviet Union capital punishment was introduced in 1917, but by a decree of the Presidium in May 1947. But it was abolished on January 19, 1949, in order to permit the application of capital punishment in the case of traitors, spies and wreckers. A decree of the Presidium of the Supreme Soviet of May 6, 1961 introduced the death penalty for fraud and destruction of Government property.

## CHAPTER IV

# GOVERNMENT AT THE CENTRE

### THE SUPREME SOVIET

**The Supreme Soviet.** The highest organ of the State power is the Supreme Soviet of the USSR<sup>1</sup> which exercises all the powers vested in the Central Government by Article 14, except those specifically delegated by the Constitution to other organs of the Union.<sup>2</sup> The legislative power "is exercised exclusively by the Supreme Soviet,"<sup>3</sup> although the rejection of the theory of the Separation of Powers and its outright condemnation as the bourgeois principle, makes the position of the Supreme Soviet rather confusing.

**Bicameral Legislature.** The Supreme Soviet is bicameral and consists of the **Soviet of the Union**, and the **Soviet of Nationalities**. The Soviet of the Union is elected by the citizens of the USSR by electoral districts on the basis of one Deputy for every 300,000 of population.<sup>4</sup> The Soviet of Nationalities is elected by citizens voting by component parts. Each of the 15 Union Republics is represented by 25 Deputies, regardless of its size or the number of its citizens. Each Autonomous Republic is represented by 11 Deputies, each Autonomous Region by 5 Deputies and each National Area by one Deputy.<sup>5</sup> In the elections of 1966 to the Supreme Soviet, there were elected 720 Deputies to the Soviet of the Union and 640 to the Soviet of Nationalities. Terms of Deputies are four years.

The Soviet of the Union is a representative Chamber of all the Soviet people and it represents the nation as a whole. It does not represent either nationality or some special interest. But the USSR is a multi-national State and all those nationalities have their special interests which require special representation. The Soviet of Nationalities, accordingly, represents the special interests of the Soviet people who have organised national State structures of their own. "Such a structure of the Supreme Soviet of the USSR," maintained Stalin, "assures the fullest and most accurate expression of the interests of all the peoples of our country in the highest organ of the State power. Such a structure of the Supreme Soviet of the USSR facilitates the consolidation of fraternal co-operation and strengthens the bond of friendship between all the Soviet people."

Bicameralism is, no doubt, a prerequisite of a federal form of govern-

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1. Article 30.
  2. Article 31.
  3. Article 33.
  4. Article 34.
  5. Article 35.

ment, but the motives which necessitate organization of the legislature into two Chambers in a federation are not the same which prompted the creation of bicameralism in the USSR. Soviet Russia is a huge country with a huge population and on this vast territory reside, in addition to Russians, about one hundred and twenty nations, nationalities and ethical groups. Fifteen of these peoples form their own sovereign states — Union Republics. Each of them has its own Constitution, its own legislative organ and its own executive and administrative organ and judiciary. These organs of Union Republics exercise sovereign state power on their territories on all matters except those which were assigned voluntarily to the jurisdiction of the USSR. Many nationalities, e.g., the Tatars, Bashkirs, Ossetians, Adjarians, Yakuts, Nenets, form autonomous republics, autonomous regions or national areas. It is, therefore, natural that, besides the common interests, each of the nationalities united in the Soviet State has its own requirements connected with the specific nature of its economy, and its culture and mode of life, evolved in the course of history. It is for this reason that Soviet Parliament consists of two Chambers having equal rights. One of these, the Soviet of the Union, is the supreme organ representing the common interests of all citizens, irrespective of their nationality. The other Chamber, the Soviet of Nationalities, is the supreme organ called upon to reflect the specific interests ensuing from the national characteristics of the population. "One cannot govern," maintained Stalin, "without having before us here, in Moscow, in the supreme organ, emissaries of these nationalities."

The Constitution makes no distinction between one Chamber and the other. It gives to both the Chambers equal rights. Their powers and functions are identical and they are elected for a term of four years. Even the Chambers are convened and hold their sessions simultaneously. The Deputies to both the Soviets are elected on the basis of universal, equal, and direct suffrage by secret ballot. Moreover, the Constitution makes no difference between a Money Bill and a legislative measure, and a Bill becomes law if passed by both Chambers by a simple majority vote in each. The nomenclature as Upper and Lower Chamber does not exist in the USSR. In fact, equality between the Soviet of Nationalities and the Soviet of the Union has been so much emphasised that both the Chambers have been made approximately equal in size.

**Composition and Organisation.** Both the Soviets are elected for a term of four years on the basis of universal, equal, and direct suffrage by secret ballot. All citizens of the USSR who have reached the age of eighteen, except the insane, and persons condemned by a court and deprived of electoral rights, are entitled to elect Deputies. Any Soviet citizen who is 23 years of age may be elected a member of either of the two Soviets. The Soviet of the Union and the Soviet of Nationalities are approximately equal in size. In the elections of 1966 the former had 720 Deputies and the latter 640. As stated earlier, the Soviet of the Union serves to represent the Union as a whole on the basis of one Deputy for every 300,000 citizens. The Soviet of Nationalities represents the various national groups on the basis of 25 Deputies for each Union Republic, 11 Deputies for each Autonomous Republic, 5 Deputies from each Autonomous Region and one Deputy from each National Area.



The composition of the Supreme Soviet is claimed to be most democratic as it is representative of all sections of the people,—workers, peasants, intelligentsia, men of letters, army commanders, and men and women of all ages and belonging to different nationalities of the Soviet Union. The election of 1954 revealed that out of 708 Deputies, 188 were workers, 114 peasants, and 406 were scientific workers, people engaged in the field of culture and art, technical intelligentsia and public officials. One hundred and seventy of the Deputies were women. Out of 639 Deputies elected to the Soviet of Nationalities, 130 were workers, 106 peasants, and 403 public figures and intelligentsia; 178 among the Deputies were women. The composition of the Supreme Soviet, therefore, ensures the fullest and all-round expression of the interests of all kinds of people and is claimed to be the real barometer of public opinion.

The Supreme Soviet is a single-party legislature and four-fifths of the Deputies are the nominees of the Communist Party. The rest are "non-party men." But it is a misnomer to designate them non-party men. The Constitution permits the existence of only one party and the Communist Party is acclaimed as "the vanguard of the working people in their struggle to strengthen and develop the socialist system." It is further held to be "the leading core of all organizations of the working people, both public and State." The Communist Party is also the only political party referred to in Article 141 as having the right to participate in elections. Other organizations listed in the same Article and entitled to nominate their candidates for elections are "societies of the working people." Non-party Deputies are the nominees of these organizations. But all of them, whether nominees of the Communist Party or nominees of the trade unions, co-operatives, youth organizations, and cultural societies, must be Communists by faith, for it is a treason in the USSR to possess any other political views or sympathies.

**Organization and Sessions of the Supreme Soviet.** When new elections are over both the Soviets meet. By an established tradition, it is opened by the oldest Deputy. He delivers the opening address and directs the elections of a Chairman and Vice-Chairman of the Chamber. At the first session of the Supreme Soviet, each Chamber also elects a Credentials Committee, consisting of a Chairman and members. The Credential Committee of each Chamber verifies the credentials of the Deputies elected to that Chamber.

All the following sessions are opened by the Chairmen of the Chambers. They approve the reporters and co-reporters on the questions on the agenda, direct the sitting of the Chambers and preside at meetings of their respective Soviets and see to the orderly conduct of business and proceeding. In case of joint sittings the Chairman of the Soviet of the Union and the Chairman of the Soviet of Nationalities preside alternately.

The Presidium of the Supreme Soviet convenes both the Soviets in sessions simultaneously twice a year. The Presidium may also convene extraordinary sessions either at its own discretion or on the demand of one of the Union Republics. Each session lasts for about one week.

**Dissolution.** The Supreme Soviet can be dissolved by the Presidium either in the event of disagreement between the Soviet of the Union and

the Soviet of Nationalities or on the expiration of its usual four years' term of office. In any case, elections must be held within two months of its dissolution. The newly elected Supreme Soviet is convened by the outgoing Presidium not later than three months after the elections.

In case of disagreement between the Soviet of the Union and the Soviet of Nationalities, the Constitution provides for the appointment of a Conciliation Commission with equal representation of both Soviets. If the Conciliation Commission cannot agree, the two Soviets reconsider the question under dispute, and if they still persist in their disagreement, the Presidium may dissolve them and order fresh elections. In practice, however, there is no possibility of disagreement. The policy is determined by the Communist Party and not by the Supreme Soviet and the controlling position of the Party in both the Chambers ensures that there is no disagreement.

### POWERS OF THE SUPREME SOVIET

The Supreme Soviet of the USSR exercises plenary State power, it expresses the sovereignty of the Soviet people. Accordingly, its authority is all embracing and its range of activities is great and varied. These are divided and discussed as follows:

**Legislative Powers.** In the USSR legislative power is exercised exclusively by the Supreme Soviet, and its jurisdiction extends to all subjects over which the Union Government has the control, as listed in Article 14. Draft laws are submitted to the Supreme Soviet by the organs empowered to initiate legislation. This power is vested in equal measure in both Chambers of the Supreme Soviet and its Standing Commissions, in Deputies of the Supreme Soviet, the Presidium of the Supreme Soviet and the Government, i.e., the Council of Ministers of the USSR, and also in all the 15 Union Republics as represented by their higher organs of State power.

Laws are adopted in the Supreme Soviet "by open vote" following a debate. Laws are put to vote at first by parts or articles and then as a whole. A law is considered passed, if it is adopted by both the Soviets by a simple majority vote in each. Laws passed by the Supreme Soviet are published in the languages of the constituent units of the Union over the signatures of the Chairman and Secretary of the Presidium of the USSR.

There is no authority in the USSR empowered to veto laws passed by the Supreme Court. This is for two reasons. First, the Supreme Soviet is the highest organ of State power and if any other authority is vested with the power to veto its actions, the supremacy of the Supreme Soviet vanishes. Secondly, what the Supreme Soviet passes is determined and decided by the Communist Party and the Communist Party controls and directs the entire machinery of the Government. The Constitution, however, empowers the Presidium, either on its own initiative or on demand of one of the Union Republics, to conduct a referendum on proposed legislation (that is, proposed by itself). But no proposed legislation has ever been submitted to a referendum.

Laws passed by the Supreme Soviet are binding in all the Union Republics and in case of conflict between a law of the Union Republic and a law of the USSR the latter prevails.

**Constitution-amending Power.** The Supreme Soviet is the Constitution-amending power in the USSR. The process of amending the Constitution is simple. All constitutional amendments must be adopted by a majority of not less than two-thirds of votes in the Soviet of Union and in the Soviet of Nationalities. The Supreme Soviet also possesses the right to exercise control over due observance of the Constitution and to ensure that the Constitutions of the Union Republic and other constituent groups are in full conformity with the Constitution of the USSR. Whenever the Supreme Soviet introduces changes or amendments to the Constitution of the USSR it makes sure that the Supreme Soviets of the Union Republics soon introduce the corresponding changes and amendments to the Constitutions of these Republics.

**Budgetary Functions.** The Supreme Soviet adopts a consolidated State budget for the whole country and exercises control over its execution. The Supreme Soviet also determines the revenues and taxes which go to the Union, the Republican, and the local budgets. Contracting and granting of loans is its prerogative and determination of national economic plans is its constitutional right.

**Power to Admit New Republics and to Create New Areas.** The Supreme Soviet possesses the right to admit new Republics into the Soviet Union, and to create new Autonomous Republics, Autonomous Regions, and National Areas. All alterations in the boundaries of the Union Republics must be finally confirmed by the Supreme Soviet.

**Power Over International Matters and Defence of the Country.** The Supreme Soviet decides about the representation of the USSR in international relations and ratifies and denounces treaties with foreign States. It also determines general procedure governing the relations of Union Republics with foreign States. Defence of the country being a Union subject, the Supreme Soviet determines the organisation of the defence of the USSR and directs all the armed forces of the Soviet Union. The Constitution authorises each Union Republic to raise its military formations. But the Supreme Soviet of the USSR determines the directing principles governing the organization of such military formations. Questions of war and peace are also decided by the Supreme Soviet as well as the questions of foreign trade.

**Direction of the Economic and Cultural Life.** The Supreme Soviet decides all the most important questions pertaining to the home and foreign policy of the country. It approves the annual and long-term plans. In directing economic and cultural life of the country, the Supreme Soviet determines the basic principles of land tenure and also of the use of forests, mineral wealth and waters, all of which belong to the people. Besides, the Supreme Soviet establishes the fundamental principles concerning education and public health services, labour legislation, the judicial system and the legal procedure. Legislation concerning Union citizenship and the rights of foreigners, and determination of the principles of legislation concerning marriage and the family also come within its sphere.

**Electoral Functions.** The electoral functions of the Supreme Soviet are more impressive than any other Legislative Assembly among the major countries of the world. Its two Soviets in a joint session elect the Presidium of the USSR, the Council of Ministers, the Supreme Court, Special Courts and the Procurator General. The Supreme Soviet exercises guidance and control over all highest State organs of the USSR. The Presidium and the Council of Ministers are also responsible and accountable to the Supreme Soviet. But ministerial responsibility in the USSR becomes merely ideological when the Constitution does not admit the need of party struggles and parliamentary Opposition. The Soviets are proud of the fact that there are bodies of non-parliamentary and one-party type. The Council of Ministers is really made and unmade by the Presidium of the Central Committee of the Communist Party.

**Criticism and Supervision of Administration.** The Supreme Soviet is vested with powers of supreme control over all State organs and officials. In implementation of this right it hears reports of its Presidium on the most important decrees issued in the intervals between sessions and confirms them. It also controls the activities of the Government of the USSR, through the Standing Commissions of each Chamber. The Deputies may direct question on any aspect of administration and it is the constitutional duty of the minister concerned to give a verbal or written reply thereto within three days. The Council of Ministers has also been made responsible to the Supreme Soviet. As control and responsibility go together, it is the constitutional right of the Deputies to criticise the Government and its policies.

But criticism is not possible in the USSR. The Constitution does not establish a government by criticism and criticism is deemed detrimental to national solidarity and to the cause of socialism. And criticism is possible only where there is Opposition. Opposition parties cannot exist in the USSR. There are, no doubt, non-party men in the Supreme Soviet and they carry an appreciable numerical strength, in 1958 there were 106 non-party men in the Soviet of the Union and 138 in the Soviet of the Nationalities and they approximate this number even now. Non-party men are not members of the Communist Party, but all of them must be Communists by faith. Then, they are not permitted to meet as a group or take a common stand. The Constitution permits the existence of only one party and it is the Communist Party. The only source, therefore, from which criticism can come is the Communist Party itself. Since the leaders of the Party determine the policy, direct and control both government and the Deputies in the Supreme Soviet, it is hardly feasible to visualise criticism of the government. Even if a reasonable plea can be made for it, it has no substance.

The dictatorship of the Proletariat does not permit criticism of the "party line" and, as such, on the policy of the Government. There may be criticism on administration, those who are actually concerned with the execution of policy, but not against the policy and the policy-makers. The Deputies do not discuss the principles involved, they simply discuss the application of principles already accepted. The centre of discussion and criticism is, accordingly, the actual working of the Ministry involved for execution of the policy. Such criticism is chiefly the work of the



Budget Committee of the Supreme Soviet and there are cases on record when Ministers were replaced following such criticism.

**Supreme Soviet as the Source of Education and Inspiration.** If the Supreme Soviet has no control over administration or it cannot criticise the policy of government, it has at least immense educative value. It is a meeting place of about a thousand and half Deputies drawn from all corners of the country, dressed in the costumes of their own lands and representing varieties of nationalities, occupations and interests. It is a thrill for them to come to Moscow and to listen to top-ranking Party leaders. The Party, too, utilises the opportunity and uses all the vehicles of propaganda to acquaint the entire country with the policies of the Government and its achievements. The press and the radio report faithfully and at length the speeches, the discussions, the plans which the Government contemplates to pursue, and the extent to which it has achieved success. The Deputies carry the message of Socialism to their distant lands, tell their fellow folks of the stupendous and almost incredible strides made by the country towards economic prosperity and thereby inspire them with the achievements of Socialism. It is the duty of a Deputy to report to his constituency the proceedings of the Supreme Soviet and highlight his own contribution towards building up Socialism.

### LEGISLATIVE PROCEDURE

A Bill in order to become a law may originate either in the Soviet of the Union or in the Soviet of the Nationalities. Ordinarily, a Bill is proposed by a member of the Council of Ministers within whose department the legislation falls, although all the Deputies have the right to introduce Bills. Each Chamber elects its own Committees or Commissions, as they are designated in the USSR. These are: Credentials Commission; Planning and Budgetary Commission; Commission for Industry, Transport and Communications; Commission for Construction and Building Materials Industry; Commission for Agriculture; Commission for Public Health and Social Maintenance; Commission for Education, Science and Culture; Commission for Trade and Public Services; Legislative Proposals Commission; Foreign Affairs Commission. As soon as a Bill is introduced it goes to the appropriate Commission of the Soviet concerned. The real work is done in the Commissions rather than in the plenary sessions of the Soviets. And this is primarily due to the reason that the Supreme Soviet assembles only for the brief period of two weeks in a year. The Commissions are not restricted to meeting solely during the brief sessions of the Supreme Soviet. The Commissions meet very often, collect the relevant data, give the Bill a detailed consideration, discuss it clause by clause, and suggest revisions. Sometimes, the Commissions display considerable vigour in revising Bills. Finally, the measures are presented to the Chamber concerned. The Commissions may also originate legislation themselves. Once a Bill emerges from the Commission it only remains for the Soviet to give it the necessary sanction.

The discussion of a Bill in either House of the Supreme Soviet is a tame affair. The Deputies do not discuss the principles involved in the legislation, but only the application of the principles already accepted. All legislation in the USSR must be in accordance with "general line"



of the Party, for the making of decision is a special concern of the Communist Party. It is, accordingly not the wording but the working of law which chiefly occupies the Soviet legislator. The text of the proposed legislation is not a centre of discussion, but the actual working of the Ministry responsible for carrying it out.

Another distinctive feature of the legislative procedure in the USSR is that there is no 'nay' in the Supreme Soviet votes. The practice is that all votes must be unanimous. That is the essence of Soviet Government. Unanimity is regarded as a logical and consistent part of the Soviet structure of the State. Moreover, in a one-party legislature "voting more often than not becomes the occasion for a demonstration of in-group solidarity and an affirmation of faith in the regime as a whole and its ruling party in particular."

In the intervals between sessions of the Supreme Soviet its standing Commissions function. These Commissions are elected from the deputies of the two Chambers. The Commissions preliminarily consider and prepare questions relating to their spheres of jurisdiction and subsequently submit them to the Supreme Soviet for its final decision. The Commissions are called upon to exercise systematic control over the work of Ministries and Departments, and actively to promote implementation of the Supreme Soviet decisions. The Commissions have also the right to initiate legislation. All offices and officials are required to carry out the requests of these Commissions and to provide them with all the necessary information and documents. When considering draft laws or the draft of measures, the Commissions may hear reports of representatives of the Government and Departments, and also request consultation with representatives of various scientific and public organizations.

All questions discussed by the Commissions are decided by a simple majority vote. Any member of a Commission, who disagrees with a decision, may submit his own proposals to the appropriate Chamber. Meetings of the Commissions may be attended with the right of a consultative vote by Supreme Soviet Deputies who are not members of the given Commission. A Standing Commission is accountable for its activities to the Chamber which elected it, and in the intervals between sessions to the Chairman of the Chamber concerned.

Early in 1957, the Supreme Soviet decided on the formation of an Economic Commission of the Soviet of Nationalities. This is an inter-Republican body called upon to work out decisions on questions of the economic and cultural development of the different Republics. The Commission is elected by the Soviet of the Nationalities from amongst its own deputies and consists of a Chairman and thirty members—two representatives from each of the 15 Union Republics. The tasks of the Commission include preliminary consideration of the requests of the Union Republics for the introduction of various measures in the field of economic development, as well as public education, the public health services, town and village planning, etc. The Commission is called upon to make a study of the drafts of the national economic plans submitted for the approval of the Supreme Soviet, and to inform to the Soviet of Nationalities as to whether these plans conform to the interests of the economic and cultural development of the Union Republics.

## ROLE OF THE SUPREME SOVIET

The Constitutional text holds the Supreme Soviet as "the highest organ of State power." Its authority to legislate covers all fields over which the Union Government has jurisdiction. Then, the Constitution ordains that the legislative power of the USSR is exercised exclusively by the Supreme Soviet. But theory is not reality. The Supreme Soviet cannot impress as the highest organ of State power personifying the sovereignty of the Soviet people, and vested with the exclusive legislative power when it meets only twice a year and that, too, just for eight or ten days at a time. It is not possible for it, during its brief sessions, to deal with all the problems which confront that vast country and require approval by the Supreme Soviet. The burden of legislation, which is highly technical, is extremely enormous and the Deputies are not skilled parliamentarians or experienced in the technicalities involved in legislation to lead the issue to discussion. But discussion is not the function of the Supreme Soviet. It is meant to endorse, what has been already determined, and record vote. The regular procedure is that members of the Council of Ministers make their report or submit their Bills, and the solidarity of the Government and nation demands that they should be unanimously passed. "The formula frequently applied now is to state that the report or proposal of government was presented with such admirable clarity that no debate is necessary." At infrequent occasions, when it becomes necessary to debate the issue, all speak in favour of the measure. Principles involved are never discussed and the text of the proposed measure is never the centre of discussion. All legislation must be in accordance with and in conformity to the general line of the Party and it seems unlikely that the Supreme Soviet will ever challenge or amend it. Amendments introduced in the Committees of the Supreme Soviet always have the prior Party sanction. What the Deputies actually do is that they may bring up shortcomings in performance and tardiness in operation of the policy and suggest measures for improvement. When this has been done all must invariably vote for the measure. There is no instance recorded in which a Deputy of the Supreme Soviet had failed to vote in favour of a measure introduced or endorsed by Government. Supreme Soviet, thus, obediently gives its approval to all that has been recommended. The institution which does not determine policy, which, in fact, has no hand in the determination of the policy, cannot and does not possess any kind of power, what to talk of the highest State power.

The Supreme Soviet does not even exercise legislative power exclusively. Majority of laws in the USSR are in the form of decrees of the Presidium. Some are in the form of "decisions" or "orders" which are the result of the joint action of the Central Committee of the Communist Party and the Council of Ministers. The development is really strange, because it deprives the Supreme Soviet of its exclusive legislative power. It is still more strange that this development was fully cemented during the lifetime of Stalin himself. At the time of the adoption of the Constitution in 1936, Stalin rejected a proposal to give the Presidium the authority to enact provisional legislation. He asserted, "It is time we put an end to a situation to which not one but number of bodies legislate. Such a situation runs counter to the principle that laws should be

stable....Legislative power in the USSR must be exercised by only one body, the Supreme Soviet of the USSR."

Soviet writers insist that the laws passed by the Supreme Soviet have greater sanctity than the decrees, decisions or orders, and the latter are subject to the confirmation of the Supreme Soviet. This is true so far as the letter of the law is concerned. In actual practice, the Presidium has not only adopted decrees, but has even changed the provisions of the Constitution itself. The decrees, decisions or orders have never been revoked, except on the initiative of the Government. And since they come into operation at once without waiting for the confirmation of the Supreme Soviet, it matters not what name we may give them, laws, decrees, or orders. Even if we differentiate between them, the differentiation becomes meaningless when we know that the Supreme Soviet, the Presidium, and even the Constitution are definitely subordinate to the ruling power of the Communist Party.

The real utility of the Supreme Soviet is that it educates and inspires the citizens of the USSR through its deputies, and the deputies exercise a reasonable influence in the public affairs of the Soviet Union. The Supreme Soviet is a meeting place, as said before, of about a thousand and a half Deputies drawn from all corners of the country. They listen, while the Supreme Soviet is in session, to the top-ranking Party leaders and familiarise themselves with the plans which the Government intends to pursue, and the extent to which it has achieved success. When the brief session of the Supreme Soviet, lasting eight to ten days, comes to an end, the Deputies carry the message of Socialism to distant lands and tell their fellow folks the achievements made by the USSR and, as such, educate and inspire them with the cause of Socialism.

The fact that all the top-ranking leaders of the Communist Party are the Deputies and that the majority of the members of both the Soviet of the Union and the Soviet of Nationalities are actively associated with the Party makes for co-ordination, the importance of which cannot be denied. The Deputies hailing from the various widely diversified sections of the country express their points of view which may not have been known to the Government before and consequently get the modification of many proposals in the light of their local experiences.

## CHAPTER V

# GOVERNMENT AT THE CENTRE (*Contd.*)

### THE PRESIDIUM

**A Plural Presidency.** The Supreme Soviet of the USSR meets, as it has already been stated, twice a year. The need therefore arises for a body which would exercise highest State power in the intervals between sessions. Such an organ is the Presidium of the Supreme Soviet of the USSR. But the Presidium is a constitutional anomaly. It is a unique institution, indigenous to the Soviet system and without parallel anywhere else, except in the States that have copied the Soviet model. By virtue of the powers granted to it, the Presidium is the highest permanently functioning organ of the State elected by the Supreme Soviet of the USSR and accountable to it. Stalin called it a "collegiate President" or the Collective President. It performs functions Executive in character which are the prerogatives of the Chief Executive Head of a State in other countries, King or President. Its power of appointing officials, receiving diplomats, conferring decorations and titles of honour, signing the Union laws, convening the sessions of the Supreme Soviet and ordering for its dissolution, etc., make the Presidium an Executive organ of the USSR and since it is a numerous body it is a plural or collective Executive.

But what makes it a constitutional anomaly is that it defies the doctrine of Separation of Powers. The Presidium has a combination of executive, legislative and even some judicial functions. The fact that the Presidium functions continuously and the Supreme Soviet only periodically, that is, twice annually and that too for short one-week sessions, devolves upon it a good deal of legislative business that cannot be held over for the Supreme Soviet, makes it a legislative body. It issues "decrees" with the force of law and this is the regular process of law-making in the USSR. The unlimited decree-issuing powers of the Presidium were demonstrated before the elections of 1936. It issued a decree raising the minimum age of Deputies to the Supreme Soviet from eighteen to twenty-three, and another providing for representation of the Red Army Units serving abroad. Both these decrees amended the constitutional provisions and were formally ratified by the Supreme Soviet, which had been elected in pursuance of these amendments. Since the decrees issued by the Presidium have never been revoked, except on the initiative of Government, the real legislative power rests with the Presidium. Towster, while summing up the constitutional role of the Presidium, has aptly said that the Presidium of the Supreme Soviet "constitutionally classified as one of the highest organs of the State power, has—like its predecessors, the Presidium of the G.E.C.—fulfilled the need of a continually operating, representing the summit of the formal Soviet pyramid, and performing a wide variety of functions. Though the competence assigned to it differs in several aspects

from that of the Presidium of the G.E.C., particularly in the publicly emphasised law of legislative power in the Presidium of the Supreme Soviet, the latter has not only acted as 'collective President' of the Soviet State, but has in fact served to a large extent as a legislative organ in the Soviet structure."<sup>1</sup> Thus, the Presidium is both a legislative and executive organ, and also it combines some of the functions exercised in other countries by or in the name of the Chief Executive head of the State with those "usually associated with an Upper Chamber or executive council."<sup>2</sup>

**How the Presidium is elected.** The Presidium is elected by a joint session of the Supreme Soviet—the Soviet of the Union and the Soviet of Nationalities—and carries on governmental work between sessions of the parent body. Originally, according to the 1936 Constitution, it consisted of a Chairman, sixteen Vice-Chairmen representing each Union Republic, and twenty-four additional members. In 1946 the number of the additional members was reduced to fifteen. Today, it is composed of a Chairman, 15 Vice-Chairmen, a Secretary and twenty other members. By established tradition, the Presidents of the Presidium of the Supreme Soviets of the Union Republics (fifteen in number) who are also Deputies to the Supreme Soviet of the USSR, are elected Vice-Chairmen of the Presidium of the USSR Supreme Soviet. All told 37 members including the Chairman, Vice-Chairman and a Secretary, make the Presidium. Anastas Mikoyan, who became President in 1964, resigned on December 9, 1966, and Nikolai Podgorniy succeeded him. Podgorniy had been the No. 2 man to Brezhnev in the Party Secretariat.

The normal term of the Presidium is four years. If the Supreme Soviet of the USSR is dissolved earlier, the Presidium too stands dissolved. But the outgoing Presidium continues in office until the newly elected Supreme Soviet shall have formed a new Presidium. On the expiration of four years, the usual term of the Supreme Soviet, or in the event of its earlier dissolution, the outgoing Presidium orders new elections to be held within a period not exceeding two months, and convenes the session of the newly elected Supreme Soviet not later than three months after the elections. The Presidium is accountable to the Supreme Soviet. Dr. Finer regards the Presidium "The Interpersonal web of Party and State."<sup>3</sup> He says that Supreme Soviet, according to the letter of the law, is the master of the Presidium, the Communist Party sees to it that the Presidium consists of none but Party members. No non-party member has ever found a place therein.<sup>4</sup> "Then there is an interlacing between the top directorate of the party—that is, its Party Politbureau—and the Soviet Presidium and the Council of Ministers." This makes the perfection in the integration of the Communist Party and Soviet Government.

**Powers of the Presidium.** The Presidium is a legacy of the earlier Soviet Constitutions and it retains, under the Stalin Constitution, its previous functions minus some of the legislative powers. The powers vested in it are enumerated in Article 49.

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1. *Political Power in the USSR, 1917-47*, p. 272.
  2. Ogg and Zink, *Modern Foreign Governments* (1953), p. 861.
  3. *Governments of the Greater European Powers*, p. 802.
  4. The Supreme Soviet has roughly 16 per cent non-party Deputies.



The Presidium convenes the sessions of the Supreme Soviet, twice annually, dissolves it in the event of irreconcilable disagreement between the Soviet of the Union and the Soviet of Nationalities, orders new elections within two months of its dissolution or on the expiration of its normal term, and convenes the first session of the newly elected Supreme Soviet. The Presidium may also convene an extraordinary session at its discretion or on the demand of one of the Union Republics.

It issues decrees and interprets the laws of the USSR. The decrees issued by the Presidium have the force of law and extend to all the country. But all such decrees must be based on All-Union laws. When the Presidium gives interpretation to the laws in operation, it explains the purposes of such national laws, the duties which they impose, and how their provisions could be properly applied. All measures passed by the Supreme Soviet are published in the languages of the Union Republics over the signatures of the Chairman and the Secretary of the Presidium. This power of the Presidium resembles the powers of assenting to a Bill by the King or the President in other countries, though the Constitution does not say anything about it.

The Constitution of the USSR does not differentiate between a Bill and a law. Article 39 reads: "A law is considered adopted if passed by both Chambers of the Supreme Soviet of the USSR by a simple majority." It implies that the Presidium, unlike the Executive Heads of other countries, does not possess the power of vetoing a Bill. The Presidium, however, may submit the proposed legislation for the popular vote and hold referendum. This it may do on its own initiative or on the demand of one of the Union Republics. But no referendum has so far been held.

The Council of Ministers is appointed by the Supreme Soviet and is responsible and accountable to it. But in between the intervals of sessions of the Supreme Soviet, the Presidium relieves and appoints ministers, authorises the appointment and formation of new ministries, and sanctions creation of new regions and adjustment of territories, subject, of course, to subsequent confirmation by the Supreme Soviet. The Constitution also empowers the Presidium to annul "decisions" and "orders" of the Council of Ministers of the USSR, and the Councils of Ministers of the Union Republics in case they do not conform to law. It should be noted here that the Stalin Constitution nowhere uses the words "dismissal of ministers." It simply refers to their "release and appointment."

If the Supreme Soviet is not in session, the Presidium declares war in the event of an armed attack, or whenever it becomes necessary to fulfil international treaty obligations concerning mutual defence against aggression. It appoints and removes the high command of the armed forces of the Soviet Union, orders partial or general mobilization, and proclaims martial law either throughout the USSR or in separate localities in the interests of the defence of the country or for purposes of ensuring public order and security. The Presidium in exercise of this power issued four decrees immediately after Germany had attacked Russia. These decrees pertained to: (1) the mobilization of citizens subject to military service in a number of areas; (2) promulgation of martial law; (3) declaration of martial law in a number of Republics, Regions, and separate cities; and

(4) formation of military tribunals in localities under martial law and regions which were threatened of actual hostilities. It also issued the decree on January 25, 1945 terminating the state of war between the Soviet Union and Germany.

The Presidium of the Supreme Soviet represents the USSR in its relations with foreign States. It ratifies and denounces international treaties, appoints and recalls ambassadors of the Soviet Union to other countries, and receives the credentials and letters of recall of foreign representatives accredited to the Soviet Union.

It bestows decorations and titles of honour, military titles, diplomatic ranks and other special titles. The Presidium both issues general acts of amnesty and examines the right of pardon of individual offenders convicted by a court of law.

The Constitution grants immunity to the Deputies against arrest. No Deputy can be arrested or prosecuted without the consent of the Supreme Soviet or, if it is not in session, without the consent of the Presidium.

When preparing and studying separate questions, the Presidium usually issues instructions to the Government or to high officials to present the necessary materials to the Presidium, and also charges the Standing Commissions of the Chambers of the Supreme Soviet with a study and preliminary consideration of these questions. In exercise of its functions of supreme State control, the Presidium regularly hears reports of Ministers, the Chairman of the Supreme Court, the Procurator-General and other high officials.

For the performance of its activities, which are of an extremely varied nature, the Presidium has at its disposal a huge staff constituting its own office as well as the departments of law, awards, pardon, question of citizenship, information, statistics, etc.

**The Chairmanship of the Presidium.** Some of the "presidential" functions vested in the Presidium are exercised by its Chairman, although neither the Constitution nor any law gives him any special powers. Nevertheless the laws passed by the Supreme Soviet are promulgated with his signature, and he signs the decrees of the Presidium itself. He receives foreign envoys and ministers, and he exchanges messages with other heads of States "as an equal among equals." But all acts of the Chairman are in the name of the Presidium. The Chairman of the Presidium, thus, in form may roughly correspond to the titular head of the State. It is a position of ceremonial importance alone and without any political significance. "As in the case of his foreign counterparts, his most important function is to mix with the ordinary citizens as a living human symbol of the paternal concern of the government with their welfare."<sup>5</sup> And in the language of the foreign countries he is described the 'President.' For instance, a news emanating from Kathmandu, May 25, 1965, reported, "President Anastas Mikoyan and the Soviet Prime Minister, Mr. Alexi Kosygin, have accepted invitations to visit Nepal"<sup>6</sup> There is

5. Carter, G.M., and others, *The Government of Soviet Union* (1954), World Press, p. 119.

6. *The Indian Express*, New Delhi, May 27, 1965, p. 1.

no President of the USSR. It is against the Constitution and the spirit of collective leadership which it establishes at every level.

**Real authority of the Presidium.** The Presidium, as Dr. Finer says "is the continuous government of the Soviet Union in fact as well as in law." It is partly a legislative body and partly an executive council which exercises decisive control over the Council of Ministers in their everyday duties of administration. The law makes its position enviable because it has the right of issuing decrees. A steady stream of decrees, which have the force of law, emanate from it. These decrees are in part based on the Presidium's own jurisdiction as enumerated in Article 49 of the Constitution, but they also invade freely the sphere which the Constitution reserves for the Supreme Soviet itself. Immediately after the Second World War elections to the Supreme Soviet had become overdue. The Presidium not only set the date, but it also enacted changes in the electoral law that amounted to amendments to the Constitution. It raised the age of the Deputies from eighteen to twenty-three years and added new electoral districts to both Chambers of the Supreme Soviet by decreeing that Soviet Army units abroad should be represented in each Chamber by a Deputy for every 100,000 voters. The decrees changing the franchise and the system of representation were presented to the Supreme Soviet, when elected under the new rules, and the decrees were adopted formally as constitutional amendments.

The Presidium can also dismiss and replace Ministers in the intervals of the Soviet sessions. It can also call an election if the two assemblies are in deadlock. Further, the Presidium may initiate a referendum at its discretion. But the real power rests with it when the two Chambers are not yet elected. The Presidium has never had the occasion to dissolve the Supreme Soviet. Nor has it even organised a referendum. It has, however, used all its other powers effectively. The extent of the authority of the Supreme Soviet, as the highest organ of the State power, has for all practical purposes been transferred to the Presidium, though the directing force remains with the inner circle of the Communist Party. Those who direct the Party have their due place in the Presidium and so have the Ministers who matter in the Party and Government. Dr. Finer gives a matter of fact summing up of the position and powers of the Presidium. He says, "It seems to hold a kind of Cabinet or policy-making, directing, co-ordinating, and initiating position above the Council of Ministers, yet to be removed from the actual day-by-day departmental executive responsibilities: It is at once a continuing substitute for the Supreme Soviet, a higher level Executive than the Council of Ministers, and a supervisor of ministerial everyday activities employing the disciplinary and corrective power that accompanies the power to quash decisions and orders and to oust Ministers." So far as the letter of the law is concerned the Presidium is appointed by the Supreme Soviet and is accountable to it for all its activities. But, in practice, it has always acted actively and effectively and has eclipsed in authority the Supreme Soviet, which, according to the Constitution, exercises plenary State power.

## CHAPTER VI

# GOVERNMENT AT THE CENTRE (Contd.)

### THE COUNCIL OF MINISTERS

**Nature of the Council of Ministers.** The real pivot of administration in the Soviet Union is the Council of Ministers, called until March 1946, the Council of the People's Commissars. It is the government of the USSR and the highest executive and administrative organ of the State power. Apparently, the Council of Ministers corresponds to a Cabinet in a parliamentary system of government. It carries the same nomenclature as the Councils of Ministers do in other countries. It is the creature of the legislature and is expressly declared responsible to the Supreme Soviet directly when it is in session and indirectly through the Presidium at other times. But theory is not practice and, once again, a legal truth becomes a political untruth in the USSR. Under one party system of government the formation of the Ministry is an accomplished fact. Then, it is not the parliamentary party which elects its leader who is summoned to form the government, and he submits a list of his colleagues. The Council of Ministers in the USSR is designated by the Party Politburo and it is responsible to the Party rather than to the Supreme Soviet. The Chairman of the Council of the Ministers (the Prime Minister) is not the choice of the parliamentary party and his position cannot be compared to a Prime Minister under a parliamentary system of government. The Council of Ministers, in fact, has no semblance of a Cabinet. Let us take a typical example of the formation of the Council of Ministers in March 1946. "The head of the outgoing government, Comrade I.V. Stalin, submitted a written statement to the Chairman of the joint session of the Chambers declaring that the government surrendered its powers to the Supreme Soviet. The Supreme Soviet accepted the statement of the government and unanimously commissioned Comrade Stalin to submit proposals for a new government. At the next joint sitting of the Chambers, the Chairman announced the composition of the new government as proposed by Comrade Stalin. After statements by deputies, the Chairman declared that there was no objection to any of the proposed candidates and that none of the deputies insisted on a roll-call vote. The composition of the Council of Ministers of the USSR as proposed by Comrade Stalin was then voted on as a whole and unanimously adopted amidst loud applause passing into an ovation in honour of Comrade Stalin, who was elected Chairman of the Council of Ministers of the USSR and Minister of its armed forces. V.M. Molotov, Comrade Stalin's close associate, was approved as Minister of Foreign Affairs." Precisely the same happened

1. Article 56.

2. Article 79.

with the Councils of Ministers headed by Bulganin, Khrushchev and Kosygin. The decrees of the Presidium of the USSR appointed them and were confirmed when the Supreme Soviet assembled in a session. One fine morning (October 16, 1964) the world was made to understand that Nikita Khrushchev had been released from his job as Russia's Prime Minister on grounds of old age and bad health. But with Khrushchev's exit, the Council of Ministers continued as before with the former First Deputy Premier, Alexei Kosygin, as the new Prime Minister. "Comrade A.N. Kosygin heartily thanked the Central Committee of the Communist Party of the Soviet Union and the Presidium of the Supreme Soviet of the USSR for the confidence shown and gave the assurance that he would do his utmost to discharge his duties."

This is not the practice of the parliamentary system of government where the Prime Minister is central to the formation of the Council of Ministers, central to its life and central to its death. Moreover, the system of government, as it obtains in the USSR, thoroughly insists on and strives for unanimity. Opposition, on the other hand, is the very breath of parliamentary democracy as obtained in other countries of the world. "His Majesty's Opposition" in Britain has now a constitutional sanction behind it. The Constitution of the USSR does not permit the existence of Opposition.

**How the Council of Ministers is formed.** The Council of Ministers of the USSR is formed at a joint session of the Soviet of Union and the Soviet of Nationalities. But it is just a formality. The Party Politburo, as stated above, designates the Council of Ministers and its Chairman. The Supreme Soviet simply ratifies it. If the Supreme Soviet is not in session, the Presidium of the USSR "releases and appoints" ministers on the recommendations of the Chairman of the Council of Ministers, subject to the confirmation of the Supreme Soviet.

The post of the Chairman of the Council of Ministers was held from 1917 to 1924 by Lenin and from 1924 to 1930 by Rykov. Then came Molotov. Stalin took the position in 1941 and he continued in the saddle till his death on March 5, 1953. On March 6, Georgi M. Malenkov was appointed the Chairman of the Council of Ministers. He resigned early in 1955 and Marshal Nikolai Bulganin took his place and Comrade Khrushchev replaced Bulganin. On October 16, 1964, Alexei Kosygin became the Prime Minister replacing Nikita Khrushchev.

**Composition of the Council of Ministers.** The composition of the Council of Ministers is provided for in Article 70 of the Constitution. It consists of a Chairman, first Vice-Chairman, Vice-Chairmen, Ministers and the Chairmen of the Council of Ministers of the Union Republics by virtue of their office.

The Council of Ministers was really a large body of an ever expanding character and prior to 1951, it consisted of fifty members. Now the number stands at 30 as a result of reorganisation after Stalin's death. The Chairman and the Vice-Chairmen (five in number) constitute an 'inner Cabinet' for the more efficient supervision and proper co-ordination of the work of the Council of Ministers. The members of the



'inner cabinet' are generally the members of Party Politburo and as the Party Politburo is the policy-making body, it "forms an interlocking directorate between party and government." Another important point to be noted is that Ministers are technicians chosen for their expert knowledge in a particular field and not as politicians and amateurs. They are not leaders of the Party, although they are all Party members. The need for proper integration and co-ordination of functions of the Council of Ministers as a whole is much more pressing in the Soviet Union as compared with other countries.

**Powers of the Council of Ministers.** The powers conferred upon the Council of Ministers by Article 68 are very wide indeed. They comprise:

(1) Direction and co-ordination of the All-Union and Union Republican Ministries, and of other institutions under the jurisdiction of the Union Government and to exercise guidance of the Economic Councils of the Union Republics and those of the economic administration areas through the Councils of Ministers of the Union Republics.

(2) Taking of necessary measures for the proper execution of the State budget and the national economic plans. The Council of Ministers is also to devise means and take necessary steps for the strengthening of the country's credit and monetary system.

(3) Maintenance of public order and defence of the country, the protection of the interests of the State, and the right of citizens.

(4) Direction of the general organization of the armed forces of the country and fixing of the annual contingent of citizens to be called up for military service.

(5) Exercising general guidance in the sphere of relations with foreign States.

(6) Creation of special Committees, Commissions, and other administrative organs to deal with economic, cultural and military matters.

**Other powers of the Council of Ministers are:**

(7) To issue 'decisions' and 'orders' on the basis and in pursuance of the All-Union laws in operation, and to verify their proper execution. The 'decisions' and 'orders' of the Council of Ministers are binding throughout the territory of the USSR.

(8) The Council of Ministers may suspend the executive orders of the Union Republics, if such orders are not in conformity with the Union laws or decrees.

(9) The Ministers of the USSR issue orders and instructions, within the limits of their respective Ministries, on the basis of the All-Union laws and in pursuance of the orders and decisions of the Council of Ministers. In fact, the Council of Ministers now requires to an increasing degree that ministerial orders and actions which they intend to make be submitted to the whole Council for information, and in a number of instances individual acts of the Ministers have been annulled. It will, thus, be noted that while the Presidium annuls acts of the Council of Ministers, the Council of Ministers annuls acts of individual Ministers.

(10) The Council of Ministers has the right, in respect of the All-Union branches of administration and economy, to suspend decisions and orders of the Council of Ministers of the Union Republics, and, as said above, to annul orders and instructions of the Ministers of the USSR.

**Responsibility of the Council of Ministers.** The Constitution of 1936 specifically provides that the Supreme Soviet appoints the Council of Ministers. It is responsible and accountable to the Supreme Soviet or its Presidium when the Supreme Soviet is not in session. This strengthens the official supremacy of the Presidium. Article 71 further provides that the Government of the USSR or a Minister of the USSR to whom a member of the Supreme Soviet addresses a question must give a verbal or written reply thereto in the Chamber to which the Deputy belongs within a period not exceeding three days. This means that the Constitution not only expressly provides for ministerial responsibility, but it also gives a right to the Deputies to elicit information either from the Council of Ministers or any particular Minister concerning his jurisdiction, and when such an information is sought it becomes the constitutional duty of that agency to whom the question is directed to give either a written or an oral reply in the House to which the Deputy belongs within a period not exceeding three days.

The device of asking questions is a parliamentary practice of invoking responsibility. And giving it a constitutional sanction may be described the third miracle of modern politics. But ministerial responsibility in the Soviet Union is just a constitutional formality. The Supreme Soviet or its Presidium have nothing to do with the composition of the Council of Ministers, their continuance in office, and both exercise no control over their policy. The Supreme Soviet simply endorses the decisions of the Party Politburo. And what is still more amazing is that since the ascendancy of Stalin to power, the action of the Presidium had remained till his death the action of Stalin. Stalin, in the words of Zhdanov, was "the genius, the brain, the heart of the Bolshevik Party, of the whole Soviet people, of the whole progressive and advanced humanity." One of the critics of the Soviet regime said, "The little father in the Kremlin formerly personified by the Tsar, has thus come to be personified by the General Secretary." The denunciation of Stalin and the cult of the individual personality at the 20th Congress of the CPSU now maximises the role of the Party and elevates the Marxist-Leninist point of view of collective leadership and, accordingly, the leadership of the Party Politburo, which was, once again, overshadowed by Khrushchev. Khrushchev was both the Prime Minister and Party's First Secretary. After his exit, Leonid Brezhnev became the First Secretary and Alexei Kosygin as the Prime Minister. How long both these key posts remain separate cannot be predicted. The course of events has never run smooth in the USSR.

The Ministers in the Soviet Union come in and go out not because they hold or lose the confidence of the legislature, but because they are the nominees of the Party and those who control it. Whether a Minister holds his post or loses it depends upon his standing with the Party leaders. There is a constant relationship of automatic approval between the Council of Ministers and the Supreme Soviet. "Thus when the Council of Ministers reports back to the Supreme Soviet it is a case of Party mem-

bers in the administration reporting to the Party members (and sympathisers) in the Soviet assembly concerning matters which have been under the constant supervision and authorization of the Communist Party itself." There has never been a single occasion when the Supreme Soviet disapproved what the Council of Ministers had done. They are distinctly two levels within the Council of Ministers: a higher group composed of those who are also members of the Party Politburo and the lower group who are not. As the Party Politburo formulates and determines policy and decides about the composition of the Council of Ministers and membership of the Supreme Soviet, there can be no occasion to disapprove what the Council of Ministers has already accepted. The Supreme Soviet is, in fact, completely subservient to the "party line" and so are other organs of government.

**The Ministers.** A good part of the executive business is performed by the individual Ministries. The Ministers head the Union Departments, the Ministries of the U.S.S.R. The Ministers direct the work of their respective Ministries and may issue orders and instructions dealing with matters within their competence, provided that such orders are based on the All-Union laws in operation and on decrees of the Council of Ministers. And, as said earlier, the Council of Ministers can annul acts of individual Ministers. The Ministers must also answer questions addressed to them within three days in the Chamber from which they originate.

The position of the Chairman of the Council of Ministers (Prime Minister) is one of the highest offices in the Soviet Union and it becomes a fortress of indomitable strength when it goes with a commanding position in the Party as in the case of Lenin, Stalin and Khrushchev. But it is not improbable in the USSR if one meets the fate of Rykov. Rykov was the Chairman of the Council of Ministers from 1924-30, but eventually he fell from grace, was tried on charges of high treason in 1938, and executed. And Stalin's grace had always mattered. Lenin himself noted, shortly before his death, that "Comrade Stalin, having become Secretary-General has concentrated enormous power in his hands...." Following Lenin's death, the Secretary-General used this power relentlessly. Stalin himself today stands publicly disreputed by the very people who a little more than ten years ago vied with each other in their extravagant tributes to him. And those who brought him to disreputation, Khrushchev, for example, have met the same fate.

The rank and file of the Ministers are men of not much political stature and do not matter, except the Foreign Minister, at home or abroad. Elevation to ministerial rank is not due to the pressure of the parliamentary group or political considerations. No one is indispensable in the Soviet Union. Talking to the journalists at a reception in Moscow on October 30, 1957, Nikita Khrushchev referred to the removal of Marshal Zhukov as Defence Minister and his future assignment and significantly remarked, "You will not hear of his new job tonight. In life one cell must die, another takes its place. Life goes on." Recognition of personal qualifications for a job, and there are many technical ministerial jobs, or

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3. As reported in *The Hindustan Times*, New Delhi, October 31, 1957, p. 10.

a reward bestowed upon deserving party functionaries are the two considerations for appointment as a Minister. But changes among Ministers are frequent and silent. They are barely noted in the press, but seldom explained.

**Two Kinds of Ministries.** There are two kinds of Ministries in the USSR: (1) the All-Union Ministries which operate through the entire territory of the Union directly or through organs they appoint; and (2) the Union-Republican Ministries which operate through the corresponding Ministries of the Union Republics and administer directly only "a definite and limited number" of enterprises according to a list confirmed by the Presidium of the Supreme Soviet. The distinction between the two groups of Ministries of the USSR would seem to be that the former deal with matters of national jurisdiction and importance while the latter deal with questions assigned to the joint jurisdiction of the Union Government and the Governments of the constituent Republics. The distinction is tenuous, and a number of Ministries have been shifted from one group to another. Dr. Munro, while differentiating between them, has aptly said, that in the case of All-Union Ministries the administration is centralised at Moscow whereas in the case of the Union Republican Ministries "the control of administrative work is centralised but the performance of it is to a considerable extent decentralized."

**All-Union Ministries.** The All-Union Ministries are listed in Article 77; six in all. These Ministries direct those branches of the national life which are of national importance. The jurisdiction of these Ministries extends over the entire country and they operate either directly or through agencies appointed by them. Originally, there were only five All-Union Ministries. The Stalin Constitution provided for eight. In 1942, the Presidium added five more. By 1947 the number reached 36, the old Commissariat of Heavy Industry alone representing about 27 new Ministries. Article 77 of the Constitution as amended on June 17, 1950 fixed their number at thirty. The following Ministries are at present All-Union Ministries:—

1. The Ministry of Foreign Trade;
2. The Ministry of Merchant Marine;
3. The Ministry of Railways;
4. The Ministry of Medium Machine-Building Industry;
5. The Ministry of Power Station Construction;
6. The Ministry of Transport Construction.

**The Union Republican Ministries.** The Union Republican Ministries "direct the branches of National economy and State administration of All-Union importance which can be managed, and which it is advisable to manage, from the centre through corresponding Union-Republican Ministries of the various Union Republics." The Union-Republican Ministries now make a total of nine as compared with 11 Ministries to the original 10 Union-Republican People's Commissariats of 1936:—

1. The Ministry of Higher and Secondary Special Education;
2. The Ministry of Geological Survey and Conservation of Mineral Resources;
3. The Ministry of Public Health;
4. The Ministry of Foreign Affairs;
5. The Ministry of Culture;
6. The Ministry of Defence;
7. The Ministry of Communications;
8. The Ministry of Agriculture;
9. The Ministry of Finance.

The Ministry of Defence and the Ministry of Foreign Affairs were transferred from the All-Union group to the Union-Republican group in 1944, when the Union Republics were given the right to enter into direct relations with foreign States, to conclude agreements, exchange diplomatic representatives and to have their own military formations.

**Advisory and Planning Boards.** Besides these Ministries there are innumerable advisory bodies. Some of the Ministries have special Advisory Boards and in many instances their functions are more than advisory. Important among these are the Council of Labour and Defence, the State Planning Commission, the Committee on the Higher Education, the Committee on Arts, etc. The "Gosplan" or the State Planning Commission is the nucleus of the planned economy of Russia. But decisions about planning are really made by the Party Politburo. The function of the Gosplan, as an expert body, is to apply those decisions and to fill in the details in order "to prevent disproportions in the economic development."



## CHAPTER VII

# THE JUDICIARY

**The Soviet Concept of Law.** The Soviet concept of law is intimately associated with the idea of the nature of the State. According to Marx, the State is a coercive machinery designed to establish and uphold a particular type of social organisation. He, accordingly, considered that within the framework of the capitalist State, the law is only the tool of the State to maintain and safeguard the interests of the capitalist class, a dominant group in society. The law of the bourgeois State, declares the **Communist Manifesto**, "is but the will of your class made into law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class."

Both Marx and Engels were equally critical of the way in which laws were administered in bourgeois States. Equality before law, the most applauded dogma of bourgeois jurisprudence, they declared, was really a cloak of inequality. For, in a capitalist society the masses have not the means to foot the expenses of legal proceedings. Moreover, the judges are predisposed to the interests of property and the law on which they base their judgments is designed to protect the interests of the dominant group. "Marxism-Leninism," writes Vyshinsky, "gives a clear definition (the only scientific definition) of the essence of law. It teaches that relationship (and, consequently, law itself) are rooted in the material conditions of life, and that law is merely the will of the dominant class elevated into a statute."

The Soviet jurisprudence, therefore, does not accept the view that law is the reflection of the principles of universal justice divorced from the economic and social structure of the State. It is, on the other hand, merely an expression of the will of the State, an expression of the material form of life in that State, and in a class society it is the will of the ruling class. In a Socialist State, the workers are the ruling class and, thus, law must be the safeguard of the proletarian State against the enemies of Socialism and a tool for the construction of a socialist society. When the State ultimately 'withers away' law, too, would disappear. But until the State 'withers away', "the strengthening and intensification" of Soviet law is necessary for the destruction of capitalism and construction of the socialist society. It is an instrument of policy of the dictatorship of the proletariat. To put it in the words of Lenin, "Law is a political measure, law is politics." Equality before law, impartiality, due process of law, and similar embellishments of the bourgeois types of law are of secondary consideration. The standards of justice are determined by the results to be achieved. Law, as such, according to the Soviet concept, is always an instrument of policy to further the aims of Socialist revolution and it has no place for any concept of "natural law" or law as a defence of the individual against the State.

**Purpose of Soviet Judiciary.** The general purpose of the Soviet Court will be clear from the Soviet concept of law. The Law of August 1938, which introduced important changes in the system of the law courts and redefined the powers of the legal officers, says that it is the duty of the Soviet Courts "to educate the citizens of the USSR in a spirit of devotion to the fatherland (*rodina*) and to the cause of Socialism, in the spirit of an exact and unfaltering performance of Soviet laws, careful attitude towards Socialist property, labour discipline, honest fulfilment of State and public duties, respect towards the rules of the Commonwealth." The primary function of the Soviet Courts is, therefore, "the protection of the social and State system of the USSR, i.e., the protection of public, socialist property, of socialist economy." While analysing the need of the Soviet Courts, Lenin and Stalin emphasised the necessity of fighting the enemies of Socialism—the enemies of the people, traitors to the country, spies, saboteurs, and wreckers—and to fight for the "consolidation of the new Soviet system to firmly anchor the new socialist discipline among the working people." The Soviet Courts are, accordingly, enjoined by law to severely punish embezzlers of State and co-operative or collective farm property, violators of labour and State discipline, and other offenders like speculators, bandits and rowdies whose actions are detrimental to the building of the socialist society, the collective farms and co-operatives and other organizations. In punishing the criminals, the Soviet Courts teach the people "unflinching revolutionary vigilance against agents of foreign powers who are being infiltrated" in the USSR. The Courts are further charged with the duty to instil in the citizens a spirit of strict and unswerving observance of Soviet laws. "They inculcate a sense of obligation to treat Socialist property with care, to discharge duties to the State and the public honestly, in a spirit of devotion to the Soviet motherland and the cause of communism." What Hitler and Mussolini taught to their people, Soviet Courts are required to teach to the citizens of the USSR. The Soviet Judges too have never claimed to be independent of the policy of the Government. In fact, they take pride in the fact that the courts participate directly in the historic venture of the construction of a Communist Society.

**Salient Features of the Soviet Judicial System.** 1. The Soviet Judiciary is a part of the regular administration like a Ministry of Finance or Agriculture. It does not have even the semblance of a separate and independent branch of government. The administration of justice is carried on by the law courts in co-operation with the Procurator-General or Attorney-General of the USSR. The Procurator-General is the official guardian of the public property and it is his business, and the officials subordinate to him, to investigate all cases of alleged or suspected graft, sabotage, misuse of public properties and all anti-Soviet crimes. The courts punish the enemies of Socialism with the utmost rigour for consolidating the new Soviet system. Rychkov, Commissar of Justice in 1938, said, "The Judiciary is an important and sharp weapon of the dictatorship of the working class in the cause of strengthening socialist construction and defending the conquest of the October Socialist Revolution. That is why it is the duty of all Judicial officials, all local Party and Soviet organs, properly to organise the organs of the judiciary, to improve their work,

to select and advance for the judicial organs, new, honest, and devoted to the cause of socialism, Party and non-Party Bolsheviks."

2. The system of Courts is uniform and equitable for all citizens. This means that the Constitution guarantees to all citizens equality before law regardless of nationality or race, social origin, and occupational status.

3. Though the administration of justice is decentralized, there is, however, a uniform criminal and civil procedure throughout the USSR. Soviet judges are independent and subject only to the law. It implies that no organ of State power, Central or that of the Union Republics, has the right to interfere in the proceedings of a court and influence its decisions. The judges must decide cases strictly in accordance with the Soviet law in operation and based on the evidence in the case. "It must be stated, however," writes the author of **USSR 100 Questions and Answers**, "that for a certain period these clear and strict requirements of the law were misinterpreted and grossly distorted, resulting in the infliction of considerable harm not alone to individuals but to the country at large." The period, of course, refers to Stalin's time. In his report to the twentieth Congress Khrushchev observed that Stalin originated the concept of "the enemy of the people" and "this term automatically rendered it unnecessary that the ideological errors of a man or men engaged in a controversy be proven, this term made possible the usage of the most cruel repression, violating all norms of revolutionary legality, against anyone who in any way disagreed with Stalin, against those who were only suspected of hostile intent, against those who had bad reputation." From 1953 onwards the Communist Party and the Soviet Government, writes the author of the Pamphlet referred to above, "have waged a vigorous struggle to eliminate any law violations and to rectify the injustice done."

4. Article 127 of the Constitution guarantees to every citizen inviolability of person. It is ordered, "No person may be placed under arrest except by a decision of a court or with the sanction of the procurator." All court proceedings are held in public, unless otherwise provided by law, and the accused person is guaranteed the right to defend himself either personally or by a counsel. Only in exceptional cases specified by law, public trial is denied, but in all such cases the Court is presided over by a bench of three judges without any People's Assessors. The judicial proceedings are conducted in the local language and persons not knowing the language are permitted the use of interpreters.

5. All judges are elected for a specific term. The judges of the Supreme Court and Special Courts of the USSR, as well as the Supreme Courts of the various Union and Autonomous Republics are elected by their respective Supreme Soviets for a term of five years. The courts of lesser territorial units are elected for the same term by the Soviets of the Regions and Areas concerned, while the judges of the lowest Courts, the People's Courts, are elected by the inhabitants of their districts for a term of three years.

6. Every Court in the USSR consists of judges and People's Assessors

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1. *Op. cit.*, p. 56.

2. *Ibid.*, p. 57.

People's Assessors are lay-judges and not jurors. There are no jurors in the Soviet system. Nor do they resemble to the old institution of assessors in India. The lay-judges are full-fledged judges, but they are temporary members of the bench. Ordinarily, there are two lay-judges and one professional judge (Chairman) in cases involving original jurisdiction, while a larger number of judges is the rule in appeal cases. The lay-judges deliberate and decide all questions of both law and fact together with the professional judge. Decisions are reached by majority vote. It means that lay-judges can out-vote the trained Judge. This is in accordance with the principle that ordinary people have a better understanding of the social need.

7. Judges and Assessors are elected in the same manner and for the same term, and both are subject to removal. But while judges serve as regular members of the Court for the term for which they are elected, each Assessor sits for only ten days in a year unless the extension of this period is necessitated by the duration of a case and during this period he receives his average earnings from his place of work. No education or other qualifications are necessary for Judges and Assessors, although as a rule the former are learned.

8. The Judges and Assessors are liable to be removed from office by the process of recall initiated by the same body that elected them. A criminal action against Judges and Assessors of lower courts may be initiated by the district procurator with the approval of the Presidium of the Union Republic concerned. Action against Judges and Assessors of the Supreme Court of the USSR may be initiated by the Procurator-General of the USSR with the sanction of the Union Presidium.

9. Capital punishment in peace time was abolished in the Soviet Union by a decree of the Presidium dated May 26, 1947. The Presidium, however, amended its previous decree on January 13, 1950, "in response to requests from many constituent Republics and other territorial subdivisions," and permitted the application of capital punishment as the supreme penalty in the case of traitors, spies and wreckers. Punishment in criminal cases is sufficiently severe. Black-marking and embezzlement of public funds are treated as serious offences involving sentences of imprisonment from 10 to 15 years. In case of large-scale embezzlers of Government property the decree of May 6, 1966, now prescribes death penalty.

10. Who the traitors, spies and wreckers are, the Soviet law remains silent. When Soviet concept of law is that it is the expression of the will of the dominant class of the dictatorship of the proletariat, traitors are naturally the persons who are viewed as enemies of the people by the leaders of the ruling Party. This is apparent from the statement of Ryckov, dated August 15, 1938. He declared, "The State demands that all its Courts shall wage an implacable struggle against all the enemies of Socialism....In sweeping away and utterly exterminating the traitorous Trotskyites and Bucharinites, the Courts will be fulfilling their sacred duty towards the country." Every citizen of the Soviet Union risks death if he dares hold an opinion contrary to the established policy of the Communist Party or fails to denounce an enemy of the people or if he openly expresses a desire to leave the Soviet Union. Even the so-called theorists

who differed on the principle of "revolutionary legality" were denounced as enemies of the people, wreckers and Trotskyites. And one does not know in the Soviet Union when he may be declared an enemy of the people. Justice is subordinated to political ends.

11. The judicial system of the USSR and the constitutional guarantees may be admirable for non-political cases. But in political cases—cases of State defence against anti-Soviet activities—there is arbitrariness and merciless cruelty. Karpinsky admits that the "verdicts and sentences of the Soviet Courts mercilessly strike down the enemies of Socialism." There is arbitrariness, because political cases come within the jurisdiction of the Political Police of the Ministries of State Security and Internal Affairs. The Political Police possesses the power of "administrative exile without trial," that is, they can send the political suspects to labour camps without any recourse to the courts. When the Political Police is regarded as the "unsheathed sword" of the revolution and when the Constitution prescribes, "Treason to the motherland is punishable with all the severity of law as the most heinous of crimes," the guarantee of the inviolability of person, as provided for in Article 127, becomes a matter of political expediency.

12. The procedure for the enforcement of fundamental rights through writ petitions filed in court by individuals does not obtain in the USSR. This is essentially due to the fact that every Soviet citizen is part of a collective or co-operative body and he can get the larger body to take up his complaint. The individual can lodge his complaint with the procurator and if he finds the complaint genuine and lodges a protest with the appropriate authority and if the matter is not remedied within three months, the procurator communicates with the Supreme Court, which will raise the matter in the Supreme Soviet.

13. Soviet judiciary does not base decisions on precedents, for Soviet theory does not recognise precedents as a source of law. The Soviet theory is that no two cases are exactly alike and for this reason subordinate courts have much discretion in applying law, as declared by the Supreme Soviet, to the cases before them. This may amount to judicial anarchy according to the Anglo-Saxon jurisprudence, but it is prevented by the exercise of clarificatory powers by the Supreme Soviet of the USSR.

### SYSTEM OF COURTS

**The People's Courts.** The basic Soviet judicial organ is the People's Court, consisting of a regular Judge and two People's Assessors. Judges of such courts are elected for five years by the voters of the district by a direct secret ballot. People's Assessors are elected for a term of two years. A Judge and an Assessor are subject to recall. The Assessors possess all the judicial powers when the court is sitting and they are paid the same salary as the Judges. The Assessors are summoned by turn for a short space of time, not exceeding two weeks a year, to discharge their court duties.

The jurisdiction of the People's Court extends over criminal and civil cases. But only minor civil and criminal cases are dealt with in these courts. Original jurisdiction in cases of more serious nature is reserved



for higher courts including the Supreme Court. Ordinarily, on the criminal side People's Courts try cases relating to assault, rape, robbery, theft, abuse of power or neglect of duty by officials, failure to perform duties imposed by the State, etc. In matters of civil jurisdiction these courts deal with cases involving property rights, violation of labour discipline and disorderly conduct. Violation of labour discipline and disorderly conduct cases are tried summarily.

**The Territorial Courts.** Above the People's Court are the Territorial, Regional, and Area Courts and Courts of the Autonomous Regions and National Areas. These Courts serve as courts of appeal in cases coming up from the People's Courts of their respective Areas. They also have original jurisdiction in cases involving "Counter-revolutionary activities, crimes against administrative orders when they involve particular danger to the State, pillaging of socialist property, and other important economic crimes." Original jurisdiction on the civil side extends to cases between State and social institutions, enterprises and organizations. The members of these Courts are elected by the Soviets of Working People's Deputies in their respective Areas for a term of five years and are subject to recall.

**The Supreme Courts of Autonomous Republics.** The next higher court is the Supreme Court of the Autonomous Republic which supervises the judicial activities of all Courts subordinate to it. It tries criminal and civil cases of which it is given jurisdiction by law and hears civil and criminal appeals of courts below it. The Judges of this Court are elected by the Supreme Soviet of the Autonomous Republic and their term is five years.

**The Supreme Court of the Union Republic.** The highest judicial authority in each Union Republic is its Supreme Court. It supervises all inferior courts in the Republic by examining all protests coming from the Procurator-General or Chairman of the Supreme Court of the USSR or the Procurator or the Chairman of Supreme Court of the Republic. It also examines on appeal judgments and verdicts of Courts which are one step in rank below that of the Supreme Court. It can set aside the decision of any court subordinate to it. It also exercises original jurisdiction in cases of exceptional gravity and in crimes in which the top officials of the Republic may be involved. The Presidium of the USSR, the Procurator, the Ministry of Internal Affairs, and the full court itself may place other cases directly before the Supreme Court of the Republic.

**Supreme Court of the USSR.** At the apex of the whole judicial system is the Supreme Court of the USSR. It consists of a Chairman, a Vice-Chairman, a large number of Judges, now numbering sixty-eight, and twenty-five People's Assessors, all elected by the Supreme Soviet of the USSR for a term of five years. The Court is organised in five divisions or panels, for criminal, civil, military, railroad transport, and water transport. The Chairman of the Supreme Court may preside over any case in any of the divisions. He may also remove any case from any court of the USSR and submit a protest about it to a full session of the Supreme Court.

The Supreme Court of the USSR is primarily a Court of Appeal and

review, but it also has original jurisdiction in criminal and civil cases of All-Union importance. Its judgments are final and have the force of law. Its entire plenum meets not less than once every two months in order to examine protests against acts of inferior courts and to issue instructions concerning general court practices and procedure for ensuring uniformity throughout the country.

Apart from the extraordinary original jurisdiction, the revisional and supervisory powers, the Supreme Court also exercises clarificatory powers. For purposes of clarifying or interpreting the law, the Supreme Court is assisted not only by the Judges of the Supreme Court of the USSR but also by Chief Justices of the 15 Supreme Courts of the Union Republics and Autonomous Republics. It can invoke the assistance of the distinguished lawyers to sit with it when it is clarifying the law. The Court holds plenary sessions and its clarifications and instructions have in fact a binding character on all courts subordinate to it.

**Special Courts.** Military Tribunals and Line Courts for the Railway and Water Transport systems are attached to the Soviet Army and Navy, and to the Railway and Water Transport services. These Special Courts are subordinate to the Supreme Court of the USSR which acts as a court of appeal for them. The need of the special Military Tribunals arises from the necessity of strengthening the military might of the USSR and military discipline. The Special Line Courts are necessitated by the special conditions prevailing on the Railways and in the Water Transport system. During World War II Line Courts were transformed into Military Tribunals. The jurisdiction of the Special Courts depends on the nature of the crime as well as the status of the accused. Thus, military tribunals may also try civilians in certain cases. The judges of the Special Courts are elected by the Supreme Soviet for five years.

## THE PROCURATOR-GENERAL

**The Office of the Procurator-General.** The office of the Procurator-General may be compared with the Attorney-General in other countries. But it is not really so. The Procurator-General enjoys a unique position in the judicial machinery of the USSR. Created by the Constitution, the powers of the Procurator-General are so extensive, his authority so pervasive, and his secret organisation so ubiquitous that he constitutes an integral organ of the State power. The need for establishing this "special" organ of the State can best be explained in terms of the provisions of the Constitution. Article 113 says, "Supreme supervisory power to ensure the strict observance of the law by all Ministries and institutions subordinated to them, as well as by officials and citizens of the USSR generally, is vested in the Procurator-General of the USSR." This means that the purpose of establishing the office of the Procurator-General is to exercise supervisory powers in order to ensure the correct application and strict execution of the Soviet law by all Ministries and other agencies subordinate to them, as well as by all officials and citizens of the USSR. A more matter of fact interpretation of this Article comes from Karpinsky. He writes, "There are cases when the acts or decisions of local organs of power or administration are at variance with the law, or when laws are

incorrectly understood and applied. Then, there are direct, deliberate violations of the law by official persons. It also happens occasionally that persons who are really enemies of the people worm their way in the Soviet institutions and enterprises and make use of their official positions for the purpose of distorting the law and delaying its application, that is, commit sabotage against the Soviet State." It is the duty of the Procurator-General to detect such spies and wreckers and bring them to book. "The Soviet prosecutor officer," writes Vyshinsky, who held the Office of Procurator-General in the late 1930's "is the watchman of the Socialist legality, the leader of the policy of the Communist Party and of Soviet authority, the champion of Socialism."

In the due performance of this supervisory function and in order to ensure the strict observance of the Soviet law the Procurator-General organises volunteer "groups of aid" presumably in all institutions. He arms them with necessary instructions and keeps constantly in touch with them. It is emphasised that the Procurator-General can successfully perform his duties only "if he has such a body of 'activists' on whom to rely." Each 'group of aid' has its own 'brigade leader' and the volunteers meet regularly and work under his inspiration. The work of the groups is simply to 'signal' cases to the Procurator-General's office and then begins regular official investigation. Vyshinsky writes, "All organs of the Soviet community, the Young Communist League, and trade unions, worker correspondents and peasant correspondents, and so on, take an active part in the work of the Soviet Prosecutor's office in its struggle to strengthen socialist legality." An official survey about the 'signals' of the 'groups of aid' disclosed that only 10 per cent of the signals proved false.

**Functions of the Procurator-General.** The work of the Procurator General and his office is closely associated with the Courts. Being the official guardian of the public property, it is his business to investigate all cases of alleged or suspected graft, sabotage, misuse of public properties, and a long list of other crimes held as anti-Soviet. He also protects the personal rights of the citizens and safeguards the inviolability of their persons. Any citizen of the USSR may file a complaint with the Procurator-General against any institution or official violating the law, or a petition seeking protection for his legal rights and interests. Article 127 of the Constitution reads, "citizens of the USSR are guaranteed inviolability of the person. No person may be placed under arrest except by decision of a court or with the sanction of a Procurator." It is both the right and duty of the Procurator to appeal against all unlawful decisions and actions of the State departments and their officers. On receipt of a complaint, the Procurator carries out on-the-spot inspection and if it is an executive action, which is illegal, he lodges his protest. As soon as he lodges the protest, the executive act must immediately be stayed and within a period of three months the matter must be remedied, otherwise he will communicate with the Supreme Court, which will raise the matter with the Supreme Soviet.

The Procurator-General causes the criminal cases to be investigated, ascertain the circumstances under which the crime was investigated, collect the necessary evidence, both oral and documentary, and then institute regular criminal proceedings against the accused person or persons and

their accomplices. It is also his duty to see that other investigating bodies do not exercise their authority in excess of that conferred upon them by law. When the Court is trying a case, the Procurator maintains the prosecution before the Court in the name of the Soviet State. At the conclusion of the trial the Court hands over its verdict and **sentence** to the Procurator and he examines them as to their correctness. If in his opinion the sentence or judgment is wrong, he prefers an appeal otherwise he attends to its execution.

In short, the Procurator-General's office stands guard over socialist legality. Like Courts in the USSR "it strengthens Soviet legality, Soviet Socialist law and order." The powers of the Procurator-General, particularly his supervisory powers to ensure the strict observance of the law by all Ministries and institutions subordinate to them, as well as by officials and citizens of the USSR, are greater than that vested in the Supreme Court. The Supreme Court of the USSR supervises only the judicial activities of the subordinate Courts.

**Mode of Appointment and Organisation of the Office.** The powers of the Procurator-General, who heads the Procurator's offices, are, indeed, extensive and all-embracing, and the Constitution is at pains to make him independent of the departments he is intended to check up. He is appointed for a term of seven years by the Supreme Soviet of the USSR and is responsible to that body alone. Even the Council of Ministers has no control upon him. The independence of the Procurator-General does not, of course, mean that he is independent of the Communist Party and its Politburo.

As the jurisdiction of the Procurator-General extends throughout the Union, it is necessary that he should have his subordinates appointed in all parts of the country to ensure the correct application and strict observance of law. He appoints, accordingly, Procurators in the constituent Republics, and their sub-divisions for a term of five years. Area, Regional and City Procurators are appointed by the Procurators of the Union Republics, subject to confirmation by the Procurator-General. The Procurator-General also appoints the chief Procurators in charge of the special organs of the Procurator's office of military, railway, and water transport.

The Procurator's office is, thus, a highly centralised body and its members function independently of all local organs of authority. They are appointed by the Procurator-General and are responsible to him alone. Karpinsky justifies the centralised nature of the Procurator's office in these words: "In order to cope with his task successfully (the uniform and correct application of Soviet laws throughout the Union) Procurators must be free to carry on their work independently of all local bodies whatsoever, must be subordinate only to the Procurator-General of the USSR. This is the reason why under-Procurators are appointed centrally and not elected."



## CHAPTER VIII

# REGIONAL GOVERNMENT

**Units of the Federation.** As said earlier, the first concern of the newly established Revolutionary Government in November, 1917, was to weld the diverse people of Russia in a unified nation. It was keenly felt that a powerful Soviet State could not be built with scores of nationalities in perpetual hostility to one another. To satisfy the political aspirations of all these nationalities and, at the same time, to develop national feelings of oneness in the outlook and sentiments of such a heterogeneous people, Lenin and his Bolshevik Party conceived of Federal Soviet State with maximum of autonomy to the constituent units. Perhaps it was a concession to the races and nationalities of Russia to accept and submit to the new economic and social order. Anyway, four forms of national State structure were evolved: Union Republics, Autonomous Republics, Autonomous Regions, and National Areas. The diversified pattern of statehood in the USSR takes cognisance of the special features and interests of each nationality and accedes to it the maximum of "creative initiative" in its economic and cultural development. How far chances for the utilization of "creative initiative" are obtainable under a system of planned economy and regimented mode of life and opinion, may be left to their natural conclusions. All the same, each of these forms of State structure is a component part of the multi-national State of the USSR.

**Soviet Socialist Republic.** The USSR today consists of fifteen constituent Republics. Each Union Republic, irrespective of the people that form it, the size of its territory, and its economic resources, stands on equality of rights with others, with its own Constitution, its own supreme legislative organ, its own highest executive and administrative organ, and its own judicial system. Each Union Republic preserves its identity and so far as the Fundamental Law permits, it retains its "sovereignty." Within its jurisdiction of administration each Republic exercises its authority independently. Article 15 of the Constitution provides that "the USSR protects the Sovereign Rights of the Union Republic." To every Union Republic is reserved the right to secede. The territorial integrity of a Union Republic is also fully guaranteed and no alteration in its boundaries can be made without its free consent. The Constitution grants to each Republic the right to have its own troops, the right to enter into direct relations with foreign States, to conclude agreements, and exchange diplomatic and consular representatives with them. But, as we have seen, all the "sovereign" rights of the constituent Republics are hedged by innumerable limitations and the hold of Moscow on every subject of administration is considerably tight.

**Administrative Structure of the Union Republic.** The Supreme Soviet of the Union Republic is its sole legislative organ and all Republican laws emanate from it. Some of its other important functions are:



(1) It adopts and amends the Constitution of the Republic. All amendments must be in conformity with the specific features of the Republic itself, and in full conformity with the Constitution of the USSR.

(2) It confirms the Constitutions of the Autonomous Republics forming part of the Union Republic and defines the boundaries of their territories.

(3) It approves the national economic plan and the budget of the Republic.

(4) It grants amnesty and pardon to persons convicted by judicial courts of the Union Republic.

(5) Decides questions of representation of the Union Republic in the international relations.

(6) Determines the manner of organising the Republic's military formations.

**The Presidium.** In between its sessions the work of the Supreme Soviet is carried on by the Presidium of the Union Republic. The Union Republic Presidium is, accordingly, an agency of the Supreme Soviet elected by itself from its own members for a period of four years. It generally consists of 11 to 17 members. The Constitution simply specifies that "the Supreme Soviet of a Union Republic elects Presidium of the Supreme Soviet of the Union Republic consisting of a Chairman of the Presidium of the Supreme Soviet of the Union Republic, Vice-Chairman, a Secretary of the Presidium and members of the Presidium of the Supreme Soviet of the Union Republic (Article 61). The powers of the Presidium of the Supreme Soviet of a Union Republic are defined by the Constitution of the Union Republic.

**The Council of Ministers.** The Council of Ministers is appointed by the Supreme Soviet of the Republic and it is the highest executive and administrative organ of State power in the Republic. The Council of Ministers is responsible and accountable to the Supreme Soviet of the Republic or in the intervals between sessions of the Supreme Soviet to the Presidium of the Union Republic. The decisions and orders of the Council of Ministers must be consistent with the laws of the USSR and the Union Republic. Article 81 of the Constitution further prescribes that the Council of Ministers of a Republic must carry out the decisions and orders of the Council of Ministers of the USSR. The Council of Ministers of the USSR are also authorised to verify that their orders are duly executed by the Council of Ministers of the Republic.

The Council of Ministers of a Union Republic, on its part, possesses the right to suspend decisions and orders of the Council of Ministers of the Autonomous Republics. It has also the power to veto decisions and orders of the Executive Committees of the Soviet of the Working People's Deputies of its Territories, Regions, and Autonomous Regions.

The Ministries of the Union Republic are organised into Union Republican Ministries; and Republican Ministries. The Union Republican Ministry directs the branch of State administration entrusted to it, and is subordinate both to the Council of Ministers of the USSR and to

the corresponding Union-Republican Ministry. A Republican Ministry directs the branch of the State administration entrusted to it and is directly subordinate to the Council of Ministers of the Union Republic.

**Autonomous Republic.** The Stalin Constitution guarantees to each nationality the fullest opportunity for its all-round development. It is in pursuance of this guarantee that the Constitution has created smaller territorial divisions of administration and they are integral parts of the State structure of the USSR. An Autonomous Republic is the first of its kind. Certain localities within the territorial limits of a Union Republic may be inhabited mainly by nationalities other than that of the basic population of the Republic, possessing distinctive national traits of their own. If such nationalities, who constitute the minorities within the Republic, voluntarily decide to set up autonomous administration of their own, they form Autonomous Republics. Each Autonomous Republic carries the name of the nationality that founded it. For example, the Russian Soviet Federative Socialist Republic (RSFSR) includes 12 Autonomous Republics, and the Georgian Union Republic has only two. The Uzbek and Azerbaijan Union Republics include one each.

Though it forms a part of the Union Republic, each Autonomous Republic exercises independent State power within its territory. It means self-government for each Autonomous Republic with regard to all subjects concerning its domestic affairs. The business of the State is transacted in the language of the people of the Autonomous Republic. Each Autonomous Republic frames its own Constitution subject to the approval of the Supreme Soviet of the Union Republic of which it forms a part. It must be in conformity with the provisions of the Constitution of the USSR, and to the Union Republic concerned. The arms and flags remain the same as those of the Union Republic with the addition of its own name.

An Autonomous Republic makes its own laws on the subjects assigned to its jurisdiction. But, at the same time, the laws of the USSR and the laws of its Union Republic are also binding within the Autonomous Republic. Each Autonomous Republic has its own citizenship. Every citizen, however, is a citizen of the Union Republic to which he belongs and of the USSR. It means three citizenships for the nationals of the USSR.

The pattern of the administration in Autonomous Republics closely corresponds to that of the Union Republic. The highest organ of State power is the Supreme Soviet elected for a term of four years. It elects the Presidium and appoints a Council of Ministers. The decisions and orders of the Council of Ministers can be suspended by the Council of its Union Republic.

**Autonomous Region.** Some part of a Union Republic may be inhabited by a small number of the people, say a few thousand, who may like to be governed by themselves and, thus, keep their identity. The voluntary Union formed as such is called an Autonomous Region and carries the name of the people that constitute the Region.

The national organ of State power in an Autonomous Region is the

**Soviet of the Working People's Deputies.** The Soviet of the Working People's Deputies enjoys the constitutional right of self-government on its territory. Its primary functions are: to ensure the maintenance of public order, due observance of laws, protection of the rights of the citizens, and direction of the local economic and cultural affairs. The Soviet is also authorised to issue orders as required and permitted by the laws of the USSR and the Union Republic.

The Soviet of the Working People's Deputies elects its own Executive Committee consisting of a Chairman, Vice-Chairman, a Secretary and members. The Executive Committee is responsible to the Regional Soviet. The powers of the Regional Soviet and its Executive Committee are determined by a special ordinance approved by the Supreme Soviet of the Union Republic. The Council of Ministers of the Union Republic can annul decisions and orders of the Executive Committee.

**National Area.** A National Area constitutes a part of the Autonomous Region and is formed by the voluntary consent of the numerically small Soviet people. A nationality which forms a National Area enjoys the right of self-government in its internal affairs.

Each National Area has its Area Soviet of the Working People's Deputies and its Executive Committee. The powers of both these organs are defined in an ordinance and approved by the Supreme Soviet of the Union Republic of which it forms a component part. The orders and decisions of the Area Executive Committee can be annulled by the Council of Ministers of the Union Republic.

## CHAPTER IX

# THE COMMUNIST PARTY

**Leading and Directing Force.** The Communist Party is the main-spring of the Soviet regime. Its pivotal and monopoly position is both a political and legal truth. "Here in the Soviet Union, in the land of the dictatorship of the Proletariat," said Stalin, "the fact that not a single important political or organizational question is decided by our Soviet and other mass organizations without directions from the party must be regarded as the highest expression of the leading role of party." The Soviet system permits of only one party and Article 126 of the Stalin Constitution states that "The most active and politically conscious citizens in the ranks of the working class and other sections of the working people unite in the Communist Party of the Soviet Union (Bolsheviks), which is the vanguard of the working people in the struggle to strengthen and develop the socialist system, and is the leading core of all organizations of the working people, both public and State." The Communist Party is also the only political organization listed in Article 141 as having the right to participate in Soviet elections. Both these constitutional provisions give to the Party "a ruling position" in the Soviet Government and positive leadership in all other organizations. The Constitution, of course, permits the existence of other organizations and societies—trade unions, co-operative societies, youth organizations, cultural, technical, and scientific societies—but all such organizations and societies are of non-political character. They are organized to promote the interests of common welfare and material advancement towards the realization of the socialistic goal of society. The justification of having one-party system in the USSR may, again, be explained in the words of Stalin. He said, "We have no contending parties any more than we have a capitalist class contending against a working class which is exploited by capitalists. Our society consists exclusively of free Toilers of town and country workers, peasants and intellectuals. Each of these strata may have its special interests and express them by means of the numerous public organizations that exist. But since there are no classes, since the dividing lines between classes have been obliterated, since only a slight but not a fundamental difference between various strata in socialist society has remained, there can be no soil for the creation of contending parties, for a party is a part of a class." The Communist Party being the vanguard of the proletariat, consisting of the most active and politically conscious citizens, as a rule, it is closely connected with all the non-Party organizations and its members are the real force behind them.

Andrei Vyshinsky writing about the Communist Party says, "The political basis of the USSR comprises—as the most important principle of the working class dictatorship—the leading and directing role of the Com-

munist Party in all fields of economic, social and cultural activity." The leading and directing force of the Party may be examined with reference to the Preamble of the Party Charter as amended by the Eighteenth Congress and adopted on March 20, 1939. The Preamble reads: "The Communist Party of the Soviet Union (Bolsheviks), as a section of the Communist International, is the organized vanguard of the working class of the Union of the Soviet Socialist Republics, the highest form of its class organization. In its activities the party is guided by the theory of Marxism-Leninism. The Party exercises the leadership of the working class, the peasantry, the intelligentsia, of the entire Soviet people, in the struggle for the consolidation of the dictatorship of the working class, for the consolidation and development of the socialist system, for the victory of Communism. The party is the guiding nucleus of all organizations of the working people, both public and State, and ensures the successful construction of the Communist society."

So extensive is the role of the Communist Party that it is often with difficulty distinguished from the role of the Soviet Government. Being the legally recognised and the only political party in the country which leads the Soviet people in their struggle for the strengthening of the proletarian dictatorship and development of the socialist order, it is the ultimate source of power. All important decisions on governmental policy are made at Party conventions, its committees and bureaus, especially the Party Politburo. The Government simply ratifies them. "The workers themselves," said Lenin, "do not know as yet how to rule and would first have to go through years of schooling. Hence, in order to rule, an army of revolutionaries—Communists hardened in battle—is necessary. We have such, it is Party." There cannot be any conflict of authority and opinion between the Party and the Government, because both are indissolubly joined by the reason of their membership, especially at the higher levels. No position of any significance can be obtained without membership of the Party. Only the most rigorous tests will admit a new member, and even after admission he must be devoted to the "party line" or face a purge. "The party is a united militant organization bound together by a conscious discipline which is equally binding on all its members,"—thus, runs the Preamble of the Party Charter and it further adds that the Party is "strong because of its solidarity, unity of will and unity of action, which are incompatible with any deviation from its programme and rules, with any violation of party discipline, with factional groupings, or with double dealing." The Party purges its ranks of persons who violate its programme, rules or discipline. The Party, in short, is a government inside the Government and the centre of gravitation in the Soviet Union. The dictatorship of the Proletariat is in effect the dictatorship of the Communist Party. To quote Samuel Harper, "Thus while officially it is the Government and not the Party that makes the laws, runs the State, administers industry and controls the army, it is also, though unofficially, the Party which does all these things and, in a certain sense, is even primarily responsible for them."

**How does the Party guide the Soviet State and the People?** If the Communist Party is the guiding and the directing force of the Soviet State, the leading force of the Soviet Society, then, the important question



is how does it guide the Soviet State and the people? This has been answered in the preceding paragraphs and requires only summing up now. The Party determines the political line to be followed in respect of major questions of foreign and home policy. It thoroughly studies the state of the national economy—industry, transport and agriculture—problems of development of science and culture, studies the experience of the foremost people, and brings shortcomings to the surface, and on the basis of these studies the Party gives directives on particular questions of Communist construction. The directives are taken up by the USSR Supreme Soviet and after approval, *ipso facto*, become law. "The Communist Party," observes the author of **USSR 100 Questions and Answers**, "has guided Soviet Society successfully, leading the country along the path of progress year after year. It adheres to the Leninist principle of collective leadership of the country, which means that all of the Party's decisions on the affairs of the Soviet State are decided by Party leaders not individually, but collectively after thorough discussion by Party Congress, plenary sessions of the Central Committee, or the Presidium of the Central Committee. Collective leadership ensures correct decisions on problems of policy, economy and culture."<sup>1</sup>

**Strength of the Party.** The strength of the Communist Party, it is claimed, lies in the fact that the people and the Party have the one and the same goal, to build Communist Society. "That is why all members of the Soviet Society support and follow the policy of the Party, regarding it as their own." The Communist Party being armed with advanced Marxist-Leninist Theory learns to know the laws of development of society, foresees the course of events, and directs them in the interests of the working people, "to outline and carry through the correct policy."

The strength of the Communist Party, it is further asserted, lies in the unity and solidarity of its "ranks, its millions of like-minded people." Lenin had very often repeated that every member of the Party was responsible for the Party, and the Party was responsible for every member. And finally, the strength of the Communist Party lies in its inseparable ties with the people. "It is a truly People's Party, for it is made up of society's best people—foremost workers, peasants and professionals—and serves the people only."<sup>2</sup>

**The Monolithic Party and "Democratic Centralism."** The Communist Party is, thus, a single, unified, and centralised structure, a "monolith." Only one will, one direction, must prevail. The Party demands of all its members unanimity of views, the strictest discipline, and requires that all its decisions must be carried out "unconditionally, precisely and punctually." It allows and tolerates no factionalism and purges its ranks of persons who may be suspected of slightest deviation from the proletarian discipline. Communist Party, therefore, is a compact and highly integrated body consisting of unflinching supporters of the Marxist-Leninist theory. The rules of the Communist Party of 1934 and 1939 speak of "coherence, unity of will and unity of action." A resolution of the Congress of the Communist Party of January 17, 1952 speaks of the need for

1. *Op. cit.*, p. 126.

2. *Ibid.*

"monolithism." And it is, indeed, so. According to Zinoviev, "We need a monolithism that is a thousand times greater than the one up to now. We cannot allow ourselves to go so far as to permit the freedom of actions or even the freedom of groupings."

At the same time, the Communist Party takes pride in what has been called "democratic centralism." The evolution of this principle has been a stormy one. Originally, some party members felt that the central party should leave to local organizations the maximum of autonomy and should not interfere in their work except for reports of general progress. But Lenin took a strong stand against this point of view. He argued that such kind of autonomy might permit general interests to be dragged into a local situation. He asserted that the central committee of the Party has the right to intervene in the local affairs and even against local interests if furtherance of general party objectives demanded so. Lenin's view prevailed and the rule of centralized authority became clearly established. The Party Congress of 1919 made the position clear when it insisted on a single centralized Communist Party with a single Central Committee to which all provincial party organizations should be completely subordinate. The Party statutes of 1952, which preserve in identical terms those of 1934 and 1939, explain what Lenin had actually intended and named by his successors "democratic centralism." Statute 21 reads:

"The guiding principle of organizational structure of the Party is democratic centralism, meaning:

- (a) Election of all Party governing bodies from bottom to top.
- (b) Periodic accountability of Party bodies to their Party organizations.
- (c) Strict Party discipline and subordination of the minority to the majority.
- (d) The decisions of the higher bodies are unconditionally binding upon lower ones."

**Statute 22.** "The party structure rests on a territorial production basis: the Party organization serving any given area to all-Party organizations serving parts of this area and a Party organization serving an entire branch of production is regarded as superior to all-Party organizations serving sections of this branch of production."

**Statute 23.** "All-Party organizations are autonomous in deciding local questions, provided that the decisions are not contrary to the party's decisions."

Democratic centralism, therefore, implies a combination between the principle of mass participation at the bottom and the concentration of leadership at the top. The primary organs elect delegates to the city or district conference of the party. Above the city or district conference are the organizations for the Areas, Regions, Territories, and Union Republics. They in turn elect delegates to the All-Union Congress of the Party on the basis of one delegate per 1,000 members. Thus, all the leading bodies of the Party, from the lowest to the highest, are elected by Party members by secret vote.

Democratic centralism also envisages periodical accounts to be rendered by the Party bodies to the Party organizations, which elected them. The old rule of the Party provided the Congress to meet every three years and oftener, though from 1939 down to October 1952 no meetings whatever were held. The new rules call for a meeting at least every four years. The Congress hears the reports of its Central Committee, adopts the Party statutes and elects the Central Committee. The Central Committee is now required to meet at least twice a year and operates through four executive Committees with the Politburo of the Central Committee at the top.

Democratic centralism, accordingly, signifies strict Party discipline which is equally compulsory for all Communists, irrespective of their offices, and also subordination of the minority to the majority. One of the most important principles of democratic centralism is that the decisions of the higher Party bodies are unconditionally obligatory for all the lower bodies. This organizational structure of the Party ensures its solidarity and monolithic nature, "promotes purposeful, principled and efficient decisions on questions concerning the structure of the Party and the guidance of the life of the country."

Democratic centralism also attaches great importance to "inner-Party democracy," which establishes the rights and duties of the members in relation to the Party. The Party charter says that a member of the Party has the right:

- (a) To take part in free and business-like discussion at Party meetings and in the Party press, of matters of Party policy.
- (b) To criticize any Party functionary at Party meetings.
- (c) To elect or be elected to Party bodies.
- (d) To insist on personal participation in all cases when decisions are adopted concerning his activities or behaviour.
- (e) To address any questions or statements to any Party body at any level, right up to the Central Committee of the Communist Party or the Soviet Union.

It follows that the Party Charter concedes to every member of the Party the inalienable right of free and business-like discussion of questions of party policy in individual organizations or in the Party as a whole. But the official theory of democratic centralism permits freedom of discussion within the Party until a policy is adopted, and absolute obedience to the policy once it has been adopted. This has been declared to be the very foundation of "Bolshevik self-criticism" and "conscious discipline." Thus, under the rules, a member may say what he thinks wise, but subject to restrictions as to the manner in which he says it. The rules provide that extensive discussion especially on the all Union scale of party policy must be so organised that it cannot lead to attempts by any insignificant minority to impose its will over the vast majority of the party, or to attempt factional groupings. The Communist Party plainly forbids formation of minority blocks as it is tantamount to factionalism and to be guilty of factionalism is a serious breach of discipline and of the principle of Party unity. Lenin wrote in 1906 that democratic centralism involves

"freedom of criticism so long as unity in a specific action is not destroyed thereby—and the inadmissibility of any criticism whatever which undermines or makes difficult unity of any action decided on by the Party." This aspect has been explained by V. Moskovsky thus, "we, Communists, have one world outlook, and we do not argue about the correctness of the general line of our Party, which is based on the Party Programme. We argue about questions of everyday policy and practical work, discuss how best and soonest to accomplish what the general line calls for. These debates are sometimes heated. Sometimes they take the form of a Party discussion in the press. In the course of this discussion every Communist freely expresses his viewpoint. But once the discussion is closed, once all the pros and cons have been expressed and a decision taken, the Communists unitedly carry out the decision of the majority. And if any of the minority do not submit to the decision of the majority, they are given a decisive rebuff, reinforced by the authority of the whole Party."

Party discipline is a frontal attack on intra-party democracy. The Communist Party is a closed party. Only those who are willing to accept the Party programme, work in a party organization, submit to Party decisions, and pay dues may be considered for membership. The preamble to the Party Charter defines Party work in these terms: "The party demands from its members active and self-sacrificing work in carrying out its programme and rules, in fulfilling all decisions of the Party and its bodies, and in ensuring the unity of its ranks and the consolidation of fraternal international relations among the working people of the nationalities of the USSR as well as with the proletarians of all countries of the world." To attack "the Party line" is the gravest offence in the USSR and amounts to "deviationism."

Another element of intra-party democracy is that all organs of the party are elected. It is true that all bodies are representative bodies. But this is also true that elections in all spheres of political life of the USSR are just a formality. There is not a single instance in the history of Soviet Russia when rival candidates have contested for office. There may be discussions preceding the personal elections when qualifications of the candidates are considered, but elections present one-candidate list. And discussions about the fitness of the candidate are always at the lower level. The higher the level the more important the office and the more evident is the will of the leader which is never disobeyed.

The accountability of the Party bodies to their respective organizations had till Stalin's death a purely theoretical concept of intra-party democracy. Meetings of the Party Congresses and Conferences had become more irregular and infrequent, despite the provision of the Party rules which demanded periodic conferences at stated intervals. There was no meeting of the Congress from 1939 down to October 1952 and the conference did not meet between 1941 and 1953. Nor could it be possible to think under such circumstances, that any official of the Party or its Committees could be removed or dissolved unless men at the top willed it.

Thus, in practice, Party unity and discipline have two results: (1) to eliminate the influence of the rank and file on major policy decisions; and (2) to concentrate policy-making in the hands of a small and virtually



permanent group, the Politburo, up to 1952 of the Central Committee. That was the conception of the "monolithic" party first enunciated by Stalin in 1924 in the struggle against Trotsky and it had remained since then the guiding principle of the Party. Even Lenin's assertion that there could be criticism of major ideas and policies by the Party colleagues could not remain a matter of reality. This is self-evident from what Stalin said at the Twelfth Congress of the Party in his reply to the arguments of Lutovinov. "He (Lutovinov)," said Stalin, "wants real democracy, that all, at least the most important questions should be discussed in all the cells from bottom up, that the whole party should be going on every question and should take part in the consideration of the question. But comrades... with all such arrangements our party will be transformed into a discussion club jobbering and never deciding (people), while our party must, above all, be an acting one, because we are in power."

Intra-party democracy is, therefore, a political myth like various others and the monolithic party has achieved in theory and practice its logical apex in the Soviet Union. It follows then, that policy is determined at the top and it always emanates therefrom: there is absolute concentration of power at the top. This is what centralism means. The Politburo of the Central Committee, dictates the policy of the Party and that of the State. But who dictated the policy in the Politburo? He was, no doubt, Stalin. From 1939 onwards and till his death unprecedented praise, no matter what occasion or the subject of address, had been showered on Stalin. Zhadnov, who until his death in 1948 was frequently mentioned as a possible successor to Stalin, typically shouted in the course of his speech, "Long live the genius, the brain, the heart of the Bolshevik Party, of the whole Soviet people, of the whole progressive and advanced humanity—our Stalin." Beria, the head of the Political Police, and afterwards accused of treason and consequently shot dead on December 23, 1953, described him: "that greatest genius of mankind." Khrushchev, a Politburo member and the First Secretary of the Party and Prime Minister till October 16, 1964, hailed him as "the towering genius of humanity." He was the "miracle-performing hero," as Khrushchev characterised Stalin at the 20th Congress, who really formulated the policy during his lifetime. Discussion and criticism vanishes in the presence of such an august personality.

Stalin today stands strikingly repudiated and he has been mercilessly condemned for the Stalin cult or the cult of personality which was spread prior to the 19th Congress. He has been vehemently accused of exaggerated centralism, suppression of initiative of workers, and flagrant violation of the principle of collective leadership and intra-party democracy. At the end of his speech at the 20th Congress Khrushchev significantly declared: "The Central Committee adopted measures for wide-scale enlightenment on the Marxist-Leninist position of the role of personality in history. The Central Committee resolutely opposes the cult of personality alien to the spirit of Marxism-Leninism, which turns one or another leader into a miracle-performing hero and, at the same time, minimises the role of the party and the popular masses." Khrushchev refrained from mentioning names, but his reference to "miracle-performing hero" was self-evident and it could be none other than Stalin. The



Central Committee, giving an account of its work to the 22nd Congress, reported on the great work carried out by the Party in eradicating the harmful consequences of the personality cult, developing inner-Party democracy in conformity with the spirit of Leninism, restoring revolutionary legality, and developing Soviet democracy. It was admitted that the implementation of the policy of the 20th Congress was accompanied "with a sharp political struggle against the anti-Party actional grouping, zealous supporters of the personality cult, who tried to lead the Party and the country astray from the Leninist Road." The Central Committee, indeed, did everything to fully erase the consequences of the personality cult and exclude any possibility "of a repetition of mistakes and distortions of this kind in the future."

But what happened to Khrushchev himself? The weapons he used and the accusations he levelled against Stalin have now been directed against him. He has been accused of personality cult and is charged with "hair-brained scheming, immature conclusions and hasty decisions and actions divorced from reality, bragging and phrase-mongering commandism and unwillingness to take into account the achievements of science and practical experience."

But will the emphasis, which is currently being laid by Soviet leaders on collective leadership, and intra-party democracy, help to bring about more initiative and assertiveness in the Party members and eliminate centralism? Khrushchev made it clear that deviations from Party lines would not be tolerated. There is a limit to "criticism and self-criticism." He said, "While criticising shortcomings and errors... We must primarily see to it that this criticism strengthens the Soviet system, and helps us to advance still more swiftly and successfully towards our great goal—communism. The enemies hope that we shall slacken our vigilance, that we shall weaken our organs of state security. No, this will never come to pass. The proletarian sword must always be sharp, must always protect the conquests of the revolution, the conquests of the working class, the conquests of the working masses." So long as the Party cannot permit the freedom to discuss problems and views alien to the spirit of Marxism-Leninism, it contradicts the principle of intra-party democracy and the rights to discuss all questions of party policy freely. Power is still concentrated in the Communist Party, and the highly centralised structure of the Party ensures ultimate control by the top leadership. In theory, it is the Central Committee which exercises collective leadership over the Party. In practice, control is concentrated in the Politburo. But the Politburo, as Dr. Munro says, "cannot be more powerful in fact than its all-powerful predecessor."

**Membership of the Party.** Party discipline and unity involve two important questions: size of the party, and control over party membership. The Communist Party is not an open mass, but a closed society of the new elite. It has been purposely kept small enough to enable exacting

standards to be maintained and rigid discipline enforced. The strength of the Party, it is emphasised, lies in its unity and discipline and not its numbers. Lenin preferred even a party of only one, so long as it was self-sacrificial in its conviction and will power. The Party enjoins on every one of its members that he should set an example for others, be a model worker on the job, know the technique of his trade or profession, excel in the improvement of his qualifications, in the acquisition of knowledge, in the observance of discipline and in compliance with the laws of the State demands. His entire conduct, in short, in public and in private, must be exemplary. Since men who possess such devotion and talent to build a socialist society were and are rare, it has been always the policy of the Communist leaders to admit only a small group who can maintain the necessary enthusiasm and sense of mission. Stalin declared in 1934, "It is not given to everyone to be a member of such a party. It is not given to everyone to stand the hardships and storms connected with membership of such a party. It is the sons of the working class, the sons of want and struggle, the sons of incredible privation and heroic efforts who before all should be the members of such a party."

Membership to the Party is, therefore, not gained easily. Rules have always required that applicants be supported by recommendations of Party members for the good quality of the new entrants. The number of required recommendations has varied from time to time. Before 1939, applicants were placed in different categories, graded in accordance "with anticipated loyalty to party principles." In 1939, the rules were made uniform and all restrictions abolished. All candidates for membership are now required to be recommended by three Party members of at least three years' standing who had known the candidate for at least one year. A candidacy of one year is required after admission, and during this period the candidate studies the party history, its policy, its technique of operation, and takes part in duties entrusted and tasks assigned. Those who pass the required tests are admitted to full membership by a decision of a general meeting of the primary party organization. The decision of the primary party is, then, required to be endorsed by the district or city committee.

Wartime procedure relating to admission was less strict and the relaxation was due to the heavy casualties the Party had suffered. Party members were expected to give an example of self-sacrifice and heroism and the new members were admitted on the condition of valorous service to the country. In 1947, Georgi Malenkov, Secretary of the Party, reported that half of 6,300,000 members had joined during or after the war. This comes to about 3 per cent of the total population of the USSR. As on February 1, 1956, the party had a membership of 7,215,505 of whom 6,796 were full members and 419,609 candidate members. In 1967, the total Party membership was 12.5 million.

A periodic review is made of the record of each member in order to ensure his constant loyalty and to provide for constant check on the execution of Party decisions. Failure to live up to the Party standards as well as any kind of "deviation" or "wrecking" is met with disciplinary punishment which may involve expulsion or general "cleansing" of the ranks of the Party. In 1922 and 1923, it is reported that more than a

quarter of the Party members were expelled. There were historic purges in 1928-29 and 1933-38 and in between them the usual minor purges. The thought of the periodic cleansing is sufficient to keep the average member alert to his responsibilities and devoted obedience to discipline.

**Youth Organizations.** In addition to the regular cadre of the Communist Party, there are certain auxiliaries among which the youth organizations are more significant.

These youth organizations not only support Party principles, but provide the means of training large number of young men and women for political work. The attention of the Communist Party is, in fact, directed more towards the younger generation in order to properly indoctrinate them with "proletarian morality." The first of these youth organizations is the Little Octobrists which accepts the children between the ages of eight and eleven years. They are organized in "links" of five members with a "Pioneer" as leader. Five "links" form a "group" to which an older youth, who is a member of the Komsomols, is assigned as a group leader. The Little Octobrists have no precise tasks. But the leaders try to instil in them by group games and by assigning them small duties a sense of association and responsibility.

The Young Pioneers is the next organization which accepts members between nine and fourteen years of age. The task of this organization is to develop in children a socialist attitude towards study, labour and communal activities and inculcate in them a conscious attitude towards physical endurance, honesty and truthfulness, a sense of comradeship and respect of elders. The admission is easy and any child may join, although a candidate may be dropped within two months if he fails to come up to group standards of intelligence and efforts. Pioneers are organised into brigades, with a Komsomol as brigade leader.

The Young Pioneers is, thus, a mass children's organization uniting more than twenty million boys and girls. The main function of the Young Pioneers organization is to help the school and teachers. By their study and conduct Young Pioneers serve as an example for other school children to follow. All kinds of clubs flourish in Young Pioneers organizations. All over the country are to be found Palaces and Houses of Young Pioneers, Young Pioneer parks and sports grounds. In summer, millions of Young Pioneers go out to camps, make special tours, or go on excursions to see the country.

Youths from the ages of fifteen to twenty-six may join the Komsomols or the Leninist young Communist League, the former being the Russian abbreviation of the latter. The Komsomols are virtually junior members of the Communist Party. They are officially termed as the assistants of the Communist Party of the Soviet Union (Bolsheviks) and its reserves. An applicant for membership must be recommended by two Komsomols or by one member of the Communist Party. Unworthy members are dropped during the period of candidacy, and their dismissal may also include those who recommended them for membership. Even after the age of twenty-six, members may remain as non-voting advisers, unless elected to higher organs of the society in which case they retain voting rights. If and when a Komsomol is elected a member of the Communist

Party, he ceases to be its member unless he holds an executive position therein.

Komsomol organizations are set up in factories, on State and collective farms, in institutions, schools and higher educational establishments. Over 22 million youths and girls are Komsomol members. The main task set itself by the Komsomol is to educate its members and the broad masses of the youth in the spirit of devoted service to their country. The Komsomol takes an active part in the country's political life, in building Communist society, inculcates love for work among the youth, sees to it that the youth regularly improve their working skill, master knowledge and the achievements of advanced science and engineering and know how to apply it in practice in all spheres of the national economy and the culture. The education of young people in the heroic traditions of revolutionary struggle by using examples of devoted labour set by workers, peasants and intellectuals, and in the great ideas of Marxism-Leninism, are the principal tasks of the Leninist Young Communist League. Over 150,000 Komsomol members are Deputies to Soviets. Seven thousand are Heroes of the Soviet Union. Very often Komsomol organizations initiate valuable undertakings that are of importance to the entire country. During the First Five-Year Plan, for instance, the Komsomol was one of the chief initiators of socialist emulation among the working people.

**Supporting Organizations.** The vast majority of the Soviet citizens do not belong to the Communist Party or to the youth organizations described above. Out of a total population of 200 million people, probably no more than 40 million belong to the Communist Party and youth organizations, and a little more than 6 million only are adults. Support for the Party programme must, therefore, be found in other agencies. Stalin explained that the dictatorship of the proletariat cannot be accomplished without the aid of the labour unions, the co-operatives and the Soviets. "The proletariat needs...these organizations because without them it would suffer inevitable defeat in the fight for the overthrow of the bourgeoisie, for the consolidation of its power and for the building of socialism...." The importance of the trade unions is emphasized by the Constitution and they are the first in the list of the organizations in which the citizens have the right to unite. The task of the trade unions has been described as a "school of communism," which form "a link between the advanced and backward elements of the working classes, as uniting the masses with their vanguard."

Then, there are the co-operatives. The Constitution of 1936 recognised co-operatively owned property as one of the two forms of socialist property and Soviet law protects co-operatively owned property on the same basis as the State property.

## PARTY ORGANIZATION

**Primary Party Organs.** The strength and invincibility of the Communist Party lies in its constant contact with the masses. "A party which has lost or even only weakened its contact with the masses loses their confidence and support and is bound to go." This is the *raison d'être* of the Communist Party and, as such, its organization comprises an exten-



sive network of territorial agencies. It is like a pyramid and at its base are the Primary Party organs formerly known as Party "cells." According to Party rules, Primary Party organs "are set up in mills, factories, State farms, machines and tractor stations and other economic establishments, in collective farms, units of the Red Army and Navy, in villages, offices, educational establishments, etc., where there are not less than three party members." If it has less than three Party members, the Primary Party organ is formed by candidates and members of the Komsomol under the leadership of the higher Party organs. According to *Pravda*, there are 250,000 Party organs.<sup>1</sup>

The Primary organizations are the back-bone of the Party, and it is they that carry on day-by-day work among the masses. The activities of the Primary organs are agitational and organizational. A Primary organ works among the masses for the fulfilment of the Party slogans and decisions, and carries on regular propaganda among the prospective members with a view to politically educating them. The Primary organ must fully co-operate with the higher Party organs in all matters. It should also strive ceaselessly to mobilise the workers in every enterprise for the completion of the production plan and the strengthening of labour discipline. In order to enhance the prestige of the Party organs, the rules specify that these organs "have the right to control the activity of the management of the enterprise." Their role, in short, is active participation in the economic and political life of the country.

**Higher Party organs.** Every Primary organ elects its executive bureau and Secretary for transacting its current work. On the next higher level are city or district (both rural or urban) Party Committees. The Primary organs elect delegates to the city or district conference. The city or district conference elects its bureau and three Secretaries who must be confirmed by the regional committee, territorial committee, or the Central Committee of the Communist Party of the Republic in which the city or district is located. The city or district Committee supervises the work of the Primary Party organs within its jurisdiction and appoints and directs the work of the editorial board of the local Party publications. Its duty is also to supervise the work of Party groups within the non-Party organizations like trade unions, youth organizations or co-operatives.

Above them are the Area Party organizations which are sub-divisions of the larger regions, territories and republics. The conference or the Congress, as the case may be, meets once in eighteen months and elects its committee of not less than eleven members and two Secretaries. The next in the hierarchy are the Party organizations for entire regions, territories, or republics. The highest authority in each organization is a Party Conference which is convened every eighteen months. It chooses a Committee and this Committee in turn appoints a bureau and four or five Secretaries, who must be approved by the Central Committee of the Communist Party of the Soviet Union. It must be remembered that the Party organization embodies the principle of "democratic centralism" and the lower units are responsible to the higher ones and function subject to their

4. There are 41,830 primary organisations at industrial enterprises, 10,127 at building sites, 18,908 on the railways and other transport services, 44,837 on collective farms, and 9,206 on state farms.



supervision. Similarly, the office-bearers selected by the lower organs are confirmed in office by higher ones.

**All Union Congress.** The All-Union Congress of the Party with its Central Committee crowns the Party organization. The supreme authority of the Party is vested in the All-Union Congress and the present break with Stalinism is the denunciation of the "personality cult" and affirmation of the principle of collective leadership. The delegates to the Congress are elected on the basis of one delegate per 1,000 members and there were 1,355 delegates to the 20th Congress. Sessions of the Congress are called by the Central Committee of the Party. The old Party rules provided that a Congress should be convened once in every three years. There was also a provision for a Party Conference to hold meetings between sessions of the All-Union Congress. No Congress was, however, held between 1939, and Conference after 1941. The fact that the Party had functioned without a Congress for nearly a decade and a half proves that it was never a nerve centre of the Party, although, according to the Party it determines the tactical line of the Party on major questions of current policy and elects the Central Committee. The new Party rules, as amended in 1952, call for a meeting of the Congress at least every four years.

**The Central Committee.** By far the most important organism in the Communist Party is the Central Committee. It is the source of policy determination and the centre of Party organisation. "Not one important political or organisational question," said Lenin, "is decided by any one State institution in our republic without guiding instructions of the Central Committee of the Party," and according to the Party rules "the Central Committee directs the work of the Central Soviet and public organizations through the Party groups in them." It is a link between the Party and Government and during intervals between Congress, it guides the entire work of the Party. It also appoints the editorial staff for the Central Party Press, confirms the appointment of editorial boards of important local papers, "organises and directs undertakings of social significance, and possesses the right to create political sections and assign special agents to key points in the economy when needed, superseding the Party organs."

According to the old rules the Central Committee was composed of approximately seventy members and an equal number of alternates, who were elected by the Party Congress, and meetings took place three to four times a year. There are now 133 full and 122 alternate members of the Committee, and according to the new Party rules it must meet at least twice a year. Formerly, the Central Committee was supposed, annually or oftener, to convene a Party Conference. This body was made up of Party Secretaries down to the regional level and a few other Communists. There is no mention of the Conference in the new Party rules.

**Specialised Party Agencies.** The work of the Central Committee is segregated in accordance with the various functions of the Committee. Three functions used to be the concern of the four bureaus and five administrations. The Politburo or the Political Bureau is incomparably the most important and was concerned with the general determination of policy. "The Politburo", maintained Stalin, "is the highest organ not of the State but Party and the Party is the highest directing force of the State." It consisted of ten members with four or five alternates. The

second was the Orgburo or the organizational bureau. It was concerned with the planning of organization to provide for organization. It passed on the decisions of the Secretariat throughout the Party organizations.

The new Party rules of 1952, as again amended in 1953, introduced important changes particularly in the bureaus. The new statutes of 1952 provided a somewhat simplified top structure by abolishing the Politburo and the Orgburo. The Politburo was replaced by a new organ, the Presidium of the Central Committee. The Presidium was so named, according to Khrushchev, "because this is a more suitable title than Politburo to indicate the general nature of its work and its function of directing the Central Committee." Stalin's death in March 1953 was followed by some changes in the Party's rules in order to consolidate its position. The Presidium of the Central Committee created in 1952 consisted of 36 members. The new Presidium constituted, after Stalin's death, consisted of 11 full and 6 probationary members. The number approximated the size of the old Politburo. In theory, it is the Central Committee which exercises "collective leadership" over the Party. In practice, control is concentrated in the Politburo of the Central Committee. Presidium was again named Politburo in 1966.

The Secretariat is the real director of Party activities and it has been retained unlike the Politburo and Orgburo. It reviews current problems and checks the fulfilment of Party directives, thus, absorbing some Orgburo functions. The Secretariat was originally an executor of the decisions of the Central Committee. Stalin, who became the First Secretary in 1922 and remained so till his death, combining the office of Prime Minister since 1941, transformed the Secretariat completely and made it, in the words of Towster, "the gear box of the Communist Party and of the Soviet system." Malenkov's resignation as First Secretary, as soon as he became Prime Minister, and the appointment of Khrushchev to this key post marked the departure from Stalin's policy to be revived by Khrushchev himself who combined the posts of the First Secretary and the Prime Minister. After Khrushchev's exit the old arrangement has been reverted and Leonid Brezhnev is the First Secretary whereas Alexei Kosygin is the Prime Minister.

The fourth bureau, according to the old rules, was the Party Control Commission whose functions were the certification of the fulfilment of the decisions of the Party and of the Central Committee by the Party organizations and by the Soviet economic organs. It was a sort of inner disciplinary organisation and would bring proceedings against those who violated the rules and programme of the Party as determined by the Central Committee. It is now designated as the Party Control Committee and possesses the same powers as the old Party Control Commission. The Control Commission formerly had committees to represent it in the localities, but these were elected locally although responsible to the Commission. The representatives are now appointed directly by the Control Committee and are entirely independent of the local organs and the Secretaries. Their primary function is to detect cases of disobedience to the Party decisions and directives including any illegal or unseemly behaviour on the part of members and to hear appeals against expulsion from the Party at all stages down to the regional organizations. Such Committees are

established in the Republics, Autonomous Republics, Territories, and Regions.

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The Government of  
The People's Republic of China



## CHAPTER I

# THE PEOPLE AND THE COUNTRY

**Importance of the Study.** There is a saying in the People's Republic of China: 'Tsou, tsou; ts'ou, ts'ou, kai, kai!' (Act, act, you will make mistakes; correct them, correct them). Forty centuries of slow change lay behind China when the Communists took over China in 1949 and brought to an end, as the Preamble of the Constitution of the People's Republic of China says, "a long history of oppression and enslavement." The new State of the People's Republic of China set before it the fundamental task of bringing about, step by step, the socialist industrialization of the country and step by step, to accomplish the socialist transformation of agriculture, handicrafts and the capitalist industry and commerce. By 1954, it was claimed that the necessary conditions had been created for planned economic construction and gradual transition to Socialism. On September 20, 1954, the First National People's Congress solemnly adopted, at its first session held in Peking, the Constitution of the People's Republic of China. The Constitution consolidates the gains of the "Chinese People's revolution and the political and economic victories won since the founding of the People's Republic of China; and moreover, it reflects the basic needs of the State in the period of transition, as well as the general desire of the people as a whole to build a socialist society."

The Constitution unequivocally declares that China has already built an indestructible friendship with the great Union of the Soviet Socialist Republics and the People's Democracies. It further states that China's policy of establishing and extending diplomatic relations with all countries on the principle of equality, mutual benefit and mutual respect for each other's sovereignty and territorial integrity, "which has already yielded success, will continue to be carried out." In international affairs the Constitution pledged the People's Republic of China to a firm and consistent policy "for the noble cause of world peace and the progress of humanity."

In a few years of the establishment of a people's democratic dictatorship Chinese Communists surprised the world by their success in boosting industrial production, by extending strong and effective government throughout China, by building massive army, in fact, wholesale militarization, and by improving the living conditions of industrial workers. But all this has been achieved at a very high price. Individual freedom and choice have been regimented and subordinated to the will of the State, the thinking of the people is choked and strangled and the whole Chinese people have become warped by propaganda. Cultural freedom, so much applauded and guaranteed in the Constitution, has all but vanished. The new class system has come into existence since 1949, and

that, too, at the cost of hundreds of thousands of Chinese lives, in order to put the Communist Party firmly at the top and to give the place of honour in the new society to the industrial worker. The great majority of the people still live in much the same way as generation upon generation of their ancestors had lived. The hand of modernization lay fairly lightly over the land in this democratic dictatorship.

In international affairs no other country has such an unpardonable record to its credit as the People's Republic of China. Its Constitution boasts that after a century of heroic struggle, the Chinese people, led by the Communist Party of China, "finally achieved their great victory in the people's revolution against imperialism, feudalism and bureaucrat-capitalism." Within just three years of its career this champion of "the noble cause of world peace and progress of humanity" began itself indulging in expansionism. Like a hungry wolf China pounced upon Tibet and subjugated it. After consolidating its conquest there, it penetrated in the Indian territory, repudiated the international frontier, the McMahon Line, claimed thousands of square miles of Indian territory and finally invaded her frontiers and launched an undeclared war smearing the **Panch Sheel** with the precious blood of the gallant Indian **Jawans**. This is how the People's Republic of China "respects each other's sovereignty and territorial integrity." Professions of the Constitution are the deceptions of the Government and yet China claims to be a people's democracy.

The People's Republic of China's relations with Soviet Russia now verge on open hostility and ideological denunciation. The Chinese students in the Soviet Union created outrageous disturbances at the Lenin Mausoleum in the Red Square, Moscow. In Peking the Soviet diplomatic staff and other Soviet citizens including women and children were subjected to humiliation and according to the **Soviet Review**, "the central core of the 'cultural revolution' is its anti-Sovietism." This is the extent of the debt of gratitude and the nature of "indestructible friendship with the great Union of the Soviet Socialist Republics" for which the People's Republic of China is constitutionally pledged.

**The People and the Country.** No one knows precisely how many Chinese there are. The most often quoted statistics place the number over 750 millions spread over 3,800,000 square miles. On its north are the Himalayan ranges and on the south and east is the Soviet Union. The People's Republic of China consists of China proper, with its twenty-five Provinces, inner Mongolian Autonomous region, Tibet and the three municipalities of Peking, Tientsin and Shanghai. The capital is Peking.

Only a few million Chinese work in industry. Nearabout 80 per cent of the population is rural and essentially depend upon agriculture. There is too little good arable land in China to meet the needs of ever growing population. Much of the country consists of desolate plains, barren mountains and winding paths, with paddy fields filling every inch of arable land. A bad season leaves millions hungry. No Government of China has yet been able to control the Gods of weather. Malcolm

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2. Concerning the "Cultural Revolution" in China, *Soviet Review*, February 11, 1967, p. 3.

MacDonald, who arrived in Hongkong on November 3, 1962, after a four week tour of China said: "The people and Government of China are confident but not complacent. They know and admit they are still inexperienced in modern affairs and the task of turning their colossal teeming country into a modern industrial and agricultural State is gigantic." MacDonald predicted it would take "a considerable number of years" for China to be "independent agriculturally" and "many more years than that" before it achieved this industrially."

## HISTORY OF THE CONSTITUTION

**From the Ancient to Manchu Dynasty.** The history of the development of the Chinese people covers different periods, the ancient period is older than the Greek and Roman civilisations. Till the emergence of the Tang dynasty (618-907 A.D.) several dynasties had ruled over the different parts of the country. The Tang dynasty was followed by several others till the rise of Manchu dynasty towards the close of the sixteenth century. Twelve emperors of the Manchu dynasty ruled and during this period the empire was consolidated and it prospered and progressed.

The East India Company carried on its trade with China in 1664, and it destroyed the monopoly of the Portuguese that they had hitherto enjoyed. The British merchants were only concerned with the accumulation of huge profits to themselves and consequently they freely encouraged the trade in opium oblivious of its effects on the health and earning capacity of the Chinese. The trade in opium resulted into the First (1841) and Second (1858) opium wars. One of the important causes of the opium wars was the Government's opposition to the British carrying on trade with Chinese people in opium, which had been declared as a contraband. But the real fact leading to both the wars was the anxiety of the British to get special rights and privileges, including equality of status, in dealing with the Chinese Government in China. The War of 1841 ended with the treaty of Nanking which provided, *inter alia*, cession of the Island of Hongkong to Britain, payment of 15 million dollars to British merchants as compensation, opening of ports of Canton, Amoy, Foochow, Ningpo and Shanghai to British trade and residence. The treaty also guaranteed equality of status to the British. These terms were deemed essentially humiliating and there spread a wave of resentment throughout the country. The Chinese Government later on granted similar concessions to the Americans too.

The second opium war started on the British taking side of the Americans and French in their conflict with the Chinese over the abuses of extra-territoriality and also for the reason that the British merchants smuggled into Chinese territory contraband and other goods. The end of the Second War gave significant rights to foreigners in China particularly to British and French. Later, similar rights were conceded to Americans also. All told the total effects of both these wars were the political humiliation and economic bankruptcy of the Chinese. All this

3. *The Statesman*, New Delhi, November 4, 1962.

4. *Ibid.*

was attributed to the weakness of the Manchu Government. The enlightened class of Chinese succeeded in making the people to rise against the Government at various places. The uprising was, no doubt, crushed with the help of the foreigners, but it created an upsurge in the country which set the ball rolling for supplanting the Manchu dynasty. In the meanwhile a war was fought between China and Japan over the Korean question. Japan insisted on the recognition of Korea as an independent State whereas China claimed Korea as its tributary. China was defeated and Korea was declared an independent State.

China had to pay an indemnity to Japan also. But the most important sequel of Sino-Japanese war was a threat to the integrity of China. The Western powers took advantage of the miseries of China and offered to lend her money freely to enable to pay the indemnity to Japan for concessions of trade. Russia, France and Germany made their own demands to obtain spheres of influence and each one succeeded in getting its own price. But in these concessions Britain saw a threat to her dominant position in China. As a result of the Spanish American War, 1898, the United States had annexed Philippines and she naturally became interested in the Western Pacific and in China itself. John Hay, the Secretary of State, then enunciated the "Open Door" policy, which should provide equal opportunity to all nations to trade with China. All these happenings aroused China's deep indignation and it gave birth to a new revolutionary nationalist movement pledged to free the country from foreign domination and to establish a republican government in the country after overthrowing the Manchu regime.

**Sun Yat-Sen and new Chinese Nationalism.** Sun Yat-Sen was the moving force of this movement. So zealously did he plunge himself in it that in 1895, he had to flee from China with a price on his head. Boxer uprising is the most important phase of the revolutionary movement. A secret society of the Boxers, outwardly started with the object of training youngmen in gymnastics and boxing, had its avowed object of overthrowing the Manchu dynasty, which they held responsible for the surrender of China to foreign powers. The Boxers, accordingly, directed their activities on attacking the foreign legations and Chinese Christians and glorified their existence by killing a few of the foreign diplomats. The foreign powers combined together and raised forces to combat the Boxers, but they did not succeed beyond protecting their legations. It was at this stage that the United States came forward with its policy of "seeking a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty or international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese empire." Russia did not accept the policy enunciated by the United States and occupied Manchuria. The Allied armies reached Peking for the relief of the foreign legations placing China entirely at their mercy. The outcome was the Boxer Protocol signed on September 7, 1901.

The Boxer Protocol was not a treaty as it did not require ratification. In fact, its terms had been fulfilled by the Chinese Government even before it could be signed. The terms provided for reparations for the

assassinated, punishment for the authors of the crime, payment of indemnity of four hundred and fifty taels with interest at four per cent to be paid in thirty-nine years, occupation by allied troops of twelve specified places for keeping open communications between Peking and the Sen, improvement of commercial relations by amending the commercial treaties, etc., etc. The Boxer movement though apparently suppressed, but the revolutionary spirit of the Chinese remained unabated and soon there emerged the Reformist movement. The Reformist movement, like its predecessor Boxer movement, was anti-foreign and it aimed at overthrowing the Manchu Dynasty. It also aimed to reform the entire life of the Chinese people by improving their social, economic and political lot. The young Chinese trained in western methods of education and institutions spearheaded the movement which soon spread even in the remotest parts of the country. Province after Province revolted and the six-year-old Manchu Emperor abdicated paving the way for the establishment of a republic in 1911.

Sun Yat-Sen after his flight from China had directed the revolutionary movement from abroad. When the Manchu Emperor abdicated and the peace conference convened by the various participants in the Reformist movement was in session, he came back home and was elected the provisional President of the Republic of China. But the revolutionaries were divided amongst themselves in different parts of the country. In the South, Yuan Shih-Kai was declared President of another republic. Sun Yat-Sen was anxious to maintain the unity of the country and, accordingly, he resigned from the provisional Presidency in favour of Yuan. Trouble again brewed up when the most powerful group under Sun Yat-Sen organised itself as Kuomintang, the National People's Party in 1912. Yuan obtained huge debts from England, France, Germany, Russia and Japan and declared himself Emperor in 1915. The Kuomintang revolted against Yuan who was obliged to postpone his coronation and eventually to restore the republic. But he soon died early in June 1916 and the former Vice-President Li Yuan Hung became the President of the Republic, thus, establishing once again the unity of the country under the leadership of the Kuomintang.

The First World War dragged the Chinese Republic in new difficulties. China sought help from the United States to preserve neutrality. But when Japan entered the war on the side of the Allies, she presented China with twenty-one demands. The Japanese demands were heavily tilted against China, but there was no way out and she was forced to concede fifteen out of twenty-one demands. Japan's position was, thus, inconceivably strengthened in the Far East. The Treaty of 1921, signed by nine powers,<sup>5</sup> bound the signatory powers: (1) to respect the sovereignty, the independence and the territorial and administrative integrity of China; (2) to provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government; (3) to use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China; (4) to refrain

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5. Great Britain, France, Italy, Belgium, the Netherlands, Portugal, Japan, the United States and China.



from taking advantages of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from counteracting action inimical to the security of the State. By another treaty, China's right to enjoy tariff autonomy was also recognised.

The October Revolution in Russia and the establishment of the Soviet State in 1917, effected the politics of China too. A number of prominent Chinese nationalists thought that only a socialist State of the Soviet pattern could remove the economic and political ills of China. The advocates of the Marxian thesis became the left-wing of the revolutionaries. The Kuomintang opposed the Communists, who were under the guidance of Joffe the Russian Representative. But in 1923, Sun Yat-sen entered into an alliance with the Communists. They were allowed to enter the Kuomintang while retaining their own party organization. The Russians, keen to help them in establishing their national independence, sent Borodin to Canton to organise a new revolutionary republic in China and General Blucher to train the revolutionary army. Chiang Kai-shek, who had been in Russia as Sun's emissary, was placed at the head of the Whampoa Military Academy, which produced the new leaders of the Chinese army. The intensive propaganda of the Communists and devoted indoctrinating of the youth created bright chances of China's becoming red. Sun Yat-sen died in 1925, and the Kuomintang acknowledged Chiang Kai-shek as their chief leader. But Sun's death had removed the unifying factor and soon open conflict arose between the Communists and the Kuomintang.

Chiang Kai-shek was an able military general and his military successes resulted in the new unification of China. The old Republic came to an end as also the Nanking Constitution under which it had worked. After establishing his leadership and influence of the Kuomintang, Chiang Kai-shek resigned his military post and under the law of October 25, 1928, established a new national government at Canton and put himself at its head. A National People's Convention adopted on May 12, 1931, a provisional Constitution which aimed to put into action Sun's three principles of People's Government, People's livelihood and People's Nationalism, that is, freedom from foreign control.

The events then followed are swift to some extent. In 1931, Japan occupied Manchuria and set up there a puppet government with a new name "Manchukuo." The League of Nations failed to prevent Japan from violating its covenant, and the terms of the Nine Power Treaty of Washington in 1921, to which Japan herself was a signatory. Chiang Kai-shek was left smarting under humiliation. During the Second World War Japan threw her lot with the Axis powers and China seized the opportunity and joined the Allies. Japan had occupied some part of the territory of China during the war. With the active aid of the Allies, China succeeded in getting it back and strengthened its position to the extent that it was included amongst the five great powers to get a permanent seat in the Security Council. The American forces and money also helped Chiang to combat the Communists who had started a virulent propaganda against his government. But the Communists with Russia's unprecedented help were able to drive Chiang's Government in the Island of Formosa.

in 1947. It was triumph for Communism and China became red. A People's Republic of China was established.

**The Provisional Constitution.** When the Communists came to power they did not base their government on a formal Constitution analysing the machinery of government. Nor did they attempt one for the first five years of their career. There existed alone the Chinese People's Political Consultative Conference, a numerous body of 662 delegates representing the various political parties including the Communist Party, the various regions, mass organizations, the People's Liberation Army and the overseas Chinese. It was a motley of delegates, but with a common programme set forth by Mao Tse-Tung, which hinged upon his thesis of People's Democratic Dictatorship. It really served the provisional Constitution for half a decade. The Organic Law consisting of 31 Articles was promulgated and it outlined the machinery of Government which was to bring forth the fulfilment of the Common Programme and the basis for the drafting of the Constitution.

**Drafting of the Constitution.** A Committee to draft the Constitution for the People's Republic of China was appointed in January 1953, under the Chairmanship of Mao Tse-Tung. The draft of the Constitution was made available to the Conference, which accepted it in March 1954. Like the Stalin Constitution, and in order to give it the complexion of the Constitution ordained by the people themselves, it was submitted for discussion to the selected people representing different democratic parties and groups, and people's organizations of all sections of society. The discussions lasted for two months and certain amendments were also suggested thereto. The draft of the Constitution thus amended was published and circulated amongst the people for general public discussion. "It is estimated that about 150,000 million persons participated in the public discussions for over two months." Here, too, the procedure was identical to the one adopted in Russia in 1936. The draft of the Constitution was further amended in the light of suggestions emerging from these public discussions, which were formally adopted by the Central People's Government Council on September 9, 1954. The final draft was, then, reported to the First National People's Congress at its first session on September 20, 1954. In pursuance of this Constitution new governmental organization was set up on November 4, 1954.

## CHAPTER II

### SALIENT FEATURES OF THE CONSTITUTION

**Gains of the Revolution.** The Constitution of the People's Republic of China sums up the struggle of the Chinese people to overthrow colonialism, feudalism and capitalism. Lin Shao-Chi, while introducing the Report on the Constitution before the first session of the People's Congress, listed five important changes governing the position and status of China, said, "First China is no longer in the position of a colony or dependency under the domination for foreign imperialism. It has become really an independent State. . . . For more than hundred years, the Chinese people made untold sacrifices to free themselves from domination by foreign imperialism. Their aspirations have come true. . . . Together with the Soviet Union and the People's democracies China has become a strong bulwark of world peace. Secondly, the age old grip of feudalism on our country is now ended. . . . Thirdly, our country has put an end to the long period of chaos. It has achieved internal peace and an unprecedented unification of the entire mainland. . . . Fourthly, our country has, to a great extent, put an end to the situation in which the people had no political power. It has attained a high degree of democracy. . . . And lastly, China's great ally, the Soviet Union, with which it had entered into a thirty-year treaty of friendship, had aided China in rehabilitating the national economy, which had been ruined by the imperialists and the Kuomintang."

The Preamble of the Constitution itself epitomises the changes enumerated by Lin Shao-Chi. The Preamble, in fact, is a narrative of the achievements of the Chinese people led by the Communist Party of China and it states how the Constitution was formulated and adopted. It also glorifies the gains of the Chinese people's revolution and the political and economic victories won since the founding of the People's Republic of China. The Preamble expresses its deep gratitude to "the great Union of Soviet Socialist Republics" and pledges China's "indestructible friendship with peace-loving people in other countries." This is an unusual feature of the Preamble of the Constitution of the People's Republic of China. A Preamble is not a part of the Constitution and it has no juristic meaning. Yet its importance cannot be denied. A Preamble declares the intention of the government which the Constitution establishes and enshrines the ideals which the government is required to realize. But the actual policy of the Chinese Government is a complete negation of the guarantees it ensures. Its "indestructible friendship" with the Soviet Union was a plea of hypocrisy and its emphatic declaration that China's policy "to strive for the noble cause of world peace and the progress of humanity" is a cloak for treachery. The champions of anti-imperialism

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1. Signed on February 14, 1950.

have proved to be worst imperialists and the advocates of "world peace and the progress of humanity" have established themselves as the warmongers whose atrocities will ever go deep in history.

**A multi-national State.** The People's Republic of China is a single multi-national State and it is just a coincidence that, like the Soviet Union, it contains scores of nationalities. The Preamble declares that all nationalities in China are united in one family of free and equal nations and the unity so forged would help China to gain in strength and to fight against "imperialism, against public enemies of the people within the nationalities, and against both dominant-nation chauvinism and local nationalism." In the course of economic and cultural development, the Preamble assures, that the State will concern itself with the needs of the different nationalities, and, in the matter of socialist transformation, it will strive to pay full attention to the special characteristics in the development of each.

Article 3 of the Constitution guarantees equality of status to all nationalities, prohibits discrimination or oppression against any nationality, and acts which undermine the unity of the nationalities. All nationalities have freedom to use and foster the growth of their spoken and written languages, and to preserve or reform their own customs or ways. The Constitution also grants regional autonomy to all those national minorities whose people live in compact communities. National autonomous areas are inalienable parts of the People's Republic of China.

**A People's democratic State.** The People's Republic of China is a People's democratic State led by the working class and based on the alliance of workers and peasants. It establishes a people's democratic dictatorship, that is, a system of people's democracy which guarantees that China can in a peaceful way banish exploitation and poverty and build a prosperous and happy socialist society. The Constitution, therefore, aims to build a classless socialist society by welding the workers and peasants, who form the large percentage of the country's population and had ever been victims of exploitation, national and international.

**Building of the Socialist Society.** The establishment of the People's Republic of China does not usher in a socialist society all at once. "From the founding of the People's Republic of China to the attainment of a socialist society," reads the Preamble, "is a period of transition." During this period the fundamental task of the State is, step by step, to bring about the socialist industrialization of the country and, step by step, to accomplish the socialist transformation of agriculture, handicrafts and capitalist industry and commerce." Article 4 of the Constitution reiterates what the Preamble says. It reads, "The People's Republic of China, by relying on the organs of State and the social forces, and by means of socialist industrialization and socialist transformation, ensures the gradual abolition of the systems of exploitation and the building of a socialist society." The organs of the State, through which socialist society is to be gradually established, are based upon a democratic dictatorship, or a dictatorship of the proletariat as known in the USSR. All these organs of State power are imbued with a ruthless spirit of constructing socialism and merciless destruction of capitalism. The social forces are the mass indoc-

termination. Hitler used it, so did Stalin. And the Chinese Communist Party is using it with alarming efficiency. It hands down "suggestions" about what should be discussed in schools, newspapers, reading groups and associations of housewives, farmers, businessmen and intellectuals thereby regimenting the entire life of the people towards a desired goal.

**Ownership of the means of production.** The Constitution accepts four kinds of ownership of the means of production. State-ownership is the first and it is a socialist sector owned by the whole people. "It is the leading force in the national economy and the material basis on which the State carries out socialist transformation." The State ensures priority for the development of the State or socialist sector of the economy and it embraces all mineral resources and waters, as well as forests, undeveloped land and other resources which the State owns by law.<sup>2</sup> The second is the co-operative sector of economy. This sector is either socialist, when collectively owned by the working masses, or semi-socialist, when a part is collectively owned by the working masses. Partial collective ownership by the working masses is a transitional form by means of which individual peasants, individual handicraftsmen and other individual working people organise themselves in their advance towards collective ownership by the working masses. The State protects the property of the co-operatives, encourages, guides and helps the development of the co-operative sector of economy. It regards the promotion of producers' co-operatives as the chief means for the transformation of individual farming and individual handicrafts.<sup>3</sup>

Thirdly, there is the ownership by the individual workers. The State protects the right of the individual peasants to own land and other means of production according to law. The State guides and helps individual peasants to increase production and encourages them to organise producers' supply and marketing, and credit co-operatives voluntarily.<sup>4</sup> Similarly, the State protects the rights of handicraftsmen and other non-agricultural individual working-people to own means of production according to law. It also helps and guides them to improve their enterprise and encourages them to organise producers, and supply and marketing co-operatives. The policy of the State towards rich-peasant economy, the Constitution ordains, 'is to restrict and gradually to eliminate it.'

Finally, there is the capitalist ownership and the Constitution guarantees to protect the right of capitalists to own means of production and other capital according to law. The policy of the State towards capitalist industry and commerce is "to use, restrict and transform them. The State makes use of the positive sides of capitalist industry and commerce which are beneficial to national welfare and the people's livelihood, restricts their negative sides which are not beneficial to national welfare and the people's livelihood, encourages and guides their transformation into various forms of State-capitalist economy, gradually replacing capitalist ownership with ownership of the whole people; and this it does by means

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2. Article 6.

3. Article 7.

4. Article 8.

5. Article 9.



of control exercised by administrative organs of the State, the leadership given by the State sector of the economy, and supervision by the workers." The State forbids capitalists to engage in unlawful activities which injure the public interest, disrupt the social-economic order, or undermine the economic plan of the State.

**The Right to property.** From the types of ownership of means of production enumerated above, the right to private property becomes self-evident. The State protects the right of citizens to own lawfully earned incomes, savings, houses and other means of life. It also guarantees the right of citizens to inherit private property according to law. The State may, however, in the public interest, buy, requisition or nationalize land and other means of production both in cities and countryside according to the provisions of law. The State forbids any person to use his private property to the detriment of the public interest.

**Planned economy.** For the gradual transformation of society planning is a matter of necessity and the Constitution explains its importance. Article 15 states that by economic planning the State directs the growth and transformation of the national economy to bring about the constant increase of productive forces, in this way enriching the material and cultural life of the people and consolidating the independence and security of the country. The First Five-Year Plan ended in 1957, and the Second ended in 1962. The targets of the First Plan aimed primarily at industrial expansion. The statistics in industrial improvements and modernization are impressive and account for China's might which is now being used in pursuit of imperialistic designs. The Second Five-Year Plan aimed largely at increasing agricultural production and one of the targets was to tame the Yellow River to irrigate its farms instead of flooding them.

**Work a matter of honour.** Like the Soviet Constitution work has been constitutionally sanctified in China too. The Constitution prescribes that work is a matter of honour for every able-bodied citizen and guarantees enjoyment of the right to work by planned development of the national economy thereby gradually creating more employment and better working conditions and wages. The State also encourages citizens to take active and creative part in their work.

**Fundamental Rights and Duties.** The Constitution of the People's Republic of China, as in the Soviet Constitution of Russia, contains a separate Chapter on Fundamental Rights and Duties of Citizens. But unlike the latter political and civil rights form a place of precedence in the Chinese Constitution. The economic rights, like the right to work,

6. Article 10.
7. Article 11.
8. Article 12.
9. Article 13.
10. Article 14.
11. Article 16.
12. Article 91.
13. Article 16.
14. Chapter III.
15. Article 85-90.

the right to rest and leisure and the right to material assistance in old age in case of illness or disability, are there, but not so prominently enshrined. The duties of the citizens as prescribed by the Constitution are more or less the same as in the Soviet Constitution.<sup>16</sup> It is an honourable duty of citizens to perform military service and a sacred duty to protect the homeland, to abide by the Constitution, to respect and protect public property, uphold discipline at work, keep public order, respect social ethics, and to pay taxes.

**Power belongs to the people.** All power in the People's Republic of China belongs to the people and is exercised through the National People's Congress and the local people's Congresses. These and other organs of the State practise democratic centralism.<sup>17</sup> The Constitution further enjoins that all organs of the State must rely on the masses of the people, constantly maintain close contact with them, heed their opinions and accept their supervision.<sup>18</sup> But how far the principle of democratic centralism is consistent with the provision that all organs of the State must rely on the masses of the people and heed their opinions and accept their supervision, finds its answer in Article 19. It says that the People's Republic of China safeguards the people's democratic system, suppresses all treasonable and counter-revolutionary activities and punishes all traitors and counter-revolutionaries. Absolute obedience to the policy once it has been adopted is the most essential requirement of democratic centralism and any deviation from the party line is a counter-revolutionary activity and one who dares indulge in it is a traitor whom the Constitution aims to ruthlessly suppress.

**The highest organ of the State authority.** The highest organ of the State authority is the National People's Congress, a sole legislative authority in the country, consisting of Deputies elected by provinces, autonomous regions, municipalities under the direct central authority, the armed forces and the Chinese residents abroad, for a period of four years.<sup>19</sup> The National People's Congress is a unicameral legislature and here it differs from the USSR Supreme Soviet which is bicameral. Russia, like China, is a multi-national State and the second Chamber, the Soviet of Nationalities, was specifically created to give special representation to the various nationalities to safeguard their special economic and cultural interests.

**A Collective Executive.** The executive authority of the head of the State in the People's Republic of China is vested in the Standing Committee of the National People's Congress and the Chairman of the Republic of China who is elected for four years by the National People's Congress.<sup>20</sup> Both the Standing Committee and the Chairman of the Republic, as such, jointly exercise the functions and powers of the head of the State. "This conforms," Liu Shao-chi maintained, while presenting the Report on the Draft Constitution to the First National People's Congress, "to the

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16. Articles 100-103.

17. Article 2.

18. Article 17.

19. Articles 21 to 24.

20. Article 39.

actual situation of our country and is based on our experience in the building up of the highest organ of state authority since the founding of the People's Republic of China. Ours is a collective head of the State. Neither the Standing Committee nor the Chairman of the People's Republic of China has powers exceeding those of the National People's Congress."

But the position of the Chairman of the People's Republic of China essentially differs from the Chairman of the Soviet Presidium. The Constitution creates the office of the Chairman of the People's Republic of China and endows him with specifically enumerated powers<sup>21</sup> similar to those vested in the executive head of the State of a non-Communist country. The Constitution of the People's Republic of China even provides for the office of the Vice-Chairman who exercises the functions of the Chairman in case of his incapacity for a prolonged period by reason of health. Should the office of the Chairman fall vacant the Vice-Chairman succeeds to the office of the Chairman.<sup>22</sup>

**Judiciary and the Procurator-General.** There are three types of Courts, the Supreme People's Court, Local People's Court and Special People's Courts.<sup>23</sup> Judges are elected for four years. The judicial system in China aims to provide for cheaper and speedy justice. The proceedings in courts are conducted in the languages of the different minorities. The Chief Procurator exercises procuratorial authority throughout the country over all departments of the State Council, all local organs of State, persons and citizens to ensure due observance of laws.<sup>24</sup> There are local procurators at different levels of administrative units working under the direction and control of the Chief Procurator.

**Amendment of the Constitution.** The Constitution can be amended by the National People's Congress by a two-thirds majority vote of all the Deputies. It is similar to the process of amending the USSR Constitution except that it requires two-thirds majority vote of both the Chambers of the USSR Supreme Soviet.<sup>25</sup> In the People's Republic of China there is a single Chamber legislature.

**Political asylum.** The People's Republic of China grants the right of asylum to any foreign national persecuted for supporting a just cause, for taking part in the peace movement or for engaging in scientific activity. It means that China, like Russia, is the haven of notable revolutionaries.

**Leading role of the Chinese Communist Party.** The Constitution, unlike that of the USSR, does not contain any provision relating to the role of the Communist Party, except for a reference to "democratic centralism" in Article 1, and that the "People's Republic of China safeguards the people's democratic system, suppresses all treasonable and counter-revolutionary activities and punishes all traitors and counter-revolutionaries." As an Article 19, the Preamble too acclaims it. It says, "in the year 1949, after more than a century of heroic struggle, the Chinese people led by the

21. Articles 40 to 43.

22. Article 46.

23. Article 73.

24. Article 81.

25. Article 29.

Communist Party, finally achieved their great victory in the people's revolution against imperialism, feudalism and bureaucratic capitalism...."

The Communist Party, thus, commands a pivotal position in the political life of the country. The general programme of the Chinese Communist Party declares, "As the highest form of class organization, the party must strive to play a correct role as the leader and core in every aspect of country's life." It, accordingly, enjoys a monopoly power and, as in the USSR, it is really the decision making body and implementing organisation. Its members staff all key positions in government and society. "Its leaders decide government policy, regardless of their titles or constitutionally vested responsibilities. Its ideology is the only officially propagated doctrine, mandatory for non-members and members alike." It is not identical with government, but it controls the government entirely and fully, and guides and disciplines the society.

**A Unitary State.** China like the USSR is a multinational state. But unlike USSR, it is not a federation. It is a unitary state, divided for purposes of administration into Provinces, Autonomous Regions, and Municipalities directly under the central authority. Article 5 of the Constitution provides, "The People's Republic of China is a single multi-national State. All nationalities are equal. Discrimination against or oppression of any nationality and acts which undermine the unity of the nationalities are prohibited. All the nationalities have freedom to use and foster the growth of their spoken and written languages and to preserve or reform their own customs or ways. Regional autonomy applies where people or national minorities live in communities. National autonomous areas are inalienable parts of the People's Republic of China."

In the Soviet Union several republics, such as Kazakhstan and Uzbekistan, as well as many smaller areas have been granted autonomy by the Constitution. But this autonomy certainly does not mean self-rule. The Party, which is the core of control in any Communist State, is not divided along regional lines but rather it is centrally governed and reaches into every corner of the country. In addition to this, in China, the rulers have not felt that they could afford to give any kind of autonomy to their people, especially to their non-Chinese people. In part, this denial is rooted in the ancient concept of China as a Unitary State. The term "autonomy," however, should not be confused with self-rule. As used in China, it merely means that the peoples of the areas concerned are permitted to implement central directives and to issue local regulations subject to approval by the Central Government. And whatever Autonomous Areas exist they were created during the first seven years of the Communist period, although an autonomous area may be still occasionally established today.

As decreed by the new leadership, administrative autonomy means that the people inhabiting the Autonomous Areas, are permitted to manage the following "internal matters":—administrative work, local finances, local industry, agriculture, animal husbandry, and the use of local minority languages. The Chinese Central Party leadership averred that neither the Central Government nor the Chinese officials will coerce (the non-Chinese minorities) into any course of action which they do not like. But at the

same time, the Party has also stated that it will carry out certain economic and cultural "construction projects" in Autonomous Areas and will decide on the time for them to be carried out. And what this "Cultural Revolution" has actually meant is within the knowledge of everyone outside China.

**A Transitional Constitution.** The Constitution of the People's Republic of China is a brief document, just containing 106 Articles. And the major portion of it covers the political, economic and social objectives to be achieved. The Preamble elaborately states what the people have actually achieved and that which has yet to be achieved. The Constitution of the People's Republic of China, is, therefore, a sort of manifesto and not strictly a legal document and, as such, it is a transitional Constitution. This feature of the Constitution is clearly indicated in the Preamble. In fact, every Communist Constitution is transitional. Stalin, too, had unequivocally stated this in 1936. The Chinese leadership has frequently suggested the period of transition to extend from fifteen to twenty years. Thus, the Constitution is not an abiding document to serve the generations to come with appropriate modifications either by amendments or growth. It is meant to serve the needs of the country "from the founding of the People's Republic of China to the attainment of Socialist Society" as the Preamble says.

### FUNDAMENTAL RIGHTS AND DUTIES

The Constitution of the People's Republic of China contains a separate Chapter on Fundamental Rights and Duties and that, too, after the description of the administrative structure as it is in the Soviet Constitution. But unlike the latter the Chinese Chapter on Fundamental Rights begins with the right to vote and other civil rights. Economic rights find a secondary position in their enumeration. The Soviet Constitution specifies that civil rights in the USSR must be "in conformity with the interests of the working people, and in order to strengthen the socialist system."<sup>26</sup> The People's Republic Constitution does not say so. But it cannot be denied that in conformity with the principles of democratic dictatorship and the socialistic structure of society that the Constitution establishes the freedom of speech, freedom of press and freedom of assembly must be consistent with and conform to the interests of the working people and that their rights must be exercised in a manner which is consistent with and in accordance to the socialist way of life. To do otherwise is a counter-revolutionary activity and the work of a traitor which the Constitution ordains must be suppressed.<sup>27</sup>

**Political Rights.** Citizens of the Republic of China, who have reached the age of eighteen years, enjoy the right to vote and stand for election irrespective of nationality, race, sex, occupation, social origin, religious belief, education, property status or length of residence, except insane persons and persons deprived by law of the right to vote and stand for election. Article 19 of the Constitution deprives feudal landlords and

26. Article 125.

27. Article 19.



bureaucrat-capitalists of political rights for specific period of time according to law, women have equal rights with men to vote and stand for election.

**Five Freedoms.** All citizens enjoy freedom of speech, freedom of the press, freedom of assembly, freedom of association, freedom of procession and freedom of demonstration. The State guarantees to citizens enjoyment of these freedoms by providing the necessary material facilities. When the People's Republic of China safeguards the People's democratic system, suppresses all treasonable and counter-revolutionary activities and punishes all traitors and counter-revolutionaries, the enjoyment of the freedoms of speech, press, assembly, association, procession and demonstration must necessarily be exercised in conformity with the interests of the working people, and in order to strengthen the socialist system. The aim of the democratic system established in China is to destroy capitalism and construct socialism. The Government will, therefore, provide the necessary material facilities for the enjoyment of these guaranteed rights to those persons, groups and associations alone who advocate and propagate the cause of socialism. And those who are against the socialist system will not be provided with the necessary material facilities. In fact, they will be suppressed as traitors and counter-revolutionaries.

**Inviolability of persons and homes.** Freedom of the person of citizens is inviolable. No citizen may be arrested, except by decision of the People's Court or with the sanction of a People's procuratorate. The homes of citizens are inviolable, and privacy of correspondence is protected by law. These provisions are identical to Articles 127 and 128 of the Soviet Constitution. Even the wording is more or less the same. If Soviet Russia can be an index of the extent of enjoyment of these freedoms, then, in China, too, it is only a theoretical guarantee. The ubiquitous secret police and the mighty hand of the procurator gripping all departments of the State and private homes of the citizens leaves nothing which can be described as inviolable. According to Article 90 citizens of the People's Republic of China enjoy freedom of residence and to change their residence.

**Freedom of religious belief.** Citizens enjoy freedom of religious belief. Article 124 of the Soviet Constitution, on the other hand, provides, "In order to ensure to citizens freedom of conscience, the church in the USSR is separated from the State, and the school from the Church." Freedom of religious worship and freedom of anti-religious propaganda is recognised for all citizens. Sufficient evidence is available that freedom of religious belief is considerably restricted in China. The wholesale prosecution of the Chinese Muslims has evoked widespread resentment amongst Muslims of the world. Christians and Buddhists (or Lamaist) too have been subjected to more or less the same treatment. Like the USSR, China too permits equal freedom of anti-religious propaganda.

**Right to education and scientific research.** Citizens have the right to education. In order to guarantee enjoyment of this right, the State establishes and gradually extends the various types of schools and other cultural and educational institutions. The State pays special attention to the physical and mental development of young people. The State also safeguards the freedom of citizens to engage in scientific research, literary

and artistic creation and other cultural pursuits. The State encourages and assists creative work in cultural education, literature, art and other cultural pursuits.

**Equality of Women.** Women in the People's Republic of China enjoy equal rights with men in all spheres of political, economic, cultural, social and domestic life. The State protects marriage, the family, and the mother and child. There is no provision, as it is in the Soviet Constitution in Article 122, for the State protection of unmarried mothers.

**Right to work, rest and leisure.** All citizens have the right to work. This right is guaranteed by planned development of the national economy, which gradually creates more employment, and better working conditions and wages. Working people have also the right to rest and leisure. With a view to ensure the enjoyment of this right, the State prescribes hours of work and holidays for workers and office employees. At the same time, the State gradually expands material facilities to enable working people to rest and build up their health.

**Right to material assistance.** Working-people have the right to material assistance in old age, and in case of illness or disability. The State, accordingly, provides for social insurance, social assistance and public health services and gradually expands these facilities to make possible the wider enjoyment of this right.

**Rights to property and inheritance.** The Constitution of the People's Republic of China protects the right of citizens to own lawfully earned incomes, savings, houses and other means of life. Inheritance of property according to law is also constitutionally protected. Article 10 recognises the right to own means of production and other kinds of capital according to law. It means, in terms of law, that the Constitution recognises and permits existence of capitalists, though the ultimate object is to establish a Socialist society. Article 4 of the Constitution speaks of "the gradual abolition of the systems of exploitation and the building of the socialist society." Continuance of capitalistic enterprise is, therefore, a transitional stage and the Constitution makes provisions for the final takeover by the State. Article 14 provides that no citizen may use his property to the detriment of public interest. It is further provided that the State possesses the power to requisition and nationalise land and other means of production in the public interest according to law. The law does not say that the payment of compensation is obligatory when the state decides to nationalise land and other means of production.

**Right for redress of grievances.** Citizens have the right to bring grievances and complaints against any person working in any organ of the State for transgression of law or neglect of duty by making a written or verbal statement to any organ of State at any level. People suffering loss by reason of infringement by persons working in organs of State of their rights as citizens have the right to compensation.

**Right of asylum.** The People's Republic of China protects the proper rights and interests of Chinese residents abroad. The right of asylum is also granted to any foreign national persecuted for supporting a just cause, for taking part in the peace movement or for engaging in scientific activity.

The Chinese Bill of Rights as incorporated in the Constitution is impressive indeed. It embraces the political, economic, social and cultural life of the individual and unlike the Soviet Bill of Rights political and civil rights precede economic rights. Viewed in terms of pure theory the Chinese Bill of Rights is a great advancement on the Bills of Rights as obtainable in the Western democracies. The Constitution of the People's Republic expresses them in absolute and unqualified terms and they are made available to all the Chinese people.

But the exact position is otherwise. All the people in China do not enjoy Fundamental Rights. There are categories of people who are "non-people." This point was elaborated by Mao Tse-tung. He declared that there are certain categories of people such as "the henchmen of imperialism, the landlord class, the bureaucratic capitalists as well as the reactionary clique of the Kuomintang" who are non-people. Non-people are not only deprived of the enjoyment of the Fundamental Rights, but it is the constitutional duty of the Government to suppress them. Article 19 analyses it. It reads, "The People's Republic of China safeguards the people's democratic system, suppresses all treasonable and counter-revolutionary activities and punishes all traitors and counter-revolutionaries." Liu Shao-chi, the real architect of the Constitution, epitomised the whole truth when he said, "Anyone who expects our Constitution to ensure freedom for traitors and counter-revolutionaries is bound to be disappointed." No one in China, as in Soviet Russia, does for certain know who is a traitor and a counter-revolutionary and Liu Shao-chi was no exception to this political truth of the Communist regime. Liu Shao-chi was deprived of his political position in November 1968 because he became suspect in the eyes of Mao Tse-tung. Enjoyment of Fundamental Rights, therefore, depends upon how one accepts the dictates of the Party leadership. The law clearly prohibits the imperialists, the feudalists and the bureaucrats to exercise the right to vote and stand for election.

**Fundamental Duties.** Like the Soviet Constitution, the People's Republic Constitution also imposes certain duties on citizens. All such duties carry with them a constitutional sanction and the State is enjoined to enforce them vigorously. The first commandment is that citizens must abide by the Constitution and the law, uphold discipline at work, keep public order and respect social ethics. The public property of the People's Republic is sacred and inviolable. It is the duty of every citizen to respect and protect public property. It is, again, the duty of citizens to pay taxes according to law. While it is the sacred duty of every citizen to defend the homeland, it is an honourable duty of citizens to perform military service according to law. All these duties are identical to those prescribed by the Soviet Constitution. But recent disturbances in China as a result of bid to power do not present a faithful picture of the due observance of duties and of social solidarity. Even the monolithic nature of the Party is destroyed by deep-rooted dissensions. Here is a marked difference between the Soviet Union and the People's Republic of China.

## CHAPTER III

# STRUCTURE OF THE STATE

### THE NATIONAL PEOPLE'S CONGRESS

**Highest organ of State authority.** The National People's Congress, like the Supreme Soviet in the USSR, is the highest organ of State authority and it is the sole legislative authority in the country. Its functions are varied, constituent, legislative, executive, electoral and judicial too, and all told they well establish its supremacy. The National People's Congress amends the Constitution, supervises the enforcement of the Constitution, enacts laws, elects and removes the different officers of the State, decides questions of war and peace, examines and approves the budget, ratifies the status and boundaries of Provinces and other local areas. If the Congress so desires it can assume any other function as it deems necessary. The general clause makes the National People's Congress the repository of all power and authority of the State.

**Composition and Organization.** The National People's Congress is a unicameral legislature. It is composed of deputies elected by provinces, autonomous regions, municipalities under the direct central authority, the armed forces and the Chinese residents abroad. Deputies to the National People's Congress are divided into groups based on the units which elect them. Citizens who have reached the age of eighteen have the right to vote and stand for election whatever their nationality, race, sex, occupation, social origin, religious belief, education, property status or length of residence, except insane persons and persons deprived by law of the right to vote and stand for election. The imperialists, the feudalists, and bureaucrats are denied the right to vote and stand for election. The number of Deputies, including those representing national minorities, and the manner of their election are prescribed by electoral law. The Congress is now composed of more than one thousand deputies. The term of office is four years. The Constitution ordains that two months before the term of office of the Congress expires, its Standing Committee must complete the next election of the Deputies. If for some exceptional circumstances new elections cannot be held, then, the terms of the sitting members may be prolonged until the first session of the succeeding National People's Congress.

The Congress is convened once a year by its Standing Committee. But it may be convened also whenever the Standing Committee or one-fifth of the Deputies may propose. When the National People's Congress meets, it elects a Presidium and a Secretary-General for the session, and adopts an agenda for that session. The Presidium presides over the sittings of the National People's Congress. Executive Chairmen to preside over the sittings by turn are elected by and from the members of

the Presidium. To convene meetings of the Presidium and preside at them standing chairmen are elected by and from among its members.

Before each session of the National People's Congress is convened, the Deputies in each group consult together on matters concerning preparations for the session put forward by the Standing Committee of the National People's Congress. When the Congress is in session, the groups discuss matters put forward by the National People's Congress or its Presidium. No Deputy may be arrested or placed on trial without the consent of the Congress, or, when the Congress is not in session, of its Standing Committee. Deputies are subject to the supervision of the units which elect them. These electoral units have the power to replace, according to the procedure prescribed by law, at any time the Deputies whom they had elected. The Constitution, therefore, vests in the people the power to recall their representatives if they ever feel dissatisfied with their performance.

Responsible officers of the State Council, the various Ministries and Commissions, the Council of National Defence, the Supreme People's Court, and the Supreme People's Procuratorate, if not Deputies to the National People's Congress, may, when the Presidium so decides, attend meetings of the National People's Congress and participate in the proceedings. The National People's Congress establishes a Nationalities Committee, a Bills Committee, a Budget Committee, a Credentials Committee and other Committees as it may deem necessary. The Nationalities Committee and the Bills Committee are under the direction of the Standing Committee of the National People's Congress when the National People's Congress is not in session.

Sittings of the National People's Congress are public, but secret sittings may be held when necessary and when the National People's Congress so resolves. Laws and other Bills require a simple majority vote of all the Deputies to the National People's Congress. But amendments to the Constitution require a two-thirds majority vote of all the Deputies.

**Functions and Powers.** The first item, which the Constitution mentions while enumerating functions and powers of the National People's Congress, is to amend the Constitution. Although it is a written Constitution, yet the procedure for amending it is simple. Amendments require just a two-thirds majority vote of the total membership of the Deputies. The Congress is the sole legislative authority of the country. Laws and other Bills require a simple majority of all the Deputies. The Congress supervises the enforcement of the Constitution and determines the infringement of its decisions and annuls decisions which contravene the Constitution. It is the fundamental duty of the citizens to abide by the Constitution and the laws. Deputies have the right to address questions to the State Council, or to the Ministries and Commissions of the State Council which are under obligation to answer. The Standing Committee must make a report on its work to the National People's Congress at each session of the latter.

The Congress elects the Chairman and the Vice-Chairman of the People's Republic of China, decides on the choice of the Premier of the State Council upon recommendation by the Chairman of the Republic,



and of the other members of the State Council on the recommendation of the Premier. It also decides on the choice of the Vice-Chairmen and other members of the Council of National Defence upon recommendation of the Chairman of the Republic. It elects the President of the Supreme People's Court, and the Chief Procurator of the Supreme People's Procuratorate. It also has the power to remove from office the Chairman and Vice-Chairman of the People's Republic of China, the Premier and Vice-Premiers, Ministers, Heads of Commissions and Secretary-General of the State Council, the Vice-Chairmen and other members of the Council of National Defence, the President of the Supreme People's Court and the Chief Procurator.

The Congress approves the State budget and the financial report and decides on the national economic plans. It ratifies the status and boundaries of provinces, autonomous regions, and municipalities under the central authority. It decides on questions of war and peace, and exercises such other functions and powers as the Congress may determine. The latter is an all-embracing power and this provision vindicates the supremacy of the National People's Congress as the highest organ of State authority in the Republic of China.

The Congress elects its Standing Committee which is a permanently acting body of the National People's Congress and is essentially analogous to the Presidium of the Supreme Soviet in the USSR. The Standing Committee is responsible for all its acts to the Congress and reports to it. The Congress has power to recall members of its Standing Committee. The National People's Congress, or its Standing Committee if the former is not in session, may, if necessary, appoint Commissions of inquiry for the investigation of specific questions. All organs of State, People's organisations and citizens concerned are obliged to supply necessary information to these Commissions when they conduct investigations. Deputies have the right to address questions to the State Council, or to the Ministries and the Commission of the State Council, which are under obligation to answer. Finally, the Congress decides on general amnesties.

The People's National Congress, thus, defies the theory of Separation of Powers. Its powers extend to all spheres of State activity. It appoints and removes the head of the State, the Chairman of the Republic, as also the Premier and the various Ministers. Its authority to appoint and remove embraces the President of the Supreme People's Court and the Chief Procurator. The National Defence Council is its creation and the Council remains in office so long as the Congress wills it. And at the top, the Congress is the Constitution amending body and it also looks to the enforcement of the Constitution.

**Legislative Procedure.** Bills are submitted to the National People's Congress by the Chairman and Vice-Chairman of the People's Republic of China, by Deputies of the National Congress, by the Presidium of the National People's, the Standing Committee and the various other Committees of the Congress and by the State Council. It means that, like USSR, there is no difference between a public Bill and a Private Bill and it is no concern of the governmental organs alone to introduce a Bill. A Bill in China is submitted to the Congress by almost all organs of gov-

ernment at the centre as also by the Deputies and the various committees of the Congress. There is no need for a Bill to cover all the Readings and pass through the various stages in its career in the Congress.

Bills submitted to the Congress are brought before its session for discussion by the Presidium, or they are brought before a session of the Congress for discussion after being referred to the Committee or Committees concerned for a joint consideration. As the sessions of the National People's Congress are brief and that too once a year generally, votes are taken on a Bill immediately after discussion. Discussion can only be according to the party-line and nothing beyond as the Constitution enjoins upon the National People's Congress, the local Congress and other organs of State to practise "democratic centralism," which precludes discussion once the decision had been taken at the top. It means that, as in the Soviet Union, unanimity in the People's Republic is insisted and if a Deputy ventures to express an opinion it may relate only to the performance of the Ministry in implementing the policy rather than to criticise the policy itself.

Amendments to the Constitution undergo the same procedure as legislative measures, except that they require a two-thirds majority vote of the total membership of the National People's Congress. Laws and other Bills require a simple majority vote of all the Deputies. Bills are passed by secret ballot or by a show of hands. The Chairman of the Republic promulgates laws passed by the Congress.<sup>2</sup> He has no power to veto such laws. The Constitution does not even say anything about their authentication.

**Committees of the Congress.** The National People's Congress establishes a Nationalities Committee, a Bills Committee, a Budget Committee, a Credentials Committee and other Committees as it may deem necessary to constitute.<sup>3</sup> These Committees assist the National People's Congress in its work. When the National People's Congress is not in session, the Nationalities Committee and the Bills Committee assist the Standing Committee in its work.

Each such Committee is composed of a Chairman, Vice-Chairmen and members. Candidates for chairmanship or membership of such committees are nominated from among the Deputies by the Presidium of that session of the Congress, subject to the approval by the Congress itself. Vice-Chairmen are elected by and from among members of such committees. Meetings of each committee are presided over by its Chairman, who directs the work of the Committee.

The Nationalities Committee examines Bills or sections of Bills that concern the affairs of the nationalities referred to it by the National People's Congress or its Standing Committee. It examines statutes governing the exercise of autonomy or separate regulations which are submitted by autonomous regions, autonomous **chou** and autonomous counties for ratification by the Standing Committee of the Congress. It also submits on

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1. Article 2.

2. Article 40.

3. Article 34.

its own initiative Bills or views concerning the affairs of the nationalities to the Congress or its Standing Committee, and studies matters concerning the affairs of the Nationalities.

The work of the Bills Committee is to examine statutory and other legislative Bills referred to it by the National People's Congress, to examine statutory and other Bills concerning laws and decrees referred to it by the Standing Committee. It drafts laws and decrees in accordance with decisions of the National People's Congress or its Standing Committee and submits Bills and views concerning laws and decrees to the Congress or its Committee.

The Budget Committee examines the State Budget, the financial report and Bills concerning the budget referred to it by the National People's Congress.

The Credentials Committee examines the qualifications of the Deputies in the right of their credentials and other references, when the National People's Congress meets for its first session. The Credentials Committee examines the qualifications of deputies at by-elections in the same manner.

Commissions of inquiry for the investigation of specific questions may be appointed by the National People's Congress or its Standing Committee. All organs of the State, people's organizations and citizens concerned are obliged to supply necessary information to these commissions when they conduct investigations. The organization and work of such commissions are laid down by the National People's Congress or its Standing Committee at the proper time.

## THE STANDING COMMITTEE

The Standing Committee is akin to the Presidium of the USSR and as the latter so is the former a constitutional anomaly. By virtue of the powers granted to it, the Standing Committee is the highest functioning organ of the State that permanently acts on behalf of the National People's Congress which is convened once a year and that, too, for just a brief session. It performs functions which are unique as many of them are purely executive in character and are usually performed by or in the name of the Chief Executive Head of the State, although the office of the Chairman of the Republic is the one which the Constitution has specifically created.

**Composition of the Standing Committee.** Article 30 of the Constitution determines the status of the Standing Committee and Article 31 enumerates its functions and powers. As the National People's Congress generally meets once a year, the Standing Committee is its permanently acting body. It is composed of: the Chairman, the Vice-Chairmen, the Secretary-General, and other members, all elected at the first session of each National People's Congress. It is a numerous body like the Presidium of the USSR but its membership is presumably more than double of the USSR Presidium; more than 65.

Meetings of the Standing Committee are called by the Chairman twice a month. When necessary, the number of such meetings may be

increased or reduced. The Chairman presides over such meetings and directs the work of the Standing Committee. If the Chairman is incapacitated for a prolonged period for reasons of health, or should his office fall vacant, the Standing Committee elects one from among the Vice-Chairmen until his recovery or until a new Chairman is elected. The Standing Committee has a general office which works under the direction of the Secretary-General. There are Deputy Secretaries-General, too, who are appointed by the Standing Committee.

**Functions and Powers.** The Standing Committee conducts the election of the Deputies to the National People's Congress. Two months before the expiry of the term of office of the National People's Congress, the Standing Committee must complete the election of Deputies to the succeeding Congress. Should exceptional circumstances arise preventing such an election, the term of office of the sitting members may be prolonged until the first session of the succeeding Congress. The Standing Committee convenes the Congress once a year. It may also be convened whenever the Standing Committee deems it necessary or one-fifth of the Deputies so propose. The Nationalities Committee and the Bills Committee are under the direction of the Standing Committee when the Congress is not in session. If the Congress is not in session, the Standing Committee may, if it deems necessary, appoint Commissions of inquiry for the investigation of specific complaints or questions. No Deputy may be arrested or placed on trial without the consent of the Standing Committee, when the Congress is not in session.

The Standing Committee interprets laws and adopts decrees. It supervises the work of the State Council, the Supreme People's Court and the Supreme People's Procuratorate. It annuls decisions and orders of the State Council which contravene the Constitution, laws or decrees. It revises or annuls inappropriate decisions issued by the government authorities of provinces, autonomous regions, and municipalities directly under the Central authority. The Committee decides, when the National People's Congress is not in session, on the proclamation of a state of war in the event of armed attack on the country or in fulfilment of international treaty obligation concerning common defence against aggression. It decides on general or partial mobilization and on the enforcement of martial law throughout the country or in certain areas.

The Committee decides on the appointment or removal of any Vice-Premier, Minister, Head of Commission or the Secretary-General of the State Council when the National People's Congress is not in session. It appoints or removes the Vice-Presidents, Judges, and other members of the Judicial Committee of the Supreme People's Court, the Deputy Chief Procurator, Procurators, and other members of the Procuratorial Committee of the Supreme People's Procuratorate. The Committee decides on the ratification or abrogation of treaties concluded with foreign States. It also institutes military, diplomatic and other special titles and ranks and institutes and decides on the award of State orders, medals and titles of honour. It decides on the granting of pardons.

Bills can be submitted to the People's Congress by the Chairman or Vice-Chairman of the Republic, by the Chairman, Vice-Chairmen or the members of the Standing Committee itself by the Nationalities Commit-



tee or the Bills Committee of the National People's Congress and by the State Council. Bills submitted to it for discussion by its Chairman are brought before the Standing Committee after having been referred to the appropriate committee of the National People's Congress for a joint or separate examination.

The Nationalities Committee and the Bills Committee are under the direct direction of the Standing Committee when the National People's Congress is not in session. Finally, the Standing Committee exercises such other functions and powers as are vested in it by the National People's Congress.

Resolutions of the Standing Committee require a simple majority vote of all its members. The Standing Committee must make a report on its work to the National People's Congress at each session of the latter. It is responsible to the National People's Congress and the members are subject to recall.

**Standing Committee is the real authority.** The Constitution holds the National People's Congress as the highest organ of State authority, but real authority, like the Presidium in the USSR, belongs to the Standing Committee. It is the continuous Government in China in fact as well as in law. Although the Standing Committee is the creature of the Congress, it is elected by the Congress, its members can be recalled, it is responsible and reports to the National People's Congress, yet the Congress meets ordinarily once a year and that, too, just for a brief period. The extent of authority of the National People's Congress has, thus, for all practical purposes been transferred to the Standing Committee which functions permanently. Its functions are numerous and its jurisdiction all-embracing. It conducts the election of the Deputies and convenes sessions of the National People's Congress. As an interpreter of laws, the authority of the Standing Committee is unquestioned. Next, it adopts decrees. It supervises the work of the State Council and annuls its decisions and orders which contravene the Constitution, laws or decrees. It also revise or annuls inappropriate decisions issued by the Government authorities or Provinces, autonomous regions and municipalities directly under the Central authority.

The Standing Committee also appoints and dismisses Vice-Premiers, Ministers, Secretary-General of the State Council and other functionaries in between the sessions of the Congress. Ratification or abrogation of treaties concluded with foreign States, and decisions on matters, such as, the proclamation of war, general or partial mobilization and enforcement of martial law throughout the country or in certain areas make the position of the Standing Committee enviable. And it goes to the credit of the Standing Committee that it has used all its powers effectively, though the directing force remains within the inner circle of the Communist Party. Those who direct the Party find their due place in the Standing Committee and it is the leading reason for the Standing Committee to become the real organ of state authority. Peter S. Tang has aptly said, "like the Presidium, the Standing Committee serves as a small and manageable group for giving the necessary legal form and authority to acts of State which are essentially decided upon in the high councils of the Party."



But there are significant points of difference between the Standing Committee and the Presidium. The latter is, as Stalin said, "the Collegiate President" of the USSR and the Chairman of the Presidium does not possess any powers and functions which the Constitution or law may confer upon him. The functions he performs are merely ceremonial and their basis is conventional. The Constitution of the People's Republic specifically creates the office of the Chairman of the Republic and his duties and functions are neatly enumerated in the Constitution and are comfortably vast than the conventional functions of the Chairman of the Presidium. Then, the Standing Committee is a numerous body as compared with the Presidium; near about double of the latter. It is true that democratic centralism and strict adherence to the Party discipline in both the countries leave no margin to doubt the perfect unanimity of decisions in both the bodies. Yet, one can say that a body with small membership is more informal in its deliberations and effective in its decisions than a numerous body consisting of as many as 65 members.

## CHAPTER IV

# THE CHAIRMAN OF THE REPUBLIC AND THE STATE COUNCIL

**The Executive in the Republic.** The State Council of the People's Republic of China, that is, the Central People's Government, is the executive organ of the highest State authority and, as such, the highest administrative organ of the State.<sup>1</sup> The Constitution creates the office of the Chairman of the Republic and vests him with functions which generally relate to the Head of the State. The Constitution emphasises the responsibility of the State Council, headed by the Premier, to the People's Congress and directs its members, popularly designated as Ministers, to answer questions which the Deputies may like to ask. This is like controlling the State Council and since control and responsibility go together, the executive appears to be like the Parliamentary system of government. But it is wrong to suppose that it is so. The essence of the Parliamentary system of government is the presence of two or more political parties with conflicting policies and programmes which they present to the people at the time of the general elections. The party or a combination of parties which are in majority in the legislature and agree to follow a common programme form the Government and other parties constitute the Opposition. The Opposition is the alternative government and its function is to criticise the government and oppose its policies with a view to defeat it in the legislature and oust the government from office. The Communist system of Government as obtainable in China permits the existence of only one party and its programme is well-defined, from which there can be no departure. The objective of the Constitution is to build Socialism and, as such, there can be no deviation from it. Then, the Constitution prescribes democratic centralism, which means that once a decision has been taken there can be no opposition to it. Clash of ideas and conflict of policies is therefore, not permissible and this is the negation of a responsible government.

## CHAIRMAN OF THE REPUBLIC

**Election and Term of Office.** The Chairman of the People's Republic of China is elected by the National People's Congress for a term of four years. Any citizen who is in possession of political rights and has reached the age of thirty-five is eligible for election as Chairman. The Constitution also provides for the office of the Vice-Chairman, who assists the Chairman in his work. The Vice-Chairman fulfils all the conditions of the Chairman for his eligibility and is elected in the same way and for the same term as the Chairman. The Vice-Chairman may exercise such

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1. Article 47.

part of the functions and powers of the Chairman as the Chairman may entrust to him. Should the Chairman be incapacitated for a long period by reason of health, the functions of the Chairman shall be exercised by the Vice-Chairman. If the office of the Chairman becomes vacant, the Vice-Chairman succeeds to the office of the Chairman. The National People's Congress has power to remove from office the Chairman and the Vice-Chairman.

**Functions and Powers.** The Chairman in pursuance of the decisions of the National People's Congress or its Standing Committee promulgates laws and decrees, appoints and removes the Premier, Vice-Premiers, Ministers, Heads of Commissions and the Secretary-General of the State Council, appoints and removes the Vice-Chairman and other members of the Council of National Defence. He confers State orders, medals and titles of honour, proclaims general amnesties and grants pardons, proclaims the state of war, orders mobilization and enforces martial law.

As head of the State, the Chairman represents the People's Republic of China in its relations with foreign States, receives foreign diplomatic representatives and, in pursuance of the decisions of the Standing Committee, appoints or recalls plenipotentiary representatives to foreign States and ratifies treaties concluded with foreign States. He commands the armed forces of the country, and is the Chairman of the National Council of Defence. Whenever necessary, the Chairman may convene a Supreme State Conference and act as its Chairman. The Vice-Chairman of the Republic, the Chairman of the Standing Committee, the Premier and other persons concerned take part in the Supreme State Conference. The Chairman submits the views of the Supreme State Conference on important affairs of the State to the National People's Congress, the Standing Committee, the State Council, or other bodies concerned for their consideration and decision.

The Constitution establishes the Supreme State Conference and the National Defence Council. The first, the Supreme State Conference consists of more than 300 persons including the Vice-Chairman of the Republic, the Chairman of the Standing Committee, the Premier of the State Council and other persons. The Chairman of the Republic convenes and presides over the meetings of the Conference. It is a high-ranking constitutional body embracing prominent non-party people and is intended to create a sense of participation of the people in the policy process. But how far the Conference possesses any effective voice, it is hazardous to conjecture in the absence of any authenticated material.

The second body is the National Council of Defence. The Council, too, has a large percentage of prominent non-party men among its hundred or more members. The Council rarely meets for more than a few days a year. Apparently the Council must have an active and effective say in the problems of defence, but in reality its role is just to meet and endorse what has already been decided at the highest Party and Governmental levels. Rigid adherence to party-line is the basic principle of democratic centralism and with that monopoly power it is difficult to think that either of these bodies is competent or is likely to suggest counter-proposals and suggestions.

**The position and authority of the Chairman.** There is no authoritative material available to precisely comment upon the role of the Chairman of the People's Republic of China. The only source of reliance, therefore, is the Constitution itself, and whatever can be gathered from the writings and speeches of two occupants of the office, Mao Tse-tung and Liu Shao-chi. The provisions of the Constitution vest the Chairman essentially with ceremonial powers as head of the State. He has a constitutional power to appoint and remove the Premier, Vice-Premiers, Ministers, Heads of the Commissions and the Secretary-General of the State Council. His authority also extends to the ratification of the treaties concluded with foreign States on behalf of the People's Republic and appoints and recalls ambassadors and other diplomatic representatives on behalf of China. The Chairman is the supreme commander of the armed forces of the country and Chairman of the Council of National Defence. He proclaims a state of war and martial law and orders mobilisation.

These are vast powers indeed and when the incumbent of the office is one of the stature of Mao Tse-tung, as he was till 1959, the authority of the Chairman is really great and his position peerless. With the control he exercised over the Party he could impose his decisions both on the People's Congress and its Standing Committee. In fact, his position could be compared with Stalin. Liu Shao-chi could not match in prestige with Mao Tse-tung, yet as a top-ranking leader of the Party, who had been the architect of the Constitution and a close associate of Mao Tse-tung he exercised considerable influence and became a rival to the authority of his master when he was denounced as a counter-revolutionary and removed from office in November 1968. No one can predict both in Russia and China the fate of the political leaders. It may, however, be noted that the Constitution gives to the Chairman of the Republic and the Standing Committee, which are supplementary and complimentary to one another, authority and the position of the Chairman essentially depends upon his Party position. If his position is commanding he carries with him the Standing Committee and the State Council otherwise he is just a figure-head.

## THE STATE COUNCIL

The State Council of the People's Republic is the Central Government and "is the executive organ of the highest State authority; it is the highest administrative organ of State."<sup>2</sup> The top-Party political leaders are, therefore, associated with the decision-making in the Government and to see the proper implementation of such decisions through the different administrative departments and agencies into which administration is divided. Both these functions of the State Council resemble to that of a Cabinet in a parliamentary system of government.

**Composition.** The State Council is composed of the Premier, the Vice-Premiers, the Ministers, the Heads of Commissions, and the Secretary-General. There are sixteen Vice-Premiers and some thirty or more Ministers and Heads of State Commissions. The organization of the State Council is determined by law. The Organic Law, enacted on September

21, 1954, created 35 Ministries and Commissions. The addition of new Ministries or Commissions under the State Council and the abolition or merging of existing ones are decided by the National People's Congress or by its Standing Committee on the recommendation of the Premier.

The Chairman of the People's Republic of China, in pursuance of decisions of the National People's Congress or its Standing Committee, appoints or removes the Premier, the Vice-Premier, Ministers, Heads of Commissions and the Secretary-General of the State Council.<sup>3</sup> Each Ministry has a Minister and Vice-Ministers and when necessary Assistant Ministers to the Minister may be appointed. Each Commission has a Head, Deputy Heads and Members. The Ministers and Heads of Commissions direct the work of their respective departments. They may issue orders and directives within the jurisdiction of their respective departments and in accordance with laws and decrees, and decisions and orders of the State Council. The State Council may, when necessary, establish administrative organs to assist the Premier in directing the work of the various departments under the State Council.

The State Council has a Secretariat under the direction of the Secretary-General, as also Deputy Secretaries-General to assist the Secretary-General in his work.

**Meetings of the State Council.** The State Council meets in a monthly plenary session. Executive meetings of the State Council are held more frequently. The Premier directs the work of the State Council and presides over its meetings.

The meetings of the State Council are, accordingly, of two kinds: plenary and executive. Plenary meetings are attended by the Premier, the Vice-Premiers, the Ministers, the Heads of Commission and the Secretary-General. They are held once every month, and may be called by the Premier at such other times as may be deemed necessary. Executive meetings are held frequently and are attended by the Premier, the Vice-Premiers and the Secretary-General. Any resolution or order issued by the State Council must first have been adopted by a plenary or an executive meeting of the State Council.

**Functions and Powers.** The State Council formulates administrative measures, issues decisions and orders and verifies their execution in accordance with the Constitution, laws and decrees. It submits Bills to the National People's Congress or its Standing Committee, co-ordinates and leads the work of the Ministries and Commissions and local administrative organs throughout the country. It revises and annuls inappropriate decisions and orders issued by local administrative organs, puts into effect the national economic plans and provisions of the State budget and controls foreign and domestic trade.

The State Council directs cultural, educational and public health work, administers affairs concerning the nationalities and the Chinese residents abroad. It protects the interests of the State, maintains public order and safeguards the interests of citizens, directs the conduct of external affairs, guides the building up of the defence forces and ratifies



the status and boundaries of autonomous **chou**, counties, autonomous counties, and municipalities. The Council appoints or removes administrative personnel according to provisions of law, and exercises such other functions and powers as are vested in it by the National People's Congress or its Standing Committee.

The State Council appoints and removes the following administrative officers: (1) The Deputy Secretaries-General of the State Council, the Vice-Ministers and Assistant Ministers, the Deputy Heads and Members of Commissions, the Heads and Vice-Heads of Departments and the Directors and Vice-Directors of Bureaux under the Ministries and Commissions; (2) Heads and Deputy Heads of Boards, Directors and Vice-Directors of Bureaux under the People's Councils of Provinces and municipalities under the Ministries and Commissions; (3) Commissioners of Special Administrative offices; (4) Officers in autonomous regions whose positions correspond to those enumerated in (2) and (3) above; (5) Counsellors of Embassy and consuls-general accredited to foreign countries; (6) Presidents and Vice-Presidents of universities and colleges of higher learning; and (7) other officers whose positions are equivalent to those enumerated above.

The Premier directs the work of the State Council and presides over its meetings. He is assisted by Vice-Premiers in his work. The Ministers and Heads of Commissions direct the work of their respective departments. They may issue orders and directives within the jurisdiction of their respective departments and in accordance with laws and decrees, the decisions and orders of the State Council.

The State Council may, when necessary, establish organs directly subordinate to it to take charge of various specific matters. The establishment, merging or abolition of such organs is subject to approval by the Standing Committee on the recommendation of the Premier. It may also establish various administrative organs to assist in the working of the various departments under the State Council. The State Council is responsible to the National People's Congress and reports to it, or when the National People's Congress is not in session, to its Standing Committee. Deputies to the National People's Congress have the right to address questions to the State Council, or to the Ministries and Commissions, which are under obligation to answer.

**Appraisal of the State Council.** The powers of the State Council are, indeed, very wide and impressive. There is no sphere of administration which it does not control and direct. The Constitution ordains it as the highest executive and administrative organ of the State. It is the creation of the National People's Congress and is responsible to it in the exercise of all its functions and powers, or when the Congress is not in session to its Standing Committee. The responsibility of the Council and the Ministers and Commissions of the Council is further invoked through the medium of questions which the Ministers are required to answer when directed by the deputies of the National People's Congress. But these provisions do not make the system of government so established in China responsible and responsive. The Prime Minister is not the head of the government and he does not lead a team of colleagues who man the administration, formulate the legislative programme, pilot

it through the National People's Congress and are collectively and individually responsible for all their acts. The Ministers do not make a team who may owe a personal allegiance to the Premier, although they are the top-ranking leaders of the Communist Party. Nor has the Premier any choice in the selection of his colleagues and he does not control the deputies either through his leadership of the legislative majority or his power of dissolution. So far as the Ministers are concerned the Constitution definitely says that they assist the Premier. In a country where centralism is the key-note of the administrative set up, nay, that of the whole system of society, the Premier and the Ministers both are the mouth-piece of the inner circle of the Party which decides the Party line. It may be democratic centralism, but really it is *minus* democratic principles and practices. The democratic dictatorship does not permit otherwise.

A country which does not permit the existence of political parties other than the Communist Party, cannot present even the semblance of a responsible government no matter in what colourful phrases the Constitution may describe its structure of government. The responsible system of government demands more than one party. It encourages discussion and criticism to make possible an alternative government. In the People's Republic of China the Constitution safeguards the people's democratic system, suppresses all treasonable and counter-revolutionary activities and punishes all traitors and counter-revolutionaries. It does not, accordingly, permit advocacy of a system of government other than the democratic dictatorship as it is a counter-revolutionary activity and it is a treason to be a counter-revolutionary. And what is the usual punishment for the traitors and counter-revolutionaries?

This apart, there is a striking overlap in membership of the State Council, the Standing Committee of the National Congress and the Politburo of the Central Committee of the Chinese Communist Party. In 1962, Premier Chou En-lai and twelve of his Vice-Premiers "were all regular or alternative Politburo members, while the remaining four Vice-Premiers were in the CCP (Chinese Communist Party). By changing rooms or titles, this group could sit as the top political group of either the Government or the party."<sup>4</sup> The Premier, the Vice-Premiers and the Secretary-General constitute the inner ring of the State Council and they meet in executive meetings.<sup>5</sup> The Constitution requires that any resolution or order issued by the State Council must first have been adopted "by a plenary or an executive meeting."<sup>6</sup> Plenary meetings are held once a month whereas executive meetings are held frequently even once or twice a week. What it exactly happens is that the Party Politburo, which has among its members nearly all those who constitute the inner-ring of the State Council, formulate the decisions. In order to give them a legal shape the executive meeting of the State Council is held. When it is reported to the Standing Committee and the National People's Congress their approval is *ipso-facto*. Acceptance is always unanimous. The published material, though meagrely issued by the Peking Government,

4. Ward and Macrides (Editors), *Modern Political System: Asia*, p. 179.

5. Organic Law of the State Council of the People's Republic of China, Article 4.

6. *Ibid.*, Article 5.

does not refer to any questions or debates in the National People's Congress. If any Deputy does really venture, it relates to the details of fulfilment. "In the last analysis," concludes Allen S. Whiting, "both the NPC (National People's Congress) and its Standing Committee seem to be window-dressing on a constitutional facade, with only the State Council serving important governmental functions at the top level."<sup>7</sup>

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7. *Modern Political System, Asia*, p. 181.

## CHAPTER V

# THE JUDICIAL SYSTEM

**Functions of the Judiciary.** The set up of the judicial system in China is described in Section VI of Chapter Two of the Constitution and it covers twelve brief Articles including the Procuratorate. The aim of the judiciary, as stated in the Report presented to the First People's Congress, is to provide for cheaper and speedy justice to the citizens. Article 78 of the Constitution says that in administering justice the People's Courts are independent and are subject only to the law. The law of the land is construction of Socialism and in the fulfilment of this fundamental task the whole people are enjoined to mobilize and rally their energies and, at the same time, to oppose enemies of Socialism within and without the country. The judiciary, therefore, like other organs of the State structure, are to educate the citizens in the spirit of devotion to the Fatherland and to the cause of Socialism. While analysing the need of the courts in the USSR, Lenin and Stalin emphasised the necessity of fighting the enemies of Socialism—the enemies of the people, traitors to the country, spies, saboteurs, and wreckers—and to fight for the "consolidation of the new Soviet system to firmly anchor the new socialist discipline among the working people." The Preamble of the Constitution of the People's Republic of China, too, emphasises this and Article 3 of the Organic Law of the People's Courts says, "The People's Courts, in all their activities, educate citizens in loyalty to their country and voluntary observance of law." The oft-repeated Article 19 clearly states that the People's Republic of China safeguards the People's democratic system, suppresses all treasonable and counter-revolutionary activities and punishes all traitors and counter-revolutionaries. The work of the courts in China is accordingly the same as that of Soviet courts. They must severely punish the violators of labour and State discipline and other offenders whose actions are detrimental to the building of Socialist society. It is the Constitutional duty of the citizens in China to abide by the Constitution and the law, uphold the discipline at work, keep public order and respect social ethics.

The judiciary in the People's Republic is not a separate branch of government, but a part of regular administration. The administration of justice is carried on by the law courts in co-operation with the Supreme People's Procuratorate, which exercises procuratorial authority over all departments of the State Council, all local organs of State, persons working in organs of State, and citizens, to ensure observance of law.

**Organization of Courts.** The judicial authority of the People's Republic of China is exercised by the following Courts:

- (1) Local People's Courts;

- (2) Special People's Courts;
- (3) The Supreme People's Court.

Local People's Courts are divided into three grades: basic people's courts, intermediate people's courts and higher people's courts. The establishment of higher people's courts and special people's courts is determined by the recommendation of the Ministry of Justice and the approval of the State Council. The establishment of intermediate and basic courts is determined by the recommendation of the judicial administrative organs of the provinces, autonomous regions or municipalities directly under the central authority, and the approval of the Councils of the Provinces or municipalities, or of the organs of self-government of the autonomous regions.

The task of the courts is to try criminal and civil cases, and, by judicial process, to punish criminals and settle civil disputes, in order to safeguard the people's democratic system, maintain public order, protect public property, safeguard the rights and lawful interests of citizens, and ensure the successful carrying out of socialist construction and socialist transformation in the country. The courts, in brief, in all their activities educate citizens in loyalty to their country, the socialist society it establishes, and voluntary observance of law.

Article 4 of the Organic Law of the People's Courts asserts that Courts administer justice independently, subject only to the law. It is applied to all citizens equally, irrespective of their nationality, race, sex, occupation, social origin, religious belief, education, property status or length of residence. Citizens of all nationalities have the right to use their own spoken and written languages in court proceedings and courts are to provide interpretation for any party unacquainted with the language commonly used in the locality. Cases are heard in public unless otherwise provided by law. The accused has the right to defence. The court may also, when deemed necessary, appoint a counsel for the accused.

The People's courts carry out the collegiate system in the administration of justice. In cases of first instance, justice is administered by a collegiate bench of a judge and people's assessors with the exception of simple civil cases, minor criminal cases and cases otherwise provided by law. In cases of appeal or protest, justice is administered by a collegiate bench of judges. People's courts at all levels are to set up judicial committees. The tasks of the judicial committees are to sum up judicial experience and to discuss cases of great importance or difficult cases as well as other questions relating to the judicial work. Members of judicial committees of local courts are appointed and removed by the people's councils at the corresponding levels upon the recommendation of the presidents of the local people's courts. Members of Judicial Committee of the Supreme People's Court are appointed and removed by the Standing Committee of the National People's Congress, upon the recommendation of the President of the Supreme Court. Meetings of the judicial committees of different sets of courts are presided over by the presidents of the courts. The Chief Procurators of the People's Procuratorates at the corresponding levels have the right to attend such meetings and participate in the discussions.



An appeal may be brought by a party from a judgment or order made by a local court as a court of first instance to the court at the higher level in accordance with the procedure prescribed by law. The people's procurate may lodge a protest against such a judgment or order before the court at the next higher level in accordance with the procedure prescribed by law.

If a person sentenced to capital punishment considers as erroneous the judgment or order of an intermediate court or a higher court as a court of last instance, he may apply to the court at the next higher level for re-examination. A judgment of a basic court and a judgment or order of an intermediate court, in a case of capital punishment, shall be submitted to the higher court for approval before execution. If the president of a court finds, in a legally effective judgment or order of his court, some definite error in the determination of facts or application of law, he must submit the judgment or order to the judicial committee for disposal. If the Supreme Court finds some definite error in a legally effective judgment or order of any lower court, or if an upper court finds such error in such a judgment or order of a lower court, they have the authority to review the cases themselves or to direct a lower court to conduct a retrial. If the Supreme People's Procuratorate finds some definite error in a legally effective judgment or order of a court at any level, or it finds such error in such a judgment or order of a lower court, they have the authority to lodge a protest against the judgment or order in accordance with the procedure of judicial supervision.

The Supreme People's Court is responsible to the National People's Congress and reports to it, or when the Congress is not in session, to its Standing Committee. Local courts are responsible to the local people's congresses at corresponding levels and report to them. The judicial work of the lower courts is subject to supervision by the upper courts. The judicial administrative work of courts at all levels is directed by the judicial administrative organs.

The term of office of Presidents is for four years. Citizens who are in enjoyment of political rights and have reached the age of 23 years are eligible to be elected Presidents, or appointed Vice-Presidents, Chief Judges of divisions, associate chief judges of divisions, judges and assistant judges. Presidents of local courts are elected by the local Congresses at the corresponding levels. Vice-Presidents, chief judges of divisions, associate chief judges of divisions and judges are appointed and removed by the local councils at the corresponding levels. A people's Congress has the power to remove from office the Presidents of the People's Courts whom they elect.

Citizens who have the right to vote and stand for election and have reached the age of 23 are eligible to be elected people's assessors. Their term of office and the method of their selection at all levels are to be prescribed by the Ministry of Justice. The assessors exercise their functions in the courts, are members of the divisions of the courts in which they participate, and have equal rights with the judges.

**Basic People's Courts.** Basic People's Courts are County People's Courts and Municipal People's Courts; People's Courts of autonomous

counties; People's Courts of municipal districts. A basic court is composed of a President, one or two Vice-Presidents, and Judges. A basic court may set up a criminal division and a civil division, each with a chief judge and, when necessary, associate chief judges. A basic court may, according to the condition of the locality, population and cases, set up people's tribunals. A tribunal is a competent part of the court and its judgments and orders are the judgments and orders of the basic court.

Basic courts take cognisance of civil and criminal cases of first instance, except such cases as are otherwise provided for by laws and decrees. Besides trying cases the courts settle civil disputes and minor criminal cases which do not need a trial, direct the work of conciliation committees and direct the judicial administrative work within their competence.

**Intermediate People's Courts.** Intermediate courts are established in various areas of a province or autonomous regions, municipalities directly under the central authority, large municipalities and autonomous **chou**. An intermediate court is composed of a President, one or two Vice-Presidents, chief judges of divisions and judges. It has a criminal division and a civil division, and such other divisions as are deemed necessary.

Intermediate courts take cognisance of:

- (1) Cases of first instance assigned by laws and decrees to their jurisdiction;
- (2) Cases of first instance transferred from the Basic Courts;
- (3) Appeals and protests against judgments and orders of the Basic Courts;
- (4) Protests lodged by the People's Procuratorate in accordance with the procedure of judicial supervision.

**Higher People's Courts.** Higher Courts are those of provinces, autonomous regions, and municipalities directly under the central authority. A Higher Court is composed of a President, Vice-Presidents, chief judges of divisions, associate chief judges of divisions and judges. The court has criminal division and a civil division and such other divisions as deemed necessary.

Higher People's Courts take cognisance of cases of first instance assigned to their jurisdiction; cases of first instance transferred from lower courts; appeals and protests against judgments and orders of the lower courts; and protests lodged by the procuratorate in accordance with the procedure of judicial supervision.

**Special People's Courts.** Military Courts, Railway-transport courts and water-transport courts come under the category of Special Courts. Their organization is to be prescribed by the Standing Committee of the National People's Congress.

**The Supreme People's Court.** The Supreme People's Court is the highest judicial organ. It supervises the judicial work of local courts and special courts. It is composed of a President, Vice-Presidents, Chief Judges of divisions, associate Chief Judges of divisions and Judges. It

has a criminal division and a civil division, and such other divisions as are deemed necessary.

The Supreme Court takes cognisance of :

(1) Cases of first instance assigned by laws and decrees to its jurisdiction or which it considers that it should try;

(2) Appeals and protests against judgments and orders of Higher Courts and Special Courts;

(3) Protests lodged by the Supreme People's Procuratorate in accordance with the procedure of judicial supervision.

**Chief Procurator and People's Procuratorate.** For the whole Republic there is the Supreme People's Procuratorate headed by the Chief Procurator who is elected for four years by the National People's Congress and is removed from office by the same authority. The Supreme People's Procuratorate exercises procuratorial authority over all departments of the State Council, all local organs of State, persons working in organs of State, and citizens, to ensure observance of the law. The Supreme Procuratorate is responsible to the National People's Congress and reports to it, or when the Congress is not in session to its Standing Committee. The Supreme Procuratorate consists of Chief Procurator apart, of the Deputy Chief Procurator, Procurators and other members of the Procuratorial Committee, all appointed and removed by the Standing Committee of the National People's Congress.

Local organs of the people's procuratorate and special people's procuratorates exercise procuratorial authority within the limits prescribed by law. Local organs of the people's procuratorate and the special people's procuratorates work under the leadership of the people's procuratorates at higher levels, and all work under the co-ordinating direction of the Supreme People's Procuratorate. In the exercise of their authority local organs of the people's procuratorate are independent and are not subject to interference of local organs of State.

The institution of the Procuratorate is unique in the judicial system of the People's Republic as it is in the Soviet Russia. The powers of the Chief Procurator are so extensive and his authority is so pervasive that it embraces all organs of administration as well as citizens. "The Soviet prosecutor officer," writes Vyshinsky, "is the watchman of the socialist legality, the leader of the Communist Party and of Soviet authority, the champion of Socialism." Similar is the position of the Chief Procurator in China. In the discharge of his supervisory functions the Chief Procurator has to ensure that there is the correct application and strict execution of the laws by all Ministries and other agencies subordinate to them, as well as by all officials and citizens of the Republic of China.

The work of the Procuratorate is closely associated with the Courts. Being the official guardian of law and consequently that of social legality it is the business of the Procuratorate to investigate all cases of violation of law and other crimes held as anti-revolutionary. The Procuratorate also protects the personal rights of citizens and safeguards the inviolability of their persons. No citizen in China may be arrested except by decision of the People's Court or with the sanction of the People's Procuratorate.

## CHAPTER VI

# ADMINISTRATIVE AREAS AND THEIR ADMINISTRATION

**Administrative Divisions.** The People's Republic of China is divided, for purposes of administration, into provinces, autonomous regions, and municipalities directly under the Central authority. The Provinces and autonomous regions are sub-divided into autonomous **chou**, counties, autonomous counties, and municipalities. The counties and autonomous counties are further divided into **hsiang**, and towns. Municipalities directly under central authority and other large municipalities are divided into districts. Autonomous **chou** are divided into counties, autonomous counties and municipalities. Autonomous regions, autonomous **chou** and autonomous counties are all national autonomous areas. It is, accordingly, complex divisions and sub-divisions.

**Administrative set-up.** For purposes of administration there have been established people's congresses and people's councils, the former representing the legislative organ and the latter executive, in provinces, municipalities directly under the central authority, counties, municipalities, municipal districts, **hsiang**, nationality **hsiang** and towns. Organs of self-government are established in autonomous regions, autonomous, **chou** and autonomous counties.

**Local People's Congress.** Local people's congresses at all levels are the organs of government authority in their respective localities. Deputies to the people's congresses of provinces, municipalities directly under the central authority, counties and municipalities divided into districts, are elected by the people's congresses of the next lower level. Deputies to the people's congresses of municipalities not divided into districts, municipal districts, **hsiang** nationality, **hsiang** and towns are directly elected by the voters. The number of deputies to local people's congresses and the manner of their elections are prescribed by electoral laws. The term of office of the provincial people's congresses is four years. The term of office of the people's congresses of municipalities directly under the central authority, counties, municipalities, municipal districts, **hsiang** nationality, **hsiang**, and towns is two years.

The local people's congresses at every level ensure the observance and execution of laws and decrees in their respective administrative areas, draw up plans for local economic and cultural development and for public work, examine and approve local budgets and financial reports, protect public property, maintain public order, safeguard the rights of citizens and the equal rights of national minorities. The local people's congresses elect, and have power to recall, the members of the people's councils at corresponding levels. The people's congresses at county level and above elect and have power to recall the presidents of people's courts at corresponding



levels. The local people's congresses adopt and issue decisions within the limits of the authority prescribed by law. The people's congresses of nationality *hsiang* may, within the limits of the authority prescribed by law, take specific measures appropriate to the characteristics of the nationalities concerned. The local people's congresses have power to revise or annul inappropriate decisions and orders issued by people's councils at corresponding levels. The people's congresses at county level have power to revise or annul inappropriate decisions issued by people's congresses at the next lower level as well as inappropriate decisions and orders issued by people's councils at the next lower level. Deputies to the people's congresses of provinces, municipalities directly under the Central authority, counties and municipalities divided into districts are subject to supervision by the units which elect them. Deputies to the people's congresses of municipalities not divided into districts, municipalities districts, *hsiang*, nationality, *hsiang*, and towns are subject to supervision by their electorates. The electoral units and electorates which elect the deputies to the local people's congresses have power at any time to recall their deputies according to the procedure prescribed by law.

**The Councils.** Local people's councils, that is local people's government, are the executive organs of local people's congresses at corresponding levels, and are the administrative organs of State in their respective localities. A local people's council is composed, according to its level, of the Provincial Governor and Deputy Provincial Governors, or the Mayor and Deputy Mayors, or the county head and deputy county heads, or the district head, and deputy district heads, or the *hsiang* head and deputy *hsiang* heads, or the town head and deputy town heads, as the case may be, together with council members. The term of office of a local people's council is the same as that of the people's Congress at corresponding level. The organization of local people's councils is determined by law.

The local people's councils administer their respective areas within the limits of authority prescribed by law. The local people's councils carry out the decisions issued by the people's congresses at corresponding levels and decisions and orders issued by administrative organs of State at higher levels. The local people's councils issue decisions and orders within the limits of authority prescribed by law. The people's councils at county level and above direct the work of all their subordinate departments and of people's councils at lower levels, as well as appoint or remove personnel of organs of State according to provisions of law. The people's councils at county level and above have power to suspend the carrying out of inappropriate decisions of people's congresses at the next lower level, and to revise or annul inappropriate orders and directives issued by their subordinate departments, and inappropriate decisions and orders issued by people's councils at lower level. The local people's councils are responsible to the people's congresses at corresponding levels and at the administrative organs of State at the next higher level, and report to them. The local people's councils throughout the country are administrative organs of State, and are subordinate to and under the co-ordinating direction of the State Council.

**Organs of Self-Government.** The organs of self-government of all autonomous regions, autonomous *chou*, and autonomous counties are form-



ed in accordance with the basic principles governing the organization of local organs of State as described above. The form of each organ of self-government may be determined in accordance with the wishes of the majority of the people of the nationality or nationalities enjoying regional autonomy. In all autonomous regions, autonomous **chou** and autonomous counties where a number of nationalities live together, each nationality is entitled to appropriate representation on the organs of self-government.

The organs of self-government of all autonomous regions, autonomous **chou** and autonomous counties exercise the functions and powers of local organs of State as in the case of local people's congresses and local people's councils. The organs of self-government of all autonomous regions, autonomous **chou** and autonomous counties exercise autonomy within the limits of authority prescribed by the Constitution and the law. They administer their own local finances, organise their local public security forces in accordance with the military system of the State. They may draw up statutes governing the exercise of autonomy or separate regulations suited to the political, economic and cultural characteristics of the nationality or nationalities in a given area, which statutes and regulations are subject to endorsement by the Standing Committee of the National People's Congress.

In performing their duties, organs of self-government employ the spoken or written language or languages commonly used in the locality. The higher organs of State are required to fully safeguard the right of organs of self-government of all autonomous regions, autonomous **chou** and autonomous counties to exercise autonomy, and should assist the various national minorities in their political, economic and cultural development.

## CHAPTER VII

# THE COMMUNIST PARTY OF CHINA

**Leader and Core in the Country's Life.** The general programme of the Chinese Communist Party declares, "As the highest form of class organization, the party must strive to play a correct role as the leader and core in every aspect of the country's life." Liu Shao-chi, in his report on the Draft Constitution of the People's Republic of China presented to the First National People's Congress,<sup>1</sup> maintained that the leadership of the Communist Party of China was essential not only to the Chinese people's democratic revolution, but also to the realization of socialism. It must also combat any tendency to departmentalism, which reduces the party's role and weakens its unity.

There is no mention of the Party in the Constitution of the People's Republic of China. But though the Party exists outside the government, yet as a teacher and leader it functions as the prime force inside the government. In the politics of China there is only one party which operates and since it is clearly the decision-making centre and implementing organization to the realization of socialism, it brooks no rival in its monopoly of power. Its members staff all the key positions in government and society. "Explicit injunctions weld them into a disciplined body under central direction from party organizations and officials at parallel or higher levels. Its leaders decide government policy, regardless of their titles or constitutionally vested responsibilities. Its ideology is the only officially propagated doctrine, mandatory for members and non-members alike."<sup>2</sup> Party members are not to limit their loyalties just to government and thereby be the tools of "departmentalism." They must respectfully and rigidly accept the higher dictates of Party. The rules of the Party Constitution prescribe, "Party decisions must be carried out unconditionally. Individual party members shall obey the party organization, the minority shall obey the majority, the lower party organs shall obey the higher party organs, and all constituent party organs throughout the country shall obey the National Party Congress and the Central Committee."<sup>3</sup>

**Democratic Centralism.** This is democratic centralism. Article 2 of the Constitution of the People's Republic of China also emphasises the practice of democratic centralism within the structure of the government. It says, "The National People's Congress, the local people's congresses and other organs of state practise democratic centralism."— In his Report on the Draft Constitution, Liu Shao-chi explained this provision in the Constitution and said, "Our system of democratic centralism is explained by the fact that the exercise of state power is unified and concentrated in the

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1. September 15, 1954.

2. *Modern Political Systems: Asia, op. cit.*, p. 154.

3. Article 19(6).

system of people's congresses...., we Marxist-Leninists have long since publicly declared that we stand for centralisation.... In the Draft Constitution, we have combined a high degree of centralism with a high degree of democracy. Our political system has a high degree of centralism but it is based on a high degree of democracy." Mao Tse-tung, in his book **On Coalition Government**, stated that the political system of China is "at once democratic and centralised, that is, centralised on the basis of democracy and democratic under centralized guidance." Democratic centralism is, therefore, a keynote of Communist doctrine and it is applied meticulously at all levels, governmental and social.

The democratic aspects of "democratic centralism" are manifested in free discussions before decisions are taken and in elections of higher bodies by lower groups. Elections are unanimous otherwise it creates factionalism, and decisions once arrived at must be obeyed vigorously and regularly. Deviation therefrom is tantamount to indiscipline which is a heinous crime in Communist ideology. The General Programme of the Party repeats at every step that "the party is a united militant organization, welded together by a discipline which is obligatory on all its members. And members of the Party, as said earlier, staff all the key positions in government and society. To sum up, the Chinese Communist Party, which for all intents and purposes means the Politburo, and more appropriately its Standing Committee, is the ultimate authority for all political decisions, although others may be politically vested with public responsibility. It will be instructive to repeat that the State Council, the Standing Committee and the Politburo present a striking overlap in membership. In 1962, Premier Chou En-lai and twelve of the sixteen Vice-Premiers were all regular or alternate Politburo members, while the remaining four Vice-Premiers were in the Central Committee. "By changing rooms or titles, this group could sit as the top political group of either the government or the party." This is democratic centralism in actual practice and it is the most important doctrine of communism.

**The Chinese Communist Party.** In 1921, thirteen anarchists, radicals and Marxists met in Shanghai and established the First Congress of the Chinese Communist Party. In 1951, their number had grown to 5.8 million and in another decade this number went up to 17 million. Although the Chinese Communist Party is the largest Communist Party in the world, yet it still comprises only 2 per cent of China's total population. The membership is strictly limited. Anyone who has attained the age of eighteen and who does work and does not "exploit the labour of others" is eligible to become a member. But a prospective member, according to the rules of the Party, must be recommended by two full members of the Party. If the Party branch as well as the next higher Party Committee approves, he is given a probationary status. After a satisfactory completion of one year of "elementary education," during which his "political qualities" are carefully observed, he is admitted as a full member of that group which approved him first for the probationary status.

**Organization of the Party.** At the bottom is the local cell and the local branch chooses delegates to county or municipal party Congress, which

4. *Documents of the First Session of the First National People's Congress*, Peking, 1955.

in turn elects provincial party Congress. The provincial Congress sends delegates to a National Party Congress which then chooses a 196 man Central Committee as "the highest leading body of party organization... when the National Party Congress is not in session." It means that the Central Committee directs the entire work of the Party when the National Party Congress is not in session. The elections at all levels are to be held periodically according to the Party Constitution. But in practice they prove to be less than periodic and at the higher levels, therefore, the party positions are held beyond their constitutional tenure. The Party Congresses are to elect the National Party Congress after every five years. But actually, only two such congresses have been elected during the last two decades.<sup>5</sup>

The National Party Congress, consisting of more than one thousand members, is elected for five years and it must meet every year unless the Central Committee decides that "extraordinary conditions" do not permit such a meeting. There has been only one meeting since 1956. It means that the Central Committee has exercised its extraordinary power of not convening annual meetings of the National Party Congress for more than a decade now. Since the Congress elects the Central Committee "and therefore is legally superior to it, failure to convene the parent body removes the problem of co-responsibility to the membership at large. In this manner, reality mirrors theory, reversing the image in the process." In fact, the Congress does not elect the Central Committee. It is the outgoing Politburo and to be more precise its Standing Committee of seven men, which actually select the Central Committee. The Standing Committee of the Politburo includes the top-ranking leaders, such as Mao Tse-tung, Liu Shao-chi, and Chou En-lai, and the choice actually rests with them if not with Mao alone.

The Central Committee does not even formulate policy. It is a numerous body which meets once or twice yearly and that, too, for only two to three weeks. It is on record that at times of particular or prolonged crisis, the Central Committee does not meet at all. No Central Committee plenum was held in 1960, despite the marked deterioration of Sino-Soviet relations and the decline of agricultural productivity that had begun in 1958. When the tenth plenum of the Central Committee met in 1962, only four days were allotted for discussion of Party as well as national affairs. Taking into account the infrequency and short duration of its meetings, the Central Committee functions mainly as a sounding board for previously determined policy.

The Politburo with a membership of twenty is the core of the important decision makers and "probably acts as a controlling nucleus for the larger body." The Politburo decides and transmits these decisions to the Central Committee and it endorses them to become a party line. Consistent with the principle of democratic centralism it is obligatory on all to accept and implement all such decisions without demur. Here is a matter of fact summing up of the position and functions of the Central Committee: "...the Central Committee is too large and meets too infrequently and too briefly to be the real decision-making centre of the CCP

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5. In 1945 and 1956.

(Chinese Communist Party). Yet it is much more than a rubber stamp for the Politburo. It gives legitimacy to Politburo decisions in accordance with the party constitution. It transmits decisions to lower levels linking the peak of the political pyramid with its mass base. It provides status to worthy party members and, finally, offers a proving ground for potential leader."

Politburo, like various other Party organs, is a numerous body and has, accordingly, its Standing Committee which constitutes the brain trust of the Politburo. And it consists of men of the stature of Mao Tse-tung, Chou En-lai, Chou Teh, Ch'en Yun, Teng Hsiao-p'ing and Lin Piao. With this galaxy of Party men, it is but natural that the Standing Committee should constitute the apex of national policy formulation.

Other Central Committee organs are the Secretariat and Departments, as of Rural Work, Industrial Work Propaganda, Organization, Social Affairs, Control Committee, etc. The Secretariat monitors the execution of policy on a daily basis through the Party Central organs, bureaus, and committees. The Control Commission, according to the Party rules, is empowered "to examine and deal with cases of violation of the party constitution, party discipline, Communist ethics, and the state laws and decrees on the part of party members; to decide on or cancel disciplinary measures against party members; and to deal with appeals and complaints from party members." It consists of seventeen regular and four alternate members. In September 1962, the tenth plenary session of the Eighth Central Committee decided to enlarge the membership in order "to strengthen the work of the party Control Commission." It emphasises the importance of the Control Commission which is entrusted with a duty to combat "improper" attitudes and "sectarian" tendencies of the Party members. The party rules enjoin that every Party member "has the duty to report to the party control committees whatever he knows about infractions against party rules, party discipline, Communist morality, national laws and decrees on the part of other party members. Moreover, it is his duty to help the party control committee struggle against such phenomena." Control committees exist at every Party level, except in primary branches and cells.

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# Government of Japan

## CHAPTER I

# THE HISTORICAL BACKGROUND

### Geography

The Japanese archipelago, situated off the east of the Asian Continent, consists of the four principal islands of Honshu, Hokkaido, Shikoku, and Kyushu plus thousands of small islands. In area Japan is 369,662 square kilometres or 142,727 square miles (only for the area under actual administration of Japan) and it stretches 2,400 kilometres or 1,500 miles in a north, south-west direction, between 27 and 45 degrees north. Japan is roughly one-twentieth the size of the United States of America, one-eighth of the size of India, but is slightly larger than that of the United Kingdom or Italy. Japan lies in the temperate zone and enjoys abundant foliage. It offers much in the way of scenic beauty, with many lakes, rivers and mountains.

Japan is 80 per cent mountainous. There are 250 mountains higher than 2,000 metres. The highest is Mt. Fuji which towers to 3,776 metres. These mountains are the results of the extreme instability of the earth's crust. There are still about 50 active volcanoes. Hot springs are counted by thousands. As very few plains can be found in Japan, they are of great economic import. It is here that a great deal of food must be produced to support a very large population and ever expanding industries. The cultivated land is 16 per cent of the total land area.

Japan has many rivers, but they are in general short and mostly unnavigable. They are most useful for irrigation and for hydro-electric power. With an extremely irregular coast line of 26,500 kilometres, Japan abounds in good natural harbours which are a great aid to industry, communication and trade. By the end of World War I, she had achieved the position of the world's third greatest naval and maritime power.

The climate in Japan is favourable for the growing of rice, the basic agricultural product in the Japanese diet. Where snowfall is frequent there are no winter crops, but in Southern Japan, the growing season is quite long. Prominent features of the Japanese climate are the rainy season in early summer typhoons. The rainy season is caused by low pressure areas, originating in Formosa, and the Yangtze Valley of China. Rainfall ranges from 1,000 to 2,500 mm. annually.

Japan is thus an island empire characterised by complex geographical features and this fact has profoundly affected the political character of the country during the past two thousand years and more. In the first place, the island and the mountains make land communications pretty difficult and consequently have produced regional outlook and psychology of the people. Each region has its own distinct history and traditions and possessed in the past some sort of political identity too. This sort of local-

ism and political fragmentation disappeared after the Restoration in 1868, when Japan was unified for the first time in her history. Yet, this outlook did not disappear altogether from the minds of the people. Their political behaviour and, as such, the practical politics of the country are still prominently influenced by the historical legacy of the political decentralisation and localism.

Secondly, Japan's insularity provided for her a well defined national frontier which created amongst her people a sense of group identity and strong nationalist feelings. Japan's nationalism is proverbial. Then, unlike Korea which is physically contiguous to China, the Japanese have developed their own culture by selecting only those elements of Chinese civilisation which suited their genius and served their needs. In due course such elements "were assimilated into Japanese culture so completely and in such a manner as to lose their original identity, frequently giving rise to products far different from, and even superior to original." The cultural homogeneity of the Japanese has produced such a sense of social solidarity amongst them that at no stage of Japan's history there has been development of any kind of racial antagonism. "Racism, therefore, has been unknown throughout her history and racial problems have never arisen in Japanese politics for racial groups have never existed to form a minority of any sort." According to the latest available statistics, Japan has a population of 9,71,90,000 out of which only 0.7 per cent belong to registered minority groups. "There is no other major nation," writes Ward, "with so small an admixture of identifiable minority elements." This also helps to explain, he further adds, "the strong nationalism frequently displayed by the Japanese in modern times. Their geographical isolation, common language and long history combine with racial identity to facilitate the development of a very strong "in group" feeling against foreigners. The result is a nation which although subject to a number of domestic cleavages, has in the past usually presented a strong and united front to the rest of the world." Nature has also endowed Japan with a degree of National Security. Prior to 1945, no one had ever successfully invaded Japan since the pre-historic times. Her national development was, therefore, achieved without the disruptive effects of foreign invasions and in accordance with the expression of the native genius. "This fact," according to Ward, "has had two prime consequences for the Japanese. First, it has enabled them to turn on and off almost at will the stream of intercourse with the Asian countries or the rest of the world. It made possible, for example, the effective adoption of deliberate policy of national seclusion for almost 250 years prior to 1854. Second, it has enabled the Japanese to concentrate exclusively and almost fiercely on domestic political issues, domestic power struggles and internecine strife with little or no concern for the effect that might have on the external safety of the nation. National Security carried to this extent is unparalleled among the other great states of modern history."

1. Chitoshi Yanaga, *Japanese People and Politics*, p. 12.

2. On October 1, 1964. *Information Bulletin*, Embassy of Japan, New Delhi, January 15, 1965.

3. Ward, Robert E., and Macridis, Roy C. (Editors), *Modern Political Systems: Asia*, p. 46.

4. Ward and Macridis, *Modern Political Systems: Asia*, op. cit., pp. 39-40.

## The People

The origin of the Japanese is shrouded in mystery. There is no conclusive proof or definite evidences are available to determine how and when the original Japanese came to settle in the archipelago. "However, of one thing there is no doubt whatever. Even at the dawn of history the Japanese people were already a mixed race and not of a single racial stock." The first people to settle on the islands were the Ainu in the neolithic period. As to who they were and from where did they actually come, it is not known. During the stone-age the Ainu population were displaced and gradually driven northward by successive migrations of Mongoloid people who came from Mongolia and Manchuria through Korea. At a much later period came the migration of the Han people and this continued down into the early stages of Japan's historic period. "but numerically they constituted only a minor addition." Thus, the Japanese people are of a very heterogeneous origin, "combining practically all the major strains of the human race, namely Caucasoid, Negroid, Mongoloid and all other variations, mixtures and mutations." In spite of their hybrid origin, the Japanese are today a remarkably homogeneous nation with a common language and common culture and common way of life acquired and transmitted in the course of a long common history.

Japan is one of the world's most literate nations. As early as 1886, three to four years of elementary education were required for all Japanese children. In 1908, this was increased to six years and since 1947, nine years of combined elementary and junior secondary education is compulsory. It comes to practically universal literacy when 97-98 per cent of the total population are literate. In Great Britain and the United States of America the percentage of literacy comes to 90. In most of the countries of Asia literacy ranges between 20 and 30 per cent.

Japan's rapid rise and attaining meritorious stature in the field of science and technology has been regarded as unparalleled even by any Western nation. Since the late nineteenth century Japan has produced a number of scientists of huge repute whose eminent contributions had attracted the attention of the scientific world. Before World War I, Dr. Hantaro Nagaoka developed a theory of atomic structure anticipating the discovery of the atomic nucleus. In 1934, Dr. Hideki Yukawa postulated on theoretical grounds the possible existence of mass (meson), intermediate between a proton and electron.

In the development of technology Japan made amazing strides. By the end of World War I, she had achieved the position of the world's third greatest naval and military power. The automatic power loom invented by Sakichi Toyoda in 1930, revolutionised the Japanese textile industry thereby paralysing Lancashire in her own home market. Japan also led the world in the production of synthetic fibre. The heavy industry, which was slow in its development in the early stages, made rapid growth since World War I, and in spite of the heavy damage on its productive facilities and resources caused by Japan's involvement in World

5. Chitoshi Yanaga, *Japanese People and Politics*, p. 110.

6. *Ibid.*

War II, she had made amazing recovery. The index of industrial production increased by 2.7 times in the seven years from 1955 to 1962.

But agriculture still accounts for 27 per cent of total employed persons in Japan and this proportion is larger than those of Western nations. Japan being a group of small volcanic islands with countless hills and mountains, there is little arable land—60,720 square kilometres or 16 per cent of the total land area. Formerly, Japanese farmers earned just a small income from land by intensive cultivation of tiny plots of land. In recent years, an intensified cultivation, use of better seed and improved fertilizers and machines has brought about great increase in crop yields, but the average income per capita engaged in agriculture is still low. The income that can be attributed to the agricultural population is as small as 10 per cent of the total national income. And the income gap between agriculture and other industries is one of the social problems in Japan, which created a marked impact together with the imbalance created by small enterprises on the political behaviour of the people.

There are three major religions in Japan, Shintoism, Buddhism and Christianity. Shintoism is the traditional religion of ancestor worship. It offers worship to the imperial ancestors and the ancestral spirits, and, accordingly, its association with the mythology of the origin of the Japanese nation made it an accepted religion of the government. In 1868, immediately after the Meiji Restoration, the government established a Shinto office and declared Shinto Shrine as a national institution. The Goddess enshrined in the Central Shrine was Amaterasu-Omikami (Heaven shining—Great Goddess) believed to be the founder of the Japanese nation. Shintoism, therefore, instilled in the Japanese religious worship of the nation which accounted for their extreme patriotism and inconceivable sacrifices which the Japanese made and were called upon to make for the integrity and supremacy of the nation. But since 1947, Shinto does not remain a government religion and has been reduced to the same status as all other religious institutions in Japan are.

Buddhism came to Japan from India through China and Korea in 538 A.D. It has the largest following in the country (65,114,000 in 1962) and it has exercised a great influence on the social institutions and customs of the country and its people. It has also greatly contributed to the promotion of learning and arts.

Christianity was first introduced in Japan by Saint Francis Xavier, a Jesuit Father, when he came to Kyushu in 1549. It spread quite rapidly at first with the encouragement of some feudal lords, but in the latter half of the sixteenth century, it was banned. It was not until the middle of the nineteenth century, when Japan opened its doors to foreign nations, that Christianity returned. Christians, both foreign missionaries and Japanese, became very active and the number of believers in Christianity has steadily increased. In 1962, they numbered 858,083. Christianity is regarded as representing Western civilisation which modernised all aspects of Japanese life after the Meiji Restoration.

### **Constitutional Development.**

There are three stages which cover the development of Japan's cons-



titutional history—from the dawn of history to 1185 A.D., from 1185 to 1868, and the third from 1868 onwards. Chitoshi Yanaga describes the three stages as pre-feudal period, the feudal period, and the post-feudal period. An insight into these three stages serves "as a background and setting, of past and present Japanese politics and government."

The primitive Japanese society was a confederation of clans, each composed of households claiming origin from a common ancestor and led by a common chieftain. Around the 5th century B.C., strong and well-organized kingdoms developed in the Kvushu and Kinki (Osaka-Kayoto, areas). One of them was ruled by the House of Yamato. The present Imperial family is descended from this House. Around 200 A.D., the power and influence of the House of Yamato began to increase rapidly. By the beginning of the fourth century, the Japanese became a united nation as a result of the merger of small states with an Emperor as their head. But the authority of the Emperor was neither direct nor absolute. It was indirectly exercised through the chiefs of the clans. This condition of diffused political power continued until 645, when Japan entered the second stage of the pre-feudal development. This stage extends up to 1185, when feudalism had been completely established. During this stage the national unity was further strengthened by taking away the political power from the clan chiefs and consolidating it in the Emperor.

Round the beginning of the fifth century Japan had greatly come under the influence of Chinese civilisation by borrowing her culture as well as institutions. In 604, the Regent Prince Shotoku composed in Chinese his famous "Seventeen Article Constitution" which incorporated Chinese exhortations enjoining on the officials harmony, obedience, and honesty in the administration of public affairs. Consistent with Confucian precepts, the ideology of centralised monarchy was emphasised in the Shotoku Charter. Article 12 provided for oneness of the Emperor and supremacy of his authority.

So profound was the Chinese influence on Shotoku that the ruler adopted for himself the same title, the Wa, as it was used by the Chinese Emperor. This title continued to be used for a little more than a century when the Wa ruler of Japan incurred the displeasure of the Emperor of China. In a message to the Emperor of China the ruler of Japan had innocuously thus written, "The Son of Heaven in the land where the sun rises addresses a letter to the son of Heaven in the land where the sun sets." It enraged the Chinese Emperor. He considered such an address derogatory to his position and might and, therefore, immediately directed his courtiers that such discourteous messages in future should not be brought to his attention. The Japanese Emperor felt insulted and discarded the title of Wa. But the Japanese invariably since then referred to their country as "the land of the rising sun," Jile-pen in Chinese and Nippon in Japanese. This is how the country became Japan.

Then came the Great Reform of 646, which aimed to redistribute

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7. *Japanese People and Politics*, p. 113.

8. Tsunoda, Ryusaku, William Theodore de Bary and Donald Keene, Comps. *Sources of the Japanese Tradition*. The text of Shotoku's Constitution is given in Tsunoda, pp. 49-53.

the economic power in favour of the Central Government by abolishing all hereditary guilds and depriving local magnates of the manors and serfs which they had appropriated to themselves. Governors were appointed, communications were improved and made safer. Registers of population were drawn up and land was redistributed according to the "mouth-share-field," that is, each household was allotted land in proportion to the number of the people of each household. Old taxes and forced labour were abolished and a system of commuted tax in kind was set up. This process of centralizing the authority of the monarch was based upon the Chinese doctrine, "under the heavens there is no land which is not the King's land. Among the holders of land there is none who is not the king's vassal."

It took well over half a century for the reforms to come to complete fruition. According to the Shinto injunction the palace of the Emperor was required to be changed after his death and consequently the Yamato Court maintained no fixed residence. In 710 this custom was abandoned and a permanent Japanese capital was constructed at Nara, near the present city of Kyoto thereby establishing a Central Government. The Central Government took the model from China with court ranks and an elaborate system of legal code.

In this way the Great Reform initiated in 646 finally helped to establish a powerful monarchy in Japan. Both Confucian and Shinto doctrines were used to raise the prestige of the Imperial power. Shinto worship was actually given precedence over mere administrative matters and it was regarded as the most important business of the State. The Emperor, accordingly, combined in himself three functions. He was the high priest of the nation, the ruler exercising sovereign power over the people and their lands, and the Commander-in-Chief of the nation's military forces.

But towards the end of the ninth century there appeared conditions which helped to reverse the existing order. Native traditions of clan privilege and local autonomy reasserted themselves to imperil the Imperial rule. The unprecedented ascendancy in power of the Fujiwara clan aside, the great increase in the number of the tax-exempt manors, and the rise of military nobility in the provinces were important factors which helped to diminish the power and influence of the monarch. From the beginning the lands of the church and certain officials were exempt from the payment of tax. The Emperor in his bid to encourage reclamation of land would temporarily make it tax free but in the long run decreed all such exemptions permanent. Provincial and court officials were granted tax-free manors in compensation for their services. The Emperor would also, very often, make gifts of land to his courtiers. With such an increasing number of tax-free possessions, the entire burden of tax fell upon the non-exempt small-holders. They also found an escape by commending their lands to exempt-holders and in this way started the vicious circle. Even the manor nobles did not hesitate to resort to the same device. "Thus, hierarchical structure of vassals—commendors and commendees—came into being. The Fujiwara Princes of the court and Toadiji (temple) were among the greatest immune land holders of the country and

thousands of the Emperor's subjects looked to them for protection from the imperial tax-gatherer."<sup>9</sup>

With depleted exchequer the authority of the Emperor declined. Administrative supervision and police protection outside the capital became deplorably inadequate and virtually there was no protection to life and property. Many manor owners began to maintain peasants as their private soldiers to safeguard their holdings and thus came into existence the Samurai, the warrior class. At a later stage, the nobles, who out of dissatisfaction with the Fujiwara rule left the court and settled in the outlying areas, became the leaders of the warrior class, and a most important segment of the society. They belonged to the Taira and Minamoto clans. But both these clans soon clashed with each other for supremacy and control of the provinces. In 1192, Yoritomo, head of the Minamoto clan, defeated the Taira clan and established his final supremacy. Yoritomo's Shogunate, military government, assumed all administrative functions that had hitherto belonged to the Emperor. Thus, "after a period of nearly a century of chaos and fighting, peace and order were finally restored. But the usefulness of the court aristocracy was now at an end. In its place appeared a feudal system under the domination of the military which lasted for nearly seven centuries leaving a deep impress upon the character of the people and their ideas, institutions and behaviour."

### Feudalism, 1192—1868

During the feudal period, when the warrior class, Samurai, held the political power instead of the nobility, the Imperial Family was rendered politically impotent though never eliminated from the political scene. Indeed, they were ever in the look-out for an opportunity "to get control of the person of the Emperor because whoever controlled him could rule in his name and thus acquire an aura of legitimacy." After the death of the second successor to Yoritomo, the Hojo clan came to power. It extended and strengthened the military government and even the manors of the nobility remained free from Samurai administration.

The decentralised feudalism which emerged after the disappearance of the nobility and lasted till the beginning of the seventeenth century was characterized by vigour and simplicity of administration. Private property was fully entrenched. The relationship between the lord and the vassals was stressed "to the point of extolling and elevating loyalty to one's master as the highest virtue, for which no sacrifice was too great." Laws were simplified and justice was administered with speed and impartiality. The great achievement of the Hojo regime was the repulse of two Mongol invasions in 1274 and 1281. But the Samurai heroes responsible for repulsing the Mongols demanded rewards as a compensation for their sacrifices. It was not possible to meet such a demand due to the financial difficulties of the Shogunate. The dissatisfied war heroes revolted and the local administration began to break down. It was a green signal for the Imperial court to make a bid for the restoration of power

9. Theodore McNelly, *Contemporary Government of Japan*, p. 9.

10. Kahin, George McT. (Ed.), *Major Governments of Asia*, p. 155.

by overthrowing the Shogunate. Their efforts succeeded and the Imperial rule was restored once more.

But it was short-lived. Fief-hungry barons found an opportunity for satisfying their ambitions. The Ashikaga clan began to defy the Imperial court and it was joined by other Samurai. This led to the establishment of two Imperial courts, the Northern Court and the Southern Court. The Ashikaga clan established a military government at Muromachi, Kyoto, and supported the Northern court. For some time, armed strife continued between the two rival courts when in 1590 order was finally resorted to by Hideyoshi Toyotomi. He succeeded in bringing national unity and sought to extend Japanese influence overseas. Hideyoshi's work of pacifying and uniting the country was consolidated by Ieyasu Tokugawa, founder of Tokugawa Shogunate.

The Tokugawa family ruled Japan for a period of 264 years. The centralised political structure of feudalism under the Tokugawa regime was in fact government by the Samurai. The successive Shoguns, supreme military commanders, were appointed by the Emperor from the Tokugawa family, and they ruled the whole nation. Under the command of the Shogunate the feudal lords governed their domains with absolute power over their people and property. It was during this period that Japan adopted a policy of seclusion which practically closed her doors to the outside world and, thus, the nation lost contacts with foreign States.

Under the Tokugawa Shogunate there gradually emerged a rigid class distinction between the Samurai, farmers, artisans, and merchants. The division of the people into four distinct classes was accompanied by inequalities of treatment and the worst sufferers in this respect were the peasants, although they outranked the artisans and the merchants in the social hierarchy. The Samurai, who were the smallest in number, held political power and enjoyed all kinds of political and social privileges. The peasants were not permitted to leave their lands and were burdened with heavy taxes. However, one redeeming feature of this era was that unprecedented peace under the Tokugawa led to the growth of manufacturing industries and commerce. New cities developed and prosperity of the merchants increased their social influence.

It was towards the middle of the eighteenth century that the Japanese people came into contact with the Western nations for the first time. The first to come were the Portuguese traders in 1543 to be followed by the Jesuit missionaries and a group of Spaniards. Trade relations with the Dutch and the British were also established. The missionaries were successful in converting a sizable number of the Japanese, particularly in the South, to Christianity. The activities of the missionaries, however, alarmed the Shogunate as they apprehended political interference by the Western powers in Japan through religious infiltration. Christianity was, accordingly, banned in Japan and the country was closed to all foreigners, except the Dutch and the Chinese traders, who were confined to a small land at Nagasaki.

### **The Meiji Restoration, 1868**

The end of the eighteenth century witnessed vital changes in the



political and social life of Japan. The country was being put to an increasing pressure for opening her ports to foreign ships and there appeared to be no alternative left to the Government but to revise the previous decision. There were also quite visible signs everywhere indicating decay of the feudalistic social and political structure. Historic clan enmities against the Tokugawa became significantly prominent. All these factors coupled with the dissatisfaction of the Samurai on their deteriorating economic and social status gave birth to a movement for the restoration of the power to the Emperor. The movement was strengthened when in 1854, Japan abandoned the policy of isolation and concluded a treaty of amity with the United States to be soon followed by similar treaties with other European countries. The enemies of the Shogun found a favourable climate to impress upon the Japanese people that such treaties posed a serious threat to the integrity of Japan and would lead to Western imperialistic exploitation. The movement gained momentum and its leaders rallied round the Emperor by proclaiming "Revere the Emperor, expel the barbarians." The spark set in the slogan had the desired effect. The Tokugawa regime ultimately collapsed despite the frantic efforts to keep it in power. In 1867, Shogun Tokugawa declared the end of the military government, *bakufu*, and in 1868, the sixteen-year-old Emperor Mutshito ascended the throne.

Immediately after the assumption of power by the Emperor the "Five Article Charter Oath" was issued which summed up the policies of the new regime. Its immediate issuance was deemed imminent in order to calm the apprehension of the rival factions that were vitiating the atmosphere. "The Five Article Charter Oath" provided that :

- (1) Deliberative assemblies shall be widely established and all matters decided by the public opinion;
- (2) The whole nation shall unite as one in carrying out the administration of the affairs of the State;
- (3) Every person shall be given the opportunity to pursue his own calling so that there may be no discontent;
- (4) Evil customs and usages of the past shall be discarded and justice shall be based upon the just laws of Nature;
- (5) Wisdom and knowledge shall be sought throughout the world in order to strengthen the foundations of the imperial rule.

The period intervening the Restoration and promulgation of the Meiji Constitution (1868-89) is described as pre-parliamentary. This period, according to Chitoshi Yanaga, "was an interlude, a transition stage, between feudalism and constitutionalism which was dominated by a small oligarchy under an interim system of absolute monarchy."<sup>11</sup> Every effort was made to stabilize monarchy and to make the Emperor's writ run throughout the length and breadth of the country. The Imperial capital was moved from Kyoto where it had been located since 794, to Edo, the capital of Tokugawa Shoguns. And to mark the transfer of political authority, Edo was renamed Tokyo, and the Shogun's palace was taken

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11. *Japanese People and Politics*, op. cit., p. 118.



over by the Emperor. A "constitution" was also promulgated in 1868 which provided for the revival of the Chinese-inspired institutions of pre-feudal epoch. The traditional division of society into four classes—Samurai, peasant, artisan and merchant—together with the rights and privileges of the Samurai and the Tokugawa fiefs were abolished as also the old land tenure system. In their place, "came mass public education, conscription, equality before the law, railroads, modern industrial plants, technology, a merchant marine, and a modern army and navy."<sup>12</sup>

But it was not a smoother switch over at least in the first decade after the Restoration. Opposition was intense on all sides. The sweeping changes from feudalism to oligarchically-run absolute monarchy headed by a minor Emperor, were subjects of bitter dispute. The people were neither friendly nor sympathetic to the new regime and its economic and political policies. Opposition within the government itself made its task uneasy and hampered the stability of the new regime. In 1877, discontented Samurai rebelled. The entire attention of the government was, therefore, in the first decade of its career, devoted to putting down peasant uprisings and beating down obstructive opposition.

Conditions, however, settled down when the Satsuma Rebellion was put down "as the last futile attempt to use force against the government." The time was, accordingly, opportune to determine finally the form of government which should mould and shape the destinies of the nation. But there was fundamental disagreement on this issue. The opposition was pretty vocal in demanding an early establishment of a representative parliament and organised political parties manifesting the will of the people. The government was reluctant to accede to this demand in the beginning, but ultimately yielded to the irresistible pressure and ceaseless agitation of the opposition. In 1881, the government declared that a constitution providing for elective parliament would be promulgated in 1890. Immediately after this announcement, political parties came into existence. The first was the Liberal Party which came into being on October 29, 1881 and it was followed by the Constitutional Progressive Party on March 15, 1882. Only four days later, on March 19, the Constitutional Imperial Party appeared on the scene. "All the parties concentrated their energies on influencing the substance of the Constitution, each one intent on making its views prevail."

Prince Ito Hirobumi was entrusted with the task of formulating the Constitution. He went to Europe to study the working of the constitutional systems of the West and returned to Japan after a stay of eighteen months. He visited almost all the countries of Europe but he came with a conviction that a Constitution similar to Prussia would best suit Japan. In March 1884, the Bureau for the study of the Constitution in the Ministry to Imperial Household was set up and it functioned under the direct supervision of Ito. It took two years to complete the research preliminary to the drafting of the Constitution. The drafting Committee consisted of Ito Hirobumi, Ito Miyoji, Inoue Tsuyoshi, and Kaneko Kentaro. "The committee carried on the work on the little Island of Natsushima off Yokosuka where they lived in isolation, out of contact even with their

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12. Ward and Maerdis (Eds.), *Modern Political Systems: Asia*, p. 24.

families. Absolute secrecy was maintained to prevent any premature publicity which might lead to obstruction and delay if not failure. Only two foreign authorities were consulted for advice, Dr. Herman Raessler, a German Professor of Constitutional Law at the Tokyo Imperial University, and Sir Francis Taylor Piggot, a British diplomat. The Drafting Committee completed its labours in 1888, and the Draft Constitution was submitted to the Privy Council for its approval. Prince Ito Hirobumi was then the President of the Privy Council. After receiving its approval, the Constitution was bestowed on the Japanese nation as a gracious gift from the Emperor on February 11, 1889. The Meiji Constitution remained in force until Japan's surrender to the Allied Powers.

### The Meiji Constitution, 1889

The Constitution of 1889 "was a splendid manifesto of the Shinto revival." Article I provided, "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal." Article III stated that "The Emperor is sacred and inviolable." There were to be Ministers "to give advice to the Emperor and be responsible to him." Prince Ito stoutly opposed the principle of ministerial responsibility. He maintained that responsibility of the Ministers to the Diet would mean denial of the principle that the Emperor really ruled. "Lest the power of the purse be used by the Diet to control the executive, Ito's Constitution provided that when the Diet failed to enact the budget, the government would carry out the budget of the preceding year."<sup>13</sup>

The Emperor was, thus, the central figure in the structure of government established by the Meiji Constitution and the State of Japan was intelligible only in terms of its Imperial institution. The Ministers simply advised the Emperor and it was for His Majesty to decide. In fact, all the powers of the State, executive, legislative and judicial, were concentrated in the person of the Emperor. Prof. Fuji Shinchi, an eminent authority on Constitutional Law, while summing up the powers and position of the Emperor, observed, "The supreme power of the Tenno (Emperor) over state affairs covers, in its broad sense, the same sphere as His Sovereign power, comprising the fields of legislation, administration and judiciary. The judicial power exercised by the courts of justice in the name of the Tenno, the executive power exercised by various administrative organs outside of matters personally attended to by the Tenno, and the legislative power exercised with the consent of the Imperial Diet all merge into the supreme power of the Tenno. Although these powers are not personally wielded by the Tenno, they all emanate from the supreme power of the Tenno." The various wings of the government, therefore, derived authority from the Emperor and exercised only those powers delegated to each branch of Government.

The legislative branch, the Imperial Diet, consisted of two Chambers. The Upper Chamber was designated as the House of Peers and it consisted of Peers, representative Peers, representatives of the highest tax payers, and Imperial appointees. The peerage was created by Ito in 1884 with a view to gather support for the Emperor and the new regime from the

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13. Theodore McNelly, *Contemporary Government of Japan*, p. 16.

court system, including *Samurai* and wealthy merchants. The members of the House of Peers of the House of Representatives were elected by a *House of Peers* electorate which met in a tax-paying assembly.

The Judiciary was not an independent department of the government but was made an arm of the Executive. Nevertheless the Constitution provided for the independence of the judges and there was no political interference in the courts. The Judiciary was accordingly not the custodian of the Constitution as it had no power to maintain and safeguard the constitution of the Constitution. A separate administrative court system to ensure justice was provided for the adjudication of administrative matters.

The Imperial Ordinance promulgated in 1888 established the Privy Council, consisting of a President, Vice-President, and 25 Councillors, and appointed by the Emperor on the advice of the Ministers of State. The Constitution provided that the Privy Council would deliberate upon important matters of state when they have been decided by the Emperor. The functions of the Privy Council were made more explicit by the Imperial Ordinance of 1890. It empowered the Privy Council to advise the Emperor concerning the Imperial Household Law, the interpretation of the Constitution, the proclamation of martial law and laws of emergency, international treaties and agreements, the organization of the Privy Council and other matters submitted for its deliberations. Councillors were entitled to participate in its deliberations and to vote. Decisions were taken by majority vote. Prince Ito Hirobumi regarded the Privy Council as "the highest body of the Emperor's constitutional advisers and the palladium of the constitution."

Another distinctive feature of the Meiji Constitution was that it contained a Bill of Rights. There was an enumeration of all the basic rights, such as freedom of thought, speech, religion, assembly, association, press and property. But all these freedoms, except the right to property, were qualified by the expression "subject to and within the limits of law," and the law included not only legislation enacted by the Diet, but also regulations and ordinances issued from time to time. The actual operation of the rights and freedoms of the people was, therefore, of a restricted nature and scope.

The Constitution remained in existence for 58 years, but it was never amended. The achievements of the Restoration and Meiji Constitution can best be summed up in the words of a publication, issued by the Bureau of Statistics Office of the Prime Minister. It states, "The Meiji Restoration was like the bursting of a dam behind which had accumulated the energies and forces of centuries. Japan set out to achieve in only a few decades what had taken centuries to develop in the West: the creation of a modern nation with modern industries, modern political institutions and a modern pattern of society. The surge and ferment caused by the sudden release of energies made themselves felt overseas. Japan emerged victorious from the Sino-Japanese War of 1894-95 and the Russo-Japanese War of 1904-05. By the end of World War I, which she entered under the provisions of the Anglo-Japanese Alliance of 1902, Japan was recognized as one of the world's greatest powers."<sup>14</sup>

While Japan's progress as a modern industrial nation and one of the world's greatest powers was remarkable and rapid, there were questions which pertained to national social, economic, and political life in the meantime. The *Yomiuri Shimbun* (Newspaper of 1927) handled these social problems. Progress certainly in the social life followed in the economic expansion, but the rapid changes of different forms of social structure necessitated a period of social reform. The social and developmental progress the effect of Japan in social life under the social structure, however, in Japan. And, this development, however, the social life of Japan, however, social structure was a social, political, economic. The progress of the development of Japan's economy was remarkable and rapid, but without her own a culture, and finally, however, Japan and the Pacific War and Japanese culture. And the War, Japan was forced upon. Along development, and a new Constitution based on the study of American progress as a model for the Japanese. And, however, and, however, a new, Japan moved her development in 1927, and a few years later she was admitted as the United Nations.

## CHAPTER II

# THE NEW CONSTITUTION (1947)

### The Potsdam Declaration and Occupation of Japan

On July 26, 1945 in Potsdam, Germany, President Truman, and Prime Minister Clement Attlee (who had just succeeded Winston Churchill), with the concurrence of Chiang Kai-shek, issued a declaration incorporating the terms for the surrender of Japan. It was essentially the handiwork of America, for it was drafted by the United States and was based on a paper originally prepared by two officials of the State Department. Russia was not a signatory to the Potsdam Declaration as she was then not at war with Japan. Two weeks later when Russia entered the War, she signified her approval to the principles contained in the Potsdam Declaration. Since the Potsdam terms of surrender have important bearing on the Constitution of 1947, these are quoted here in full:

"There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of basic objectives we are here setting forth.

The terms of the Cairo Declaration<sup>1</sup> shall be carried and Japanese territory shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine.

The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives.

We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the survival and strengthening of democratic tendencies among the Japanese people. Free-

1. The Cairo Declaration of Roosevelt, Chiang-Kai-shek and Churchill of December 1, 1943, had provided that Japan would be deprived of all the islands in the Pacific which she had seized and occupied since the beginning of World War I and all that Japan had stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores would be restored to the Republic of China. Japan would be expelled from "all other territories which she had taken by violence and greed." Korea "in due course" would become free and independent.



dom of speech, of religion and of thought, as well as respect for the fundamental human rights, shall be established.

Japan shall be permitted to maintain such industries as will sustain her economy and permit the execution of just reparations in kind but not those which would enable her to rearm for war. To this end access to, as distinguished from control of, raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.

The occupying forces of the Allies shall be withdrawn from Japan as soon as those objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government."

The first offer of the Japanese Government to accept the terms of the Potsdam Declaration was delivered through the Swiss Government on August 10, 1945, "with the understanding that the said declaration does not comprise any demand which prejudices the prerogative of His Majesty as a Sovereign Ruler." The Allies in their reply referred to the position of the Emperor somewhat indirectly in the following terms. "From the moment of surrender the Authority of the Emperor and the Japanese Government to rule the State shall be subject to the Supreme Commander of the Allied Powers who will take such steps as he deems proper to effectuate the surrender terms. The ultimate form of government of Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people." This clearly implied that the Allied Powers would like to continue with the monarchy in Japan after Occupation subject to two conditions. Firstly, the Emperor would be subject to the authority of the Supreme Commander of the Allied Powers, and, secondly, the future form of government, as also the role the Emperor would play therein, would be determined by the Japanese people themselves.

The assurances that the Emperor would continue to reign, and that the Japanese Government would continue in existence after the surrender were accepted by Japan. On September 2, 1945, Allied and Japanese representatives signed the Instrument of Surrender aboard the U.S.S. Missouri in Tokyo Bay. General Douglas MacArthur was appointed Supreme Commander for the Allied Powers to direct the Occupation and to effectuate the surrender terms which for brevity could be reduced to demilitarization, disarmament and democratization.

Although the Occupation was complete and the authority of the Supreme Commander for the Allied Powers was absolute, the Japanese Government continued as before with the Emperor at the head of the nation. The Allied Powers and for that matter the Supreme Commander never ruled Japan directly. This was unlike Germany. The relationship between the Supreme Commander and the Japanese Government was clearly stated in "United States Initial Postsurrender Policy for Japan." It was determined that:

2. While the Potsdam conference was still going on, a highly important development in the area of policy formulation for a defeated Japan was taking place inside the U.S. Government. The State, War and Navy Coordinating Committee (SWNCC) produced a policy paper entitled "United States' Initial Postsurrender Policy for Japan." It was approved by the President and became the basis of policy that General MacArthur was to execute.

"The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers to effectuate the surrender terms and to carry out the policies established for the conduct of the occupation and the control of Japan."

"In view of the present character of the Japanese society and the desire of the United States to attain its objectives with a minimum commitment of its forces and resources, the Supreme Commander will exercise his authority through Japanese Government machinery and agencies, including the Emperor, to the extent that this satisfactorily furthers United States' objectives. The Japanese Government will be permitted, under his instructions, to exercise the normal powers of government in matters of domestic administration. The policy, however, will be subject to the right and duty of the Supreme Commander to require changes in governmental machinery or personnel or to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms. This policy, moreover, does not commit the Supreme Commander to support the Emperor or any other Japanese governmental authority in opposition to evolutionary change looking toward the attainment of United States' objectives. The policy is to use the existing form of Government in Japan, not to support it. Changes in the form of Government initiated by the Japanese people or government in the direction of modifying its feudal and authoritarian tendencies are to be permitted and favoured. In the event that the effectuation of such changes involves the use of force by the Japanese people or government against persons thereto, the Supreme Commander should intervene only where necessary to ensure the security of his forces and the attainment of all other objectives of the occupation."

The Japanese Government was, therefore, an instrument by which the United States' objectives were to be realized. The authority of the Supreme Commander was complete in all respects and it was his "right and duty" to see that the changes which he deemed necessary and consistent with and in pursuance of those objectives were properly and expeditiously implemented. If the Emperor or any other Japanese authority did not meet the requirements of the Supreme Commander in effectuating the surrender terms, he could order changes in the governmental machinery or personnel as he deemed necessary or to act directly. The procedure actually adopted was that directions were issued under the authority of the Supreme Commander and the Japanese Government was required to act thereupon. The Occupation Authorities kept a close watch on the actions of the Japanese Government to ensure that the directions issued were faithfully observed. "Of almost equal significance were the informal aspects of the relationship between the government and the occupation, ranging from "suggestions" from General MacArthur to Japan's Prime Minister, through conferences between occupation authorities and Japanese bureaucrats, to private, after-hour conversation between Japanese and Americans who found a common interest in solving the problems created by the peaceful evolution."<sup>3</sup>

Demilitarization was relatively a simple problem and it was speedily

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3. Maki, John M., *Government and Politics in Japan*, p. 50.

and efficiently accomplished by the Occupation Authorities. By the end of 1948, Japan had been completely demilitarized. Democratization, however, was rather a complicated problem and it raised enormous difficulties. Any programme of democratization was deemed impracticable and futile unless a sizeable Japanese population, especially its critical elements, were convinced of its value and supported its implementation. To enable the people to adequately appreciate the implications of a democratic set up, the first attempt was made on October 4, 1945 by issuing a series of fundamental directives entitled the "Removal of Restrictions on Political, Civil, and Religious Liberties." It was also enjoined upon the Japanese Government to forthwith release all political prisoners, to abolish all governmental agencies responsible for maintaining restrictions and discriminations, to remove all such officers from office and to bar their future appointments in any important capacity. The object was to abolish all privileges and vested interests and to create a climate of liberty in which the Japanese should be in a position to demand and safeguard the basic human rights, hitherto denied to the people of Japan, and to provide them with an opportunity to determine their political fortune.

Closely in its wake, General MacArthur informed the Prime Minister of Japan on October 11, 1945 that "In the achievement of the Potsdam Declaration the traditional social order under which the Japanese people for centuries have been subjugated will be corrected." Accordingly, the Supreme Commander required the Government to institute the following reforms: the emancipation of women by their enfranchisement, the encouragement of the labour unions, the opening of the schools to more liberal education, the abolition of "systems which through secret inquisition and abuse have held the people in constant fear," and the democratization of economic institutions by curbing monopolies in order to widen the distribution and trade. The Shidehara Government in consultation with the Occupation Authorities immediately took measures to enact necessary laws relating to the social and political reforms in implementation of the policy of the Allied Powers.

Another directive from the Supreme Commander issued on December 15, 1945 demanded the abolition of Shinto, the State religion. The aim was to convert the Emperor "from an absolute ruler with allegedly divine attributes to a mere mortal who serves as the symbol of the nation and of the people's unity." Two weeks after this directive which demanded abolition of Shinto, the Emperor declared in his 1946 New Year Message that the ties between the Throne and the people "do not depend upon mere legends and myths. They are not predicated on the false conception that the Emperor is divine and that the Japanese people are superior to other races and fated to rule the world." Thus, the ideological basis of ultranationalism and militarism which had for centuries been the cult of the Throne was effaced from Japan. This was followed by a great purge. On January 4, 1946, the Supreme Commander directed the Japanese Government to plan for the removal and exclusion from office of those persons arrested as suspected war criminals, commissioned officers in the Imperial Japanese Armed Forces and others who had served in the military police

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4. As cited in Theodore McNelly's *Contemporary Government of Japan*, p. 31.

and secret intelligence and high ranking civilians in the Ministry of War and Navy, influential members of ultranationalistic, terroristic, or secret patriotic organisations, persons influential in the activities of the Imperial Rule Assistance Association and other allied organizations, officials of financial and development organizations involved in Japanese expansion, Governors of occupied territories, and additional militarists and ultranationalists.

### First Effort to Revise the Japanese Constitution

The declared object of the Potsdam Declaration was to establish in Japan a peacefully inclined and responsible government in accordance with the freely expressed will of the Japanese people and it was made a condition precedent for the withdrawal of the Occupation Forces of the Allies. On October 4, 1945, General MacArthur urged upon Prince Konoye Fumimaro, Vice-Premier in the Higashi Kumi Cabinet, to take the initiative in revising the Meiji Constitution. Prince Konoye was not taken in the succeeding Shidehara Cabinet, but he managed to obtain a commission from the Emperor to investigate whether the Constitution required any revision and if so to what extent. Konoye held a number of private conferences with George C. Atcheson Jr., SCAP's<sup>5</sup> Political Advisor and three U.S. State Department Officials who happened to be in Tokyo then. Various parts of the Meiji Constitution which these officials felt required revision were pointed out to Konoye, but no reference was made for the abolition of the institution of the Emperor.<sup>6</sup> There was, however, widespread feeling among the Allies that Konoye should have nothing to do with any scheme of constitutional reforms because of his alleged war guilt. It had been stated that the conference held between U.S. Senate Government officials and Konoye angered the Supreme Commander and he directed them to have no more parleys with Konoye. On November 1, SCAP Headquarters announced that MacArthur "had not chosen Konoye to reform the Japanese Constitution."

But Konoye continued on his job and late in November submitted his report on constitutional reforms to the Emperor. He recommended that the Meiji Constitution required revision with a view to strengthen the Diet, but such revisions should not destroy the basic principle of the Constitution that sovereignty resided in the Emperor. In December Konoye was indicted as a war criminal, but before he could be arrested he committed suicide.

In October, just when Prince Konoye had obtained his Commission from the Emperor authorizing him to investigate whether the Constitution needed revision, General MacArthur summoned Prime Minister Shidehara and pointedly advised him that the Government of Japan must immediately be reformed and, accordingly, the Constitution required to be liberalised. The Prime Minister pleaded that the legislation enacted by the Diet to enlarge the franchise and other reforms connected thereto adequately served the purpose and consequently there was no need to revise the Constitution. But MacArthur did not agree. He rather pulled up the Prime

5. Supreme Commander Allied Powers.

6. Theodore McNelly, *Contemporary Government of Japan*, pp. 37-38.



Minister and forced him to set up a committee to recommend proposals for reforms and revision of the Constitution.

The Committee on the Constitution, headed by Matsumoto Togi, was not in the beginning inclined to propose substantial alterations in the Constitution. But towards the end of December when pressed hard it was made to suggest some concrete proposals for revision. By this time the political parties, too, had presented their proposals for reforms. The Liberal and Progressive Parties proposed that the power of the Diet should be increased, but without impairing the principle that sovereignty resided in the Emperor. The Social Democratic Party recommended that while sovereignty resided in the State the political authority should vest in the Diet and the Emperor, the Diet sharing the most important part of it. The Communists, on the other hand, pleaded for the establishment of a Republic, and the trial of the Emperor as a war criminal.

### MacArthur Constitution

The Matsumoto Committee submitted its draft of the revised Constitution on February 1, 1946, which was rejected by the Supreme Commander. He characterised it as reactionary. MacArthur thereupon directed the SCAP Government Section to prepare the draft which should serve as a "guide" for the Japanese Government. In his directive to the SCAP Government Section, MacArthur's instruction was that "guide" should provide for the institution of the Emperor but the powers of the Emperor should be exercised according to the will of the people. The Government Section worked with utmost speed to prepare the draft Constitution and within a week's time it completed the job. The draft Constitution was presented to the Japanese Government on February 13. It is reported that General Courtney Whitney, Chief of Government Section, while presenting the draft Constitution, which was intended to serve as a "guide" to the Cabinet, made its members clearly understand that if they did not accept the general principles contained therein, General MacArthur would present the Constitution straightaway to the people of Japan and in that case "The person of the Emperor" could not be guaranteed.

The Shidehara Government was left with no option but to accept the draft. When it was shown to the Emperor he also observed that there was no other alternative. The Prime Minister, then, reported to his Cabinet that "we are making an extremely grave commitment in accepting such a Constitution as this. Perhaps this commitment will also bind our posterity. When this draft is made public, some will applaud and others will keep silence. The latter will undoubtedly be highly indignant at bottom towards us. However, I believe that we are following the only possible course in view of the situation confronting us." There was a deep sense of shock and it was known to all that almost all ministers wiped tears from their eyes.

The Constitution was, thus, an accomplished fact. Still to observe the formality, the draft was sent to the Matsumoto Committee to serve as a "guide." The Committee made some minor revisions in it in close consultation with the Government Section. It was then sent back to the Cabinet. The draft was made public on March 6 as if it was actually Shidehara Government's own revision of the Constitution. To make it



still reassuring an Imperial Rescript announced the adoption of the draft and explained the democratic principles on which it was based. General MacArthur, too, kept with the track and issued his approval of the draft Constitution to authenticate that it was the handiwork of the Japanese themselves and not an American made Constitution.

The draft Constitution was, then, finally submitted to the Diet for its approval in accordance with the provisions of the Meiji Constitution. But the Houses of the Diet took pains to fully debate it "always honouring the fiction that it was of Japanese origin." The Diet made some minor alterations too. But all this was done with the final approval of the Occupation Authorities. The Diet gave its approval on October 7, 1946, and the Constitution was promulgated on November 3 to synchronize with the birthday of Emperor Meiji. The new Constitution became operative six months later on May 3, 1947. "It was the occupation," succinctly remarks Maki, "that originated, directed, and obviously controlled the drafting, the content, and the process of approval of the new Constitution." It may aptly be called the MacArthur Constitution.

## BASIC FEATURES OF THE CONSTITUTION, 1947

### The Constitution as a Document

Although the Constitution was adopted as an amendment of the Meiji Constitution 1889, but actually it was a total revision which drastically transformed the nature and structure of the Government in Japan. It consists of 103 Articles in XI Chapters written in a simple style and easily comprehensible language. Both in broad principle and in specific details the Constitution of 1947 differs completely from the Constitution of 1889, which is replaced. Its three basic principles are: sovereignty of the people, the guarantee of the Fundamental Rights, and the renunciation of war, the last being a most peculiar feature of the Constitution and an object of the country's greatest constitutional controversy. Japan's Constitution is the only instance which constitutionally renounces war.

The structure of the government which the Constitution sets up completely supplants the institutions Japan had proudly inherited since the "ages eternal." It was the avowed policy of the Allied Powers to obliterate the image of divinity which the Japanese people believed surrounded the Throne and to eliminate completely from their minds the concept of national polity. Shidehara Cabinet had hoped that the process of democratization, which the Supreme Commander had urged as the most important element of the Potsdam Declaration, would not entail demolishing the past entirely. They had, in fact, expected that the proposals of the Matsumoto Committee would form the basis of discussion and compromise in order that a part of the old system might be retained. The Supreme Commander, however, had left no alternative for the Shidehara Government, but to accept the draft Constitution as prepared, under his instructions, by the SCAP Government Section. Although the draft Constitution was claimed to serve as a "guide" for the Japanese Government, but in reality it was the Constitution they were required to accept and a

few minor changes which the Matsumoto Committee and the Diet made therein had the full approval of the SCAP. This "American inspired Constitution" is replete with the fundamentals of American political philosophy. "The preamble to the Constitution," says Chieshi Y. 1947, "reminds the reader of the ideas and language of such historic documents as the Declaration of Independence, the Federalist Papers, the Preamble to the Constitution, the Gettysburg Address, and even the Atlantic Charter."

### **Sovereignty of the People**

Sovereignty of the people which runs through the entire Constitution is its basic feature. It is a revolutionary change as it destroys the old principle of Imperial Sovereignty. The Meiji Constitution was a gift of the Emperor to the nation and its Preamble declared that "the right of sovereignty of State. We (the Emperor) have inherited from our Ancestors, and we shall bequeath to our descendants." It further provided, "the Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal." Article IV provided that "The Emperor is the head of the Empire, combining in himself the rights of sovereignty and exercises them according to the provisions of the Constitution."

Under the Constitution of 1947 sovereignty belongs to the people and the Emperor is only the "symbol of the State and unity of the people," and he derives "his position from the will of the people with whom resides sovereign power."

The transfer of sovereignty from the Emperor to the people finds full expression in the Preamble which states, "we, the Japanese people, acting through our duly elected representatives in the National Diet, . . . do proclaim that sovereign power resides with the people and do firmly establish this Constitution." It further provides that "Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people." Sovereignty of the people, the Preamble asserts, "is a universal principle of mankind" upon which the new Constitution of Japan is founded and the people of Japan through this Constitution "reject and revoke all constitutions, laws, ordinances and rescripts" which are in conflict with this principle. Accordingly, the Constitution establishes a representative and responsible government manifesting the will of the people at the national as well as the local level. The institutions of referendum, initiative and recall also prevail in one way or the other.

### **Fundamental Rights and Duties of the People**

The Constitution bestows on the people a truly imposing list of Rights which itself is an expression of the sovereignty of the people. Chapter III of the Constitution is exclusively devoted to the enumeration of these Rights. Out of a total of 103 Articles which comprise the Constitution, 31 are contained in Chapter III and embrace civil and political Rights as also Duties, though the latter are not many. The Rights are

8. *Japanese People and Politics*, p. 125.

9. Article 1.

fully guaranteed and the Constitution declares them "eternal and inviolate" and include political, social and economic equality as well as suffrage, welfare and liberty for the people. All told, the emphasis throughout is on respect for the dignity of labour. A section of the Japanese people feel that the constitutional emphasis on the role of the individual is rather excessive and suggest some modification thereto. But this suggestion has not been favourably accepted and the majority of the people feel that it is not desirable to effect any change.

### Renunciation of War

A peculiar rather unprecedented feature of the Constitution is that it unequivocally renounces war for ever. Article 9, which constitutes a single Article in Chapter II and is entitled "Renunciation of War," reads: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes." It is provided that "in order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the State will not be recognized."

This provision should, indeed, be the most cherished goal of State policy if all other States provided for the same in their constitutions and their governments pursue the path of international amity by renouncing war and settling their disputes by and through peaceful means. But none has done so far, not even the United States of America which was at pains to specifically enshrine it in the Constitution of Japan. The Occupation Authorities in their bid to militarily cripple Japan made this provision in the Constitution and also ordained that Japan would never maintain land, sea, and air forces, as well as other war potential. The right of belligerency of the State is also not recognized by the Constitution. The provisions of Article 9 are, however, now interpreted by the Government to mean that defensive armament is permissible and the Constitution outlaws only war and threat or use of force as means of settling international disputes. "It has been very plausibly argued," remarks Theodore McNelly, "that war and threat or use of force as means of self-defence are permissible."<sup>10</sup>

### Supremacy of the Constitution

Article 98 specifically provides that "this Constitution shall be the supreme law of the nation, and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity." It means that all laws, ordinances, imperial rescripts and Cabinet orders prevailing at the time when the Constitution became operative in 1947, and were inconsistent with the provisions of this Constitution became *ipso facto* invalid and consequently inoperative. And after the Constitution became operative nothing shall be enacted by the Diet which is not consistent to and in accordance with the fundamental law. Similarly, no act of government will be valid which is contrary to the provisions of the Constitution. Article 99 ex-

10. *Contemporary Government in Japan*, p. 202.

explicitly holds responsible all those engaged in public acts, the Emperor or the Regent as well as Ministers of State, members of the Diet, judges and all other public officials, to uphold and respect the Constitution. It is their constitutional duty and any deviation therefrom makes them liable to punishment as prescribed by the Constitution or the laws made thereunder. Nothing in Japan, therefore, can be enacted or done by any agency of the government which is not permitted by the Constitution. To safeguard against invasion on the liberties and freedoms of the people, Article 97 reiterates that the fundamental Human Rights guaranteed by the Constitution "are fruits of the age-old struggle of man to be free, they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate."

### A Rigid Constitution

The supremacy of the Constitution is ensured if it is not alterable under the ordinary law-making procedure. The Constitution of Japan prescribes the procedure for amending the Constitution and it is distinct from that of an ordinary law. It means that the constitutional law is not at par with the statutory law and the former has precedence in status over the latter, that is, the constitutional law is fundamental and supreme. Article 96 provides that proposals for amending the Constitution may be initiated either in the House of Councillors or in the House of Representatives. Such a proposal must separately pass in each House by a majority of two-thirds or more of its membership. After the amendment has been passed by the Diet, it is submitted to the people at a referendum for their ratification. If majority of the people voting at the referendum approve it, it becomes an amendment of the Constitution and is immediately promulgated.

The Constitution has not so far been amended even once. In spite of the strong pressure of the Conservatives for its revision, and the setting up of a Commission on the Constitution under the law of the Diet,<sup>11</sup> the Constitution reads today as it did in 1947. The Commission on the Constitution has not yet finalized its deliberations.<sup>12</sup> Moreover, it is difficult to obtain a concurring vote of two-thirds or more of all the members of each House plus an affirmative vote of a majority of the votes cast at a referendum. Because of the relative difficulty of the amendment process, the Constitution of Japan can reasonably be characterised as an example of a rigid Constitution.

If the Constitution has seen no amendment, it does not mean that the Constitution has not expanded. The laws enacted by the Diet, interpretation of the Constitution and elaboration of its provisions by the courts have considerably helped the Constitution to grow, though the latter make a minor contribution. But a number of basic laws passed by the Diet have sufficiently supplemented the provisions of the Constitution as, for example, the Imperial House Law, the National Diet Law, the Finance

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11. The legally stipulated duties of the Commission are: to study the Constitution, to investigate and deliberate on problems relating to it, and "to report the results to the cabinet and through the cabinet to the Diet."

12. It was not until almost fifteen months after the law was passed that the Commission held its first meeting.



Law, the Cabinet Law, the Public Autonomy Law, etc. Since changes in the basic law can be made under the ordinary process of legislation, it makes the Constitution to some extent flexible.

### Judicial Review

The Constitution explicitly vests in the Supreme Court the power of judicial review, though it establishes a unitary system of government. Article 81 provides that the Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official Act. Here Japan introduces an American element of institutions. But whereas in the United States the Supreme Court does not derive its power of judicial review from the Constitution, the Japanese Supreme Court has the constitutional power to interpret the Constitution and to maintain its sanctity and supremacy.

The Supreme Court in Japan has not so far held, with the exception of certain laws passed to implement Occupation Directives, any law, order, regulation or official Act void and unconstitutional, but has upheld a few as constitutional. In the Sunkawa case (1959) the Supreme Court declared that the stationing of American forces in Japan did not violate Article 9 of the Constitution. It also set the principle that unless a treaty is "obviously unconstitutional and void, it falls outside the purview of the power of judicial review granted to the Court."

### Emperor, the Symbol of the State

The Constitution preserves the institution of the Emperor but deprives His Majesty of all powers, privileges and prerogatives he formerly enjoyed and exercised. The Constitution now declares him to be the symbol of the State and of the unity of the people.<sup>13</sup> He has no powers and authority related to government. He performs only those "acts" which are enumerated in the Constitution" subject to the provision that the "advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of State, and the Cabinet shall be responsible thereof."<sup>14</sup> As the Emperor derives "his position from the will of the people,"<sup>15</sup> and he performs acts in matters of State as specified in the Constitution, he must do so on the advice and approval of the Cabinet.<sup>16</sup> The Constitution also prescribes that no property can be given to, or received by, the Imperial House, nor can any gifts be made therefrom without the authorization of the Diet.<sup>17</sup>

### Parliamentary System of Government

The Government of the United States had decided to establish in Japan a parliamentary system of Government in preference to the presidential system and the Secretary of State, Mr. Byrnes, had accordingly

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13. Article 1.

14. Article 7.

15. Article 4.

16. Article 1.

17. Article 7.

18. Article 8.



advised Mr. George Atcheson, Jr., SCAP's Political Adviser. But a peculiar feature of the parliamentary government, which the Constitution establishes in Japan, is that the Emperor does not perform even those acts which are associated with the constitutional head of the State. The Emperor is the symbol of the State and of the unity of the people who derives his position from the will of the people. The executive power is vested in the Cabinet and it is made collectively responsible to the Diet. The Prime Minister heads the Cabinet and a majority of the number of Ministers, including the Prime Minister, must be members of the Diet. The Diet designates the Prime Minister and on his resignation the Cabinet resigns *en masse*.<sup>19</sup> If the House of Representatives passes a no confidence resolution or rejects a confidence resolution, the Cabinet resigns *en masse*.<sup>20</sup> All these are the attributes of a parliamentary system of government and ensure the smooth working of the Cabinet. In the United Kingdom these well-recognized principles of Cabinet government are the result of deep-rooted conventions. In Japan, they have been specifically incorporated in the Constitution.

### Local Autonomy

Finally, the Constitution prominently introduces the principle of local autonomy. Local Governments, prefectures and city, town and village municipalities have been granted by the Constitution extensive rights of self-government. Article 93 provides that the "local public entities shall establish assemblies as their deliberative organs" and that "the Chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities." The Local Autonomy Law, 1947, which supplements Article 92 of the Constitution, provides for the exercise of initiative and recall by the voters of local entities. Such a democratic potential was hitherto unknown in Japan.

### RIGHTS AND DUTIES OF THE PEOPLE

The Constitution bestows on citizens an imposing list of civil and political rights and thirty-one Articles out of a total of 103 are contained in Chapter III under the caption "Rights and Duties of the people." It is probably one of the world's most detailed and ambitious constitutional statements which guarantees that these human rights "conferred upon the people of this and future generations of the people" are "eternal and inviolate."<sup>21</sup> The Constitution further provides that the freedoms and rights guaranteed to the people shall be maintained by the constant endeavour of the people, and enjoins upon them that they "shall refrain from any abuse of these freedoms and rights and shall be responsible for utilizing them for the public welfare."<sup>22</sup> It means that the Constitution explicitly impresses upon citizens that vigilance is the price of democracy and since

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- 19. Article 70.
  - 20. Article 69.
  - 21. Article 11.
  - 22. Article 12.

they have the inalienable right of determining their political destiny, they must not abuse any of these freedoms and rights and utilize them for their own good and the public welfare. Accordingly, the Constitution emphasises respect for the individual, without any kind of discrimination, and guarantees to him the right to life, liberty and the pursuit of happiness, provided it does not interfere with the public welfare which would "be the supreme consideration in legislation and other government affairs."<sup>23</sup>

The provision in Article 11 that "the people shall not be prevented from enjoying any of the fundamental human rights...conferred...as eternal and inviolate rights" is an unconditional guarantee of rights and the government is debarred from imposing any restriction or curtailment on their rights. But Articles 12 and 13 impose restrictions. Article 12 prescribes certain responsibilities for the people. The first is that they should maintain their rights through their constant endeavour, and refrain from any abuse of them. Secondly, the people should be responsible for utilising their rights for the public welfare. Article 13 while declaring that all of the people shall be respected as individuals, conditions their right of life, liberty, and the pursuit of happiness to the extent that none of them does interfere with the public welfare. Some fears have been expressed in Japan that incorporation of public welfare provision and making enjoyment of rights subject to public welfare is likely to be misinterpreted and the liberties of the people might be infringed or curtailed in the name of public welfare. It is argued that public welfare has ever remained a misleading concept. There is no activity of the State and no action of Government, down to the most ruthless and tyrannical, which has not been defended on the ground of public welfare. And Japan has a legacy of the long authoritarian tradition.

But this issue, as Maki observes, "is an important one in every democracy, because it involves the balance between the enjoyment of freedom by the individual and the good of the entire community."<sup>24</sup> Rights cannot be divorced from obligations and human rights cannot subsist without limitations. While imposing responsibilities on the people of Japan, the Constitution also makes the government responsible for serving the people's right to life, liberty and pursuit of happiness.<sup>25</sup> No representative and responsible government, which is accountable to the people, can afford to infringe Fundamental Rights on the plea of public welfare which it cannot adequately defend. The government is ever under scrutiny and it cannot forget that tomorrow is the day of election and it shall have to account for its public welfare which it cannot adequately defend. The Supreme Court of Japan has upheld that public welfare is a valid justification to restrict freedom. But it has also equally insisted that the doctrine of public welfare "cannot be used by any governing authority as an abstract justification for the limitation of freedom, it can be applied only under duly enacted legislation and under clearly defined circumstances."<sup>26</sup> It is creditable that during the past twenty years when the

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23. Article 14.

24. Article 13.

25. Maki, John M., *Government and Politics of Japan*, p. 87.

26. Article 13.

27. Maki, John M., *Government and Politics in Japan*, p. 9.

Constitution became operative there has been "no erosion of any constitutionally guaranteed freedoms through legislative, executive or judicial action."<sup>28</sup>

### Specific Rights

Here is a summary of rights the Constitution guarantees to citizens: freedoms of thought, conscience, religion, assembly, association, speech, press and all other forms of expression, choice of residence and occupation, choice to move to a foreign country and to give up nationality, academic freedom,<sup>29</sup> freedom from discrimination in political, economic or social relations because of race, creeds, sex, social status, or family origin,<sup>30</sup> equality before law and under the law, the inalienable right to choose public officials and to dismiss them; the right of petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations, or for other matters, the right to sue the State or public entity for damage resulting from an illegal act of any public official,<sup>31</sup> freedom to marriage based on mutual consent, equal rights of husband and wife, the right to maintain the minimum standards of wholesome and cultural living, the right to receive an equal education correspondent on their ability, the right to work, the right of the workers to organize and bargain and act collectively, the right to own or hold property, and the right to due process of law.

From the rights and freedoms enumerated above, it should be noted that the concept of equality has received a prominent and practical place in the Constitution. Social equality is guaranteed by abolishing special privileges by not recognising peer and peerage and excluding any privilege from any award of honour or any distinction which is not limited to the lifetime of the recipient. No person can be held in bondage and involuntary servitude except as punishment for crime. Equality of the sexes, the right to equal education and equality of the rights of husband and wife enhance the dignity of the individual and his social stature. The equality before the law finds yet more emphasis. Ten Articles out of a total of thirty-one in the Chapter on Rights and Duties are devoted to what may be characterised as the due process of law. It includes: freedom from deprivation of life or liberty or the imposition of other criminal penalty except according to procedure established by law, freedom of access to courts, no arrest except upon warrant, no arrest or detention without immediate notification of the nature of the charges, privilege of counsel, security of home, papers and effects except under warrant, security against torture or cruel punishments, the right of speedy and public trial by an impartial tribunal, right of examination of witnesses and of compulsory process for obtaining witnesses in his behalf at public expense, freedom from compulsion to testify against himself, freedom from being criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, and from double jeopardy, and the

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28. *Ibid.*

29. Articles 19 to 23.

30. Article 14.

31. Articles 14 to 17.

right to sue the State for redress after acquittal following arrest or detention.

Political equality finds expression in guaranteeing universal adult suffrage with regard to the election of public officials, giving the people the inalienable right to choose public officials and to dismiss them, declaring all public officials as servants of the whole community, ensuring secrecy of ballot in all elections and not making a voter answerable publicly or privately, for the choice he has made, and granting to every person the right of petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters. The Constitution guarantees that no person shall be in any way discriminated against for sponsoring such a petition.

### Duties

The Constitution also places emphasis on the duties of the individual, though they are not many. Chitoshi Yanaga says that the "traditional attitude has for centuries been to emphasize duties practically to the exclusion of rights, this was especially the case under feudalism. For the purpose of encouraging democratic development it was imperative that individual rights be stressed to effectively counteract the altogether too powerful influence of the authoritarian tradition and its legacies in Japanese society. The result has been the inclusion of only a few basic obligations of citizenship...."<sup>32</sup> The duties and responsibilities of the citizen include: refraining from the abuse of any freedom or right, the responsibility for preserving and maintaining by constant endeavour the freedoms and rights guaranteed by the Constitution,<sup>33</sup> the obligation to work which is also a right,<sup>34</sup> liability to taxation,<sup>35</sup> and the obligation of all people to have all boys and girls under their protection receive ordinary education as provided for by law."<sup>36</sup>

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32. *Japanese People and Politics*, p. 353.

33. Article 12.

34. Article 27.

35. Article 30.

36. Article 26.

## CHAPTER III

# THE EXECUTIVE

### The Emperor in History

Chitoshi Yanaga gives a matter of fact description of the Emperor. He says, "The Emperor has been and still is the living symbol of the nation's history, heritage, and achievements, of all that is glorious in the nation's past and present, of its continuity and durability. He is the incarnation of history and religion. In his person are epitomized the nation's hopes, aspirations and promise. He is the spiritual anchor, the moral rudder, and the political gyroscope that insure the safety and steadiness of the course of the ship of state. As a symbol he is enshrined in the hearts of the people who attribute everything good to his virtue."<sup>1</sup> He was and still is the nation's rallying point descending in direct and unbroken line from Amaterasu-Omikami, the Goddess of the Sun. The Emperor pictured as a *Kami* or heaven-descended, divine, sacred, virtuous and all-wise became the accepted ideology of the State and these attributes of the monarch were taught in the schools. Near the entrance to every schoolyard there was a small shrine in which were installed the pictures of the Emperor and the Empress. Every schoolchild had to uncover and bow before this shrine each time he entered or left the school. "On national holidays, usually at 10 A.M. all Japanese inside or outside the country were supposed to bow respectfully in the direction of the Imperial Palace in Tokyo. It was a custom, not rigidly enforced, for Japanese to bow each time they passed the main entrance to the Palace ground."<sup>2</sup> It was sacrilege to discuss any aspect concerning the person of the Emperor.

The Emperor was, thus, for the Japanese the State, the repository of sovereignty which was eternal and unalterable, that is, "co-extensive with the Heavens and with the Earth." His authority was supreme and inalienable to which all religiously bowed. In interpreting the Peace Preservation Law of 1925, which forbade, *inter alia*, advocating the alteration of *Kokutai* or national polity, the Supreme Court declared that the Emperor, of a line unbroken for ages eternal, reigned and exercised sovereignty in Japan.

Despite this fact of political loyalty and unbounding reverence and devotion of the people, the Emperor actually possessed very little political power and His Majesty usually had never made any important political decision. At least during the past 750 years, he had always followed the advice of the effective government of the time that was in the saddle and was in no way responsible for the formulation and execution of public policy. The Emperor was the ceremonial head of the State and performed only the ceremonial functions. The Constitution of 1889 gave him

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1. *Japanese People and Politics*, p. 129.

2. Maki, John M., *Government and Politics in Japan*, p. 113.



absolute power. Article IV stated that "The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of this constitution." But even then he had always acted on the advice of his ministers. He did no wrong and performed no public act on his own initiative and responsibility. He could, thus, be described as the constitutional monarch even under the Meiji Constitution, the most powerful symbol of the unity and solidarity of the Japanese nation. The Japanese adored their nation by adoring the Throne and the Royal Family provided a useful focus for patriotism and patriotic devotion. Here the Emperor of Japan resembled the British monarch. "The reverence of the Emperor," writes Chitoshi Yanaga, "is almost unbelievable especially to those who have not witnessed its manifestation. Perhaps the British alone of the Western peoples today can come closest to understanding attitude toward the sovereign."

### The Emperor as He is Today

In their bid to efface the doctrine of Kokutai or national polity, which vested the power to rule ultimately in the Emperor, the Occupation Authorities strived to "humanize" the Emperor. They contrived a Constitution which reduced the Emperor to a mere symbol of the State and of the unity of the people. The Emperor derived his "position from the will of the people with whom sovereignty resides." With a view to vindicate the sovereignty of the people the ultimate authority of amending the Constitution is vested in the people themselves. It means that if the majority of the people acting through their representatives and ratified at a referendum so desire, the institution of the Emperor can be abolished. This is a revolutionary change and perhaps the Japanese will never venture to abolish it, yet it is a legal truth that they can do it if they so desire. It is an irony that the Emperor, who had advised his Cabinet on August 14, 1945, to accept the Allied Surrender Terms in order to save national polity from destruction and the nation from annihilation, was left with no option but to accept the Constitution which ordained his own political demise. The mind of the Occupation Authorities and the shape of the things to come was fully reflected in the Emperor's New Year Day Rescript of January 7, 1946. He declared that the ties between him and his people "have always stood upon mutual trust and affection" and not "upon legends and myths," nor are they "predicated on the false conception that the Emperor is divine and that the Japanese people are superior to other races and destined to rule the world." It is reported that the day the new Constitution was made operative, Shimizu Cho, the Constitutional Adviser to the Emperor and Chairman of the Privy Council which approved the Constitution, drowned himself at Atami. The note, which Shimizu Cho left, read, "I have decided to die so that I from the spiritual world may help to protect our national polity and wish the safe-being of His Majesty."<sup>4</sup>

There was almost the entire nation which thought likewise. In a survey conducted by the United Nations Educational and Cultural Organ-

3. As cited in Chitoshi Yanaga's *Japanese People and Politics*, pp. 137-38.

4. As cited in Theodore McNelley's *Contemporary Government of Japan*, p. 56.

ization, it was found out that "74 per cent of the Youth of postwar Japan strongly believe the Emperor remains, at the very least, the symbol of the nation, not only on paper, but in the hearts and minds of the people."<sup>5</sup> This was really a shock for the Western nations especially the Americans who had really engineered the Constitution of 1947. Since the time Japan regained her independence determined efforts are afoot for restoring that universal reverence for monarchy as it prevailed before the defeat of Japan in 1945. The Conservatives are the most active and their advocacy is more enthusiastic. They hold that the Emperor's position as a mere symbol of the State and of the unity of the people "does violence to the historical tradition and sentiment of the people." Some of the critics of the Constitution maintain that Japan is not a constitutional monarchy, as it is claimed, but a Republic. They maintain that the symbolic role of the Emperor, derivation of his position from the people and their possessing the ultimate power of even abolishing monarchy, and denial of even nominal powers to the Emperor are the characteristics of a republic, although the Imperial Throne is dynastic. This is, however, a wrong interpretation of a republican form of government so long as the Imperial Throne remains dynastic. But the Conservatives cannot be induced to reconcile themselves to the position which the Constitution assigns to the Emperor. Accordingly, the Liberal and Progressive parties set up in 1954 their separate committees for a thorough study of the problem of constitutional revision with special reference to the powers and position of the Emperor. Both the committees came to the conclusion that the constitution need be immediately revised and the position of the Emperor elevated to the constitutional head of the State as the British King is. The Government has also appointed a Commission on the Constitution. Nothing tangible has yet come about, but there is a strong feeling among the Japanese people that the Emperor be restored to his former position. In some parts of Japan a movement called Kigensetsu (National Foundation Day) is strengthening its activities. Kigensetsu, February 11, is the traditional anniversary of the founding of the Japanese State by the first Emperor Jimmu Tenno in 600 B.C. It reveals the reverence and affection of the people of Japan towards the Imperial family of which the present ruler, Emperor Hirohito, is the 124th in the line of succession. There has been only one dynasty which has ruled Japan in lineal succession unbroken for ages eternal.

### Succession to the Throne

Article 2 of the Constitution provides that the Imperial Throne is dynastic and shall be succeeded to in accordance with the Imperial House Law enacted by the Diet. According to the Meiji Constitution the Imperial Diet could not amend or repeal the Imperial House Law which determined succession to the Throne. The Emperor alone, with the advice of the Imperial Family Council and the Privy Council, could amend it. But under the prevailing Constitution of 1947, it is the Diet alone which makes, amends or repeals the existing Imperial House Law enacted in

5. UNESCO, *Courier*, August-Sept., 1954, pp. 12-35. Also refer to "Japanese Popular Attitude Toward the Emperor," *Pacific Affairs*, Dec. 1952, pp. 235-44.

1947, and which came into effect simultaneously with the inauguration of the Constitution on May 3, 1947.

The Imperial House Law of 1947 provides that the "Imperial Throne shall be succeeded by a male offspring in the main line belonging to the Imperial lineage." Primogeniture is the rule with succession running through the main line and the law rigidly defines the composition of the Imperial Family. No adoption is permitted. If there is no member of the Imperial Family in the main line of succession, the Throne is passed to members of the Imperial Family next nearest in lineage, precedence being given to the senior member of the senior line. The Imperial House Council, which consists of ten members,<sup>6</sup> at a meeting presided over by the Prime Minister may change the order of succession in case the heir to the Throne suffers from an incurable and serious disease. A regency is established in case the Emperor has not come of age (18 years) or when the Emperor suffers from a serious disease, or there is a serious hindrance in the performance of his public acts. The regent performs his acts in the name of the Emperor.

### **Imperial Household Finances**

The Imperial Household affairs are now completely under the jurisdiction and authority of the Diet. Before 1945, the Imperial Family was extremely wealthy and possessed extensive property holdings both in land and big industries. The Emperor was really "the greatest of the *Zaibatsu* (cartels) and exercised a powerful influence on the economy of the country. But now the greater part of that extensive property has been transferred to the State and the needs of the Imperial Household are provided by appropriations subject to the approval of the Diet. Article 8 of the Constitution specifically provides that "No property can be given to, or received by the Imperial House, nor can any gifts be made therefrom, without the authorization of the Diet."

The Imperial Family was reduced in size in 1947, when eleven princely families, consisting of fifty-one Princes and Princesses, renounced their status and privileges and became **commoners**. The Imperial Family now includes the families of the present Emperor and his three brothers. The Constitution of 1947 abolishes the titles and, accordingly the former eleven princely families are not even titled.

### **The Emperor and His Functions**

Articles 1, 3 and 4 determine the position of the Emperor under the Constitution and Articles 6 and 7 list his functions. Article 1 makes the Emperor "the symbol of the state and the unity of the people, deriving his position from the will of the people with whom resides sovereign power." The effect of this Article is adequately expressed in Articles 3 and 4. Article 3 ordains that "The advice and approval of the Cabinet

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6. The composition is: two members of the Imperial family, the Presidents and Vice-Presidents of both Houses of the Diet, the Prime Minister, the Head of the Imperial House Agency, the Chief Judge and one other Judge of the Supreme Court. Two members of the Imperial Family are chosen by election within the Imperial Family, and a Judge by other Judges of the Supreme Court.

shall be required for all acts of the Emperor in matters of State, and the Cabinet shall be responsible therefor." Article 4 prescribes that the "Emperor shall perform only such acts in matters of state as are provided for in the Constitution and he shall not have powers related to government." The combined effect of all these provisions may, thus, be summed up:—

- (1) that the Emperor no longer exercises any power or authority relating to government;
- (2) that he only performs certain acts in matters of State and such acts are as specified in the Constitution. There is no prerogative which he enjoys and no privilege or authority he can exercise;
- (3) that the advice and approval of the Cabinet is required for all acts of the Emperor and there is ministerial responsibility for all such acts;
- (4) that the Emperor is only the symbol of the State and the unity of the people; and
- (5) that the Emperor derives his position from the will of the people in whom resides sovereign power. If the people so will they can abolish monarchy and the Emperor be deprived of his position.

Articles 6 and 7 specify the following acts in matters of State which the Emperor performs on behalf of the people and on the advice and approval of the Cabinet:—

- (1) the appointment of the Prime Minister as designated by the Diet;
- (2) the appointment of the Chief Judge of the Supreme Court as designated by the Cabinet;
- (3) the promulgation of amendments of the Constitution, laws, Cabinet orders and treaties;
- (4) the proclamation of general election of members of the Diet;
- (5) the convocation of the Diet;
- (6) the dissolution of the House of Representatives;
- (7) receiving of foreign ambassadors and ministers;
- (8) attestation of instruments of ratification and other diplomatic documents as provided for by law;
- (9) attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers;
- (10) awarding of honours;
- (11) attestation of general and social amnesty, commutation of general punishment, reprieve, and reservation of rights; and
- (12) performance of ceremonial functions.



### Role of the Emperor

The functions enumerated above are a part of the overall functions which generally belong to the head of the State. But all such functions the Emperor performs on behalf of the people and on ministerial advice and approval. Neither of them involves any initiative, discretion or influence on his part. The Constitution does not only debar him from performing any personal act related to government, but also so incapacitates him politically that the Emperor cannot even claim to be the chief of the State or the representative of the nation. "It appears," writes Theodore McNelly, "that the term symbol of the state" may have been suggested by the British Statute of Westminster (1931) which provides that the British monarch is the symbol of the British Commonwealth." But such a use of the term is not happy in the case of the head of a Sovereign State as Japan is.

The Emperor is, thus, relegated to the position of a mere cypher and he stands no comparison with the constitutional monarch of England who plays a definite role in the governmental process. The Emperor of Japan performs only ceremonial functions and nothing beyond. He has absolutely no discretion in the appointment of the Prime Minister and must appoint one designated by the Diet. Nor can he influence dissolution. It is the constitutional right of the Cabinet alone; the Emperor must accept the advice tendered and promulgate dissolution. Treaties are not negotiated and concluded in the name of the Emperor. He simply promulgates them on behalf of the people and as concluded by the government and approved by the Diet. The assent of the Emperor is not needed to validate laws passed by the Diet. In England a Bill becomes a law after it is passed by Parliament and on receiving the Royal assent. The King has the power to veto a Bill duly passed by Parliament, although it has never been done since 1707. The Emperor has no power to withhold assent. A Bill, *ipso facto*, becomes a law when passed by the Diet. The Emperor simply promulgates it. Finally, he does not enjoy the prerogative of mercy. The Emperor simply attests general and special amnesty, commutation of punishment, reprieve, and restoration of rights.

The Emperor is, no doubt, provided with requisite information about the affairs of the State and political policies by the Cabinet, but he possesses none of those rights—the right to be consulted, the right to encourage, and the right to warn, which Bagehot assigned to the British King. And a King of great sense and sagacity, he said, "would want no other." The Emperor of Japan is never consulted and his opinion is not solicited on any matter related to government by the Ministers. He performs only those functions which are specifically detailed in the Constitution and that, too, on behalf of the people from whom he derives his position. The Ministers are responsible for all such acts of the Emperor. He has neither a legal nor a theoretical right to intervene and influence important decisions. Asquith, in a Memorandum on the rights and obligations of the British King wrote, "He (King) is entitled and bound to give his

7. *Contemporary Government of Japan*, p. 59.

8. Bagehot, *W. L. Bagehot's Principles of Politics*, 1867, 1887, 1892, 1897, 1907, 1912, 1917, 1922, 1927, 1932, 1937, 1942, 1947, 1952, 1957, 1962, 1967, 1972, 1977, 1982, 1987, 1992, 1997, 2002, 2007, 2012, 2017, 2022, 2027, 2032, 2037, 2042, 2047, 2052, 2057, 2062, 2067, 2072, 2077, 2082, 2087, 2092, 2097, 2102, 2107, 2112, 2117, 2122, 2127, 2132, 2137, 2142, 2147, 2152, 2157, 2162, 2167, 2172, 2177, 2182, 2187, 2192, 2197, 2202, 2207, 2212, 2217, 2222, 2227, 2232, 2237, 2242, 2247, 2252, 2257, 2262, 2267, 2272, 2277, 2282, 2287, 2292, 2297, 2302, 2307, 2312, 2317, 2322, 2327, 2332, 2337, 2342, 2347, 2352, 2357, 2362, 2367, 2372, 2377, 2382, 2387, 2392, 2397, 2402, 2407, 2412, 2417, 2422, 2427, 2432, 2437, 2442, 2447, 2452, 2457, 2462, 2467, 2472, 2477, 2482, 2487, 2492, 2497, 2502, 2507, 2512, 2517, 2522, 2527, 2532, 2537, 2542, 2547, 2552, 2557, 2562, 2567, 2572, 2577, 2582, 2587, 2592, 2597, 2602, 2607, 2612, 2617, 2622, 2627, 2632, 2637, 2642, 2647, 2652, 2657, 2662, 2667, 2672, 2677, 2682, 2687, 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5182, 5187, 5192, 5197, 5202, 5207, 5212, 5217, 5222, 5227, 5232, 5237, 5242, 5247, 5252, 5257, 5262, 5267, 5272, 5277, 5282, 5287, 5292, 5297, 5302, 5307, 5312, 5317, 5322, 5327, 5332, 5337, 5342, 5347, 5352, 5357, 5362, 5367, 5372, 5377, 5382, 5387, 5392, 5397, 5402, 5407, 5412, 5417, 5422, 5427, 5432, 5437, 5442, 5447, 5452, 5457, 5462, 5467, 5472, 5477, 5482, 5487, 5492, 5497, 5502, 5507, 5512, 5517, 5522, 5527, 5532, 5537, 5542, 5547, 5552, 5557, 5562, 5567, 5572, 5577, 5582, 5587, 5592, 5597, 5602, 5607, 5612, 5617, 5622, 5627, 5632, 5637, 5642, 5647, 5652, 5657, 5662, 5667, 5672, 5677, 5682, 5687, 5692, 5697, 5702, 5707, 5712, 5717, 5722, 5727, 5732, 5737, 5742, 5747, 5752, 5757, 5762, 5767, 5772, 5777, 5782, 5787, 5792, 5797, 5802, 5807, 5812, 5817, 5822, 5827, 5832, 5837, 5842, 5847, 5852, 5857, 5862, 5867, 5872, 5877, 5882, 5887, 5892, 5897, 5902, 5907, 5912, 5917, 5922, 5927, 5932, 5937, 5942, 5947, 5952, 5957, 5962, 5967, 5972, 5977, 5982, 5987, 5992, 5997, 6002, 6007, 6012, 6017, 6022, 6027, 6032, 6037, 6042, 6047, 6052, 6057, 6062, 6067, 6072, 6077, 6082, 6087, 6092, 6097, 6102, 6107, 6112, 6117, 6122, 6127, 6132, 6137, 6142, 6147, 6152, 6157, 6162, 6167, 6172, 6177, 6182, 6187, 6192, 6197, 6202, 6207, 6212, 6217, 6222, 6227, 6232, 6237, 6242, 6247, 6252, 6257, 6262, 6267, 6272, 6277, 6282, 6287, 6292, 6297, 6302, 6307, 6312, 6317, 6322, 6327, 6332, 6337, 6342, 6347, 6352, 6357, 6362, 6367, 6372, 6377, 6382, 6387, 6392, 6397, 6402, 6407, 6412, 6417, 6422, 6427, 6432, 6437, 6442, 6447, 6452, 6457, 6462, 6467, 6472, 6477, 6482, 6487, 6492, 6497, 6502, 6507, 6512, 6517, 6522, 6527, 6532, 6537, 6542, 6547, 6552, 6557, 6562, 6567, 6572, 6577, 6582, 6587, 6592, 6597, 6602, 6607, 6612, 6617, 6622, 6627, 6632, 6637, 6642, 6647, 6652, 6657, 6662, 6667, 6672, 6677, 6682, 6687, 6692, 6697, 6702, 6707, 6712, 6717, 6722, 6727, 6732, 6737, 6742, 6747, 6752, 6757, 6762, 6767, 6772, 6777, 6782, 6787, 6792, 6797, 6802, 6807, 6812, 6817, 6822, 6827, 6832, 6837, 6842, 6847, 6852, 6857, 6862, 6867, 6872, 6877, 6882, 6887, 6892, 6897, 6902, 6907, 6912, 6917, 6922, 6927, 6932, 6937, 6942, 6947, 6952, 6957, 6962, 6967, 6972, 6977, 6982, 6987, 6992, 6997, 7002, 7007, 7012, 7017, 7022, 7027, 7032, 7037, 7042, 7047, 7052, 7057, 7062, 7067, 7072, 7077, 7082, 7087, 7092, 7097, 7102, 7107, 7112, 7117, 7122, 7127, 7132, 7137, 7142, 7147, 7152, 7157, 7162, 7167, 7172, 7177, 7182, 7187, 7192, 7197, 7202, 7207, 7212, 7217, 7222, 7227, 7232, 7237, 7242, 7247, 7252, 7257, 7262, 7267, 7272, 7277, 7282, 7287, 7292, 7297, 7302, 7307, 7312, 7317, 7322, 7327, 7332, 7337, 7342, 7347, 7352, 7357, 7362, 7367, 7372, 7377, 7382, 7387, 7392, 7397, 7402, 7407, 7412, 7417, 7422, 7427, 7432, 7437, 7442, 7447, 7452, 7457, 7462, 7467, 7472, 7477, 7482, 7487, 7492, 7497, 7502, 7507, 7512, 7517, 7522, 7527, 7532, 7537, 7542, 7547, 7552, 7557, 7562, 7567, 7572, 7577, 7582, 7587, 7592, 7597, 7602, 7607, 7612, 7617, 7622, 7627, 7632, 7637, 7642, 7647, 7652, 7657, 7662, 7667, 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8502, 8507, 8512, 8517, 8522, 8527, 8532, 8537, 8542, 8547, 8552, 8557, 8562, 8567, 8572, 8577, 8582, 8587, 8592, 8597, 8602, 8607, 8612, 8617, 8622, 8627, 8632, 8637, 8642, 8647, 8652, 8657, 8662, 8667, 8672, 8677, 8682, 8687, 8692, 8697, 8702, 8707, 8712, 8717, 8722, 8727, 8732, 8737, 8742, 8747, 8752, 8757, 8762, 8767, 8772, 8777, 8782, 8787, 8792, 8797, 8802, 8807, 8812, 8817, 8822, 8827, 8832, 8837, 8842, 8847, 8852, 8857, 8862, 8867, 8872, 8877, 8882, 8887, 8892, 8897, 8902, 8907, 8912, 8917, 8922, 8927, 8932, 8937, 8942, 8947, 8952, 8957, 8962, 8967, 8972, 8977, 8982, 8987, 8992, 8997, 9002, 9007, 9012, 9017, 9022, 9027, 9032, 9037, 9042, 9047, 9052, 9057, 9062, 9067, 9072, 9077, 9082, 9087, 9092, 9097, 9102, 9107, 9112, 9117, 9122, 9127, 9132, 9137, 9142, 9147, 9152, 9157, 9162, 9167, 9172, 9177, 9182, 9187, 9192, 9197, 9202, 9207, 9212, 9217, 9222, 9227, 9232, 9237, 9242, 9247, 9252, 9257, 9262, 9267, 9272, 9277, 9282, 9287, 9292, 9297, 9302, 9307, 9312, 9317, 9322, 9327, 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10857, 10862, 10867, 10872, 10877, 10882, 10887, 10892, 10897, 10902, 10907, 10912, 10917, 10922, 10927, 10932, 10937, 10942, 10947, 10952, 10957, 10962, 10967, 10972, 10977, 10982, 10987, 10992, 10997, 11002, 11007, 11012, 11017, 11022, 11027, 11032, 11037, 11042, 11047, 11052, 11057, 11062, 11067, 11072, 11077, 11082, 11087, 11092, 11097, 11102, 11107, 11112, 11117, 11122, 11127, 11132, 11137, 11142, 11147, 11152, 11157, 11162, 11167, 11172, 11177, 11182, 11187, 11192, 11197, 11202,



ministers all relevant information which comes to him, to point out objections which seem to him valid against the course which they advise, to suggest (if he thinks fit) an alternative policy. Such intimations are always received by ministers with the utmost respect and considered with more respect and deference than if they proceeded from any other quarter." The moral influence of the Emperor of Japan is still considerable and he may exert it in exceptional circumstances, but it will be a purely personal function carrying with it the weight of his institutional prestige. Constitutionally he has no *locus standi* to do so. Nor can the Emperor act as a mediator and use his prestige to settle political conflicts as the British monarch has done on many occasions. The Constitution insists that he should not take interest in politics and express any shading of public opinion.

It cannot, however, be denied that in spite of the political incapacitation of the Emperor, the popular attitude towards the throne remains unabated. The Emperor of Japan was and is still the most powerful symbol of the unity and solidarity of the Japanese nation. The Japanese adore their nation by giving ardent adoration to the Throne. The Emperor symbolizes two thousand years of "Japaneseness" of the unity and stability of the nation and, thus, provides a strong focus for patriotism and patriotic devotion. "The reverence of the Emperor," observes Chitoshi Yanaga, "is almost unbelievable especially to those who have not witnessed its manifestation at first hand. Furthermore, it is unfathomable since it is an emotional and practically a religious manifestation. Perhaps the British alone of the Western people can come closest to understand the Japanese attitude toward the sovereign." The role of the Emperor, therefore, cannot be discounted. He is the rallying point of the nation and majority of the Japanese people wish and strive to elevate him to the position and status of a constitutional head of the State. Parliamentary democracy requires the presence of some dignified and detached person who should play a definite role in the governmental process as the British monarch does.

## THE CABINET

### The Cabinet System in Retrospect

The beginning of the Cabinet system in Japan goes back to the Imperial Ordinance of 1885, which set up the Cabinet. But it did not establish the Cabinet system of government as obtainable in Great Britain. In fact, it was unlike the evolution of Cabinet Government in Great Britain where the Cabinet was the last element to evolve. In Japan "the cabinet antedated the promulgation of the Constitution by four years and the opening of Parliament, that is the Diet, by full half decade."<sup>9</sup>

But the beginning had been made, though in the Constitution of 1889, itself the terms "Cabinet" and the Prime Minister occurred nowhere. Article 55 simply stated that there would be "ministers of state" who were

9. Spender, J.A., *Life of Lord Oxford and Asquith*, Vol. II, pp. 29-30.

10. *Japanese People and Politics*, p. 130.

11. *Japanese People and Politics*, p. 144.

"to give advice to the Emperor and be responsible to it." From this provision it could be implied that the Meiji Constitution established a sort of Cabinet to advise the Emperor and be responsible to him for that advice.

Since the "ministers of state"<sup>12</sup> did not constitute a Council of Ministers and they were individually responsible to the Emperor alone, it was not necessary that they should have been members of the Diet and belong to its majority party or a combination of parliamentary groups agreeing to form a Coalition Government. In the beginning the Emperor selected his own Prime Minister on the recommendation of his advisers who included the Elder statesmen, the Lord Keeper of the Privy Seal and the Minister of the Imperial Household. The Prime Minister would then select the ministers in consultation with the Emperor. By the second decade of the present century, the Emperor began summoning, but not invariably, the leader of the majority party in the Diet and would command him to recommend other ministers. But the Prime Minister did not make a team by selecting ministers from his own political party. Besides the multiplicity of political parties, there were other considerations, which weighed heavily with the Prime Minister in making his choice. He had always to give premium to the wishes of the oligarchy and the views of the armed forces. The obvious result was a weak Cabinet which had to work under various pressures and influences. Nobutaka Ike correctly remarks that "the power of the pre-war Cabinet, therefore, was greatly circumscribed both in theory and practice. Nevertheless, of all the organs of government the Cabinet was perhaps most consistently in the public eye, and almost all political figures came to consider appointment as Prime Minister, or even as a Cabinet Minister, the crowning achievements of their careers."

### Cabinet System under the Constitution, 1947

The terms "cabinet" and the "Prime Minister" are now constitutionalized, and the Constitution of 1947 incorporates all the basic principles which are the essence of the system of Cabinet government. The executive power vests in the Cabinet<sup>13</sup> and the Emperor is only the symbol of the State and of the unity of the people.<sup>14</sup> The Cabinet consists of the Prime Minister as its head and other Ministers of State who are appointed by the Prime Minister.<sup>15</sup> The Prime Minister is designated from among the members of the Diet<sup>16</sup> by a resolution of the Diet, and the post goes invariably to the leader of the majority party or majority coalition in the Lower Chamber of the Diet. The Prime Minister and other members of the Cabinet must be civilians<sup>17</sup> and a majority of them must be chosen from among the members of the Diet.<sup>18</sup> The Cabinet in the exercise of its executive powers is collectively responsible to the Diet<sup>19</sup> and the Prime

12. Kabin, George McT. (Ed.), *Major Governments of Asia*, p. 193.

13. Article 65.

14. Article 1.

15. Article 66.

16. Article 67.

17. Article 66.

18. Article 68.

19. Article 66.

Minister may remove the Ministers of State as he chooses them" The Cabinet must resign when the Lower Chamber either passes a no-confidence resolution or rejects a confidence resolution" The Cabinet, thus, remains in office so long as it can retain the confidence of the House of Representatives. While the collective responsibility of the Cabinet is to the House of Representatives, individual Ministers are responsible to the Prime Minister and they can be removed from office at his will. A hand which had made them can also unmake them.

### Composition and Organization of the Cabinet

The size of the Cabinet varies from time to time but usually 16 Ministers of the State are appointed. All ministers are technically of equal rank and status. In practice, however, only twelve hold Portfolios and head the various Ministries. Ministers without Portfolios do not hold charge of Ministries and are as a matter of distinction designated State Ministers.

Cabinet meetings are held twice a week, on Tuesday and Friday, at the Prime Minister's official residence. The Prime Minister presides over meetings of the Cabinet and in his absence the Vice-Premier presides. It is an established practice now that Cabinet decisions must be unanimous. If a Minister does not agree to the decision or policy of the Cabinet, he should resign from office. The Cabinet proceedings are strictly secret and no minutes are maintained. The Ministers have explicit instructions not to divulge what transpires in the Cabinet meetings. The Cabinet Secretariat, headed by a Director and two Deputy Directors, assists in the work of the Cabinet, arranges the agenda, prepares documents and handles other matters. It is customary that the Director of the Cabinet Secretariat, and the Director and Deputy Directors of the Bureau of Legislation attend the meetings of the Cabinet, participate in its deliberations but they cannot vote.

Sixteen Ministries or Departments have been established in addition to the Prime Minister's Office. The Prime Minister himself heads his office and it is the nerve centre and operational matrix of the government. The Cabinet Secretariat and the Legislative Bureau are the auxiliary organs of the Cabinet. The former is charged with the function of preparing the agenda of Cabinet meetings and other miscellaneous affairs of the Cabinet. The Legislative Bureau examines and drafts government Bills and Cabinet orders as well as examines drafts of treaties and other matters of equal importance. There are three extra-ministerial agencies, the National Personnel Agency, the Commission on Constitution, and the Economic Planning Agency. The Board of Audit is independent of the Cabinet and it is constitutionally charged with the duty of finally auditing every year the accounts of the expenditure and revenues of the State.

The two principal committees of the Cabinet are the Ministerial Defence Council and the National Defence Council. The Ministerial De-

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20. Article 68.

21. Article 69.

fence Council consists of the Prime Minister, Foreign Minister, Finance Minister, Agriculture and Forest Minister, International Trade and Industry Minister, the Transport Minister, and the State Minister who serves as Director of the Economic Planning Agency. The National Defence Council consists of the Prime Minister, Foreign Minister, Finance Minister and the State Ministers serving as Director of the Defence Agency and Director of the Economic Planning Agency. The Prime Minister is the Chairman of both these Committees.

The average life of the Cabinet is little more than ten months. Paradoxical as it may seem, Prime Ministers have been more durable than Cabinets. The average life of the Prime Minister is twenty-five months. Intra-party and intra-factional differences on policy or personnel of the Cabinet are the two main reasons for short Cabinet tenures. "And there is constant factional and intra-party pressure on all Cabinets to step aside in favour of other deserving colleagues. This pressure is so strong on any Prime Minister that frequent Cabinet changes are almost the necessary political price for his own continuance in power."<sup>22</sup>

### Functions of the Cabinet

Under the Constitution of 1889, the executive power was vested in the Emperor. The Ministers of State advised His Majesty. It was for the Emperor to make decisions and the Ministers exercised only those functions which the Emperor was pleased to delegate to them. The Constitution of 1947 vests the executive power in the Cabinet<sup>23</sup> and the Emperor possesses no powers related to the government.<sup>24</sup> In regard to acts specified in the Constitution which the Emperor performs, the advice and approval of the cabinet is necessary.<sup>25</sup> There is no act which the Emperor can perform in his discretion. The Cabinet, thus, formulates and decides policy and co-ordinates and controls the Ministries and other agencies of administration.

But for the implementation of policy necessary legislation must be available. If the existing frame-work of law does not provide it, old laws may be amended, or new laws enacted. Administration and legislation go together. It is for the cabinet to decide what laws need be amended and the new laws which are required and their priority. The Cabinet is, thus, the magnet of policy and it integrates and guides the work of the legislature. It is the instrument through which the executive branch of government is linked with the legislature. To express it in the words of Bagehot, Cabinet is a "hyphen that joins, the buckle that binds the executive and legislative departments together."

But administration cannot be divided rigidly into sixteen or more Ministries. The action of one Ministry affects another and, indeed, every important problem cuts across departmental boundaries. It is the function of the Cabinet to co-ordinate the functions of several Ministries or

22. Robert E. Ward and Roy Maeridis (Editors), *Modern Political Systems: Asia*, p. 97.

23. Article 65.

24. Article 4.

25. Article 7.

departments of government. Finally, the Cabinet is responsible for the whole expenditure of the State and to raise necessary revenue to meet such expenditure.

The functions stated above are the general functions inherent in a cabinet and are of universal application. The Constitution of Japan as a measure of abundant caution specifies various functions with which the cabinet is charged. The most important of them are enumerated in Chapter V. According to Article 72, the Prime Minister representing the Cabinet:

- (1) submits Bills to the Diet,
- (2) reports on the general national and foreign affairs to the Diet, and
- (3) exercises control and supervision over various administrative branches.

Article 73 prescribes that the Cabinet, in addition to other general administrative functions, shall perform the following functions:—

- (i) administer the law faithfully and conduct affairs of the State,
- (ii) manage foreign affairs and conclude treaties,
- (iii) administer the civil service, in accordance with standards established by law,
- (iv) prepare the Budget, and present it to the Diet,<sup>26</sup>
- (v) enact cabinet orders in order to execute the provisions of the Constitution and of law,
- (vi) decide on general amnesty special amnesty, commutation of punishment, reprieve and restoration of rights,
- (vii) all laws and Cabinet orders are to be signed by the competent Minister of the State and countersigned by the Prime Minister.<sup>27</sup>

The Cabinet also performs functions connected with other organs of government:

- (a) advises the Emperor on acts in matters of State,
- (b) designates the Chief Judge of the Supreme Court,<sup>28</sup>
- (c) appoints Judges of the Supreme court, excepting the Chief Judge, and Judges of the interior courts from the list of persons nominated by the Supreme Court,<sup>29</sup>
- (d) determines the convocation of extraordinary session of the Diet,<sup>30</sup>

26. Article 86 also states, "The cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year."

27. Article 74.

28. Article 3.

29. Article 6.

30. Article 79.

31. Article 80.

32. Article 53.



- (e) convenes the House of Councillors in emergency session when the House of Representatives has been dissolved,"
- (f) advises the dissolution of the Houses of Representatives to the Emperor,"
- (g) advises promulgation of general election of the members of the Diet,"
- (h) advises the convocation of the Diet,"
- (i) expends monies from the Reserve Fund to meet unforeseen deficiencies in the Budget and gets subsequent approval of the Diet,"
- (j) submits final accounts of expenditures and revenues of the State and the statement of audited report prepared by the Board of Audit to the Diet every year," and
- (k) reports at regular intervals and at least annually to the Diet and the people on the state of national finances."

### THE PRIME MINISTER

#### Designation and Appointment of the Prime Minister

There is no Act of the British Parliament which establishes the office of the Prime Minister in the United Kingdom.<sup>33</sup> But the Constitution of Japan specially provides for it, and determines his status. Article 6 of the Constitution says that the Emperor shall appoint the Prime Minister as designated by the Diet. This is repeated in Article 67 with a further addition that the Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. At the same time, the Constitution requires that the Prime Minister and other Ministers must be civilians.<sup>34</sup> It, however, does not provide that the Prime Minister must always belong to the Lower House of the Diet. Legally, therefore, if the Prime Minister belongs to the Upper House, there is no Constitutional bar to it. But it has never happened since the Constitution became operative in 1947, and it is now a well established practice that the Prime Minister must come from the House of Representatives. That the Prime Minister should belong to the House of Representatives is implied in proviso to Article 67. It provides that if the House of Representatives and the House of Councillors disagree, and if no agreement is reached in a Joint Committee of both the Houses, or if the House

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33. Article 54.

34. Article 7.

35. *Ibid.*

36. *Ibid.*

37. Article 87.

38. Article 90.

39. Article 91.

40. The Ministers of the Crown Act, 1937 recognised for the first time the office of the Prime Minister by determining his salary as Prime Minister and First Lord of the Treasury.

41. Article 66.

of Councillors fails to make designation within ten days after the House of Representatives has made designation, the decision of the House of Representatives is the decision of the Diet. Added to it is the responsibility of the Cabinet to the House of Representatives. Since the Prime Minister leads the Cabinet, it is agreed to infer that he belongs to that Chamber to which the Cabinet is constitutionally responsible.

The procedure actually followed in designating the Prime Minister is the same in both the Houses of the Diet. For clarity it may be divided into two stages. The first stage consists in nominating the candidates. If one single party commands a majority, its leader will be automatically designated as a majority of the members present and a vote is required to designate the Prime Minister. If one single party does not command a majority and a few of them combine to form the majority coalition, its leader is again an obvious choice. If this is not possible, parties nominate their candidates. Since voting is on strict party lines, none can command a majority vote. In that case the first two candidates securing the maximum votes form the final nomination and one securing the majority of votes stands designated. In the event of a tie, decision is made by lot. This completes the first stage or step in the designation of the Prime Minister. Then, a resolution of formal designation is presented and voted upon. In the event of disagreement between the two Houses a Joint Committee is appointed to resolve the difference. If the Joint Committee does not come to a decision and the disagreement continues, the decision of the House of Representatives finally prevails and that decision is deemed as the decision of the Diet. This actually occurred in 1948, when Prime Minister Ashida won over his rival Yoshida. The person who is officially designated by the Diet becomes the Prime Minister on appointment by the Emperor. The appointment by the Emperor is just a ceremonial function as he is not legally competent to refuse such an appointment.

### Powers of the Prime Minister

The extent of the powers of the Prime Minister can well be appreciated from his constitutional position as the chief executive and the head of the administration. Article 66 of the Constitution declares the Prime Minister as the head of the Cabinet. He appoints Ministers and possesses the undisputed right of keeping them in office at his pleasure.<sup>42</sup> He represents the Cabinet in submitting bills, reporting on general national affairs to the Diet, and exercising control and supervision over various administrative branches.<sup>43</sup> All laws and Cabinet orders are signed by the competent Minister and countersigned by the Prime Minister.<sup>44</sup> The Prime Minister presides at the Cabinet meetings<sup>45</sup> and decides disputes of jurisdiction among Ministers of Cabinet.<sup>46</sup> The Prime Minister may suspend the official act or order of any administrative office pending action by the Cabinet.<sup>47</sup> The identity of Ministers is unknown to law

42. Article 68, *The Constitution of Japan, 1947.*

43. Article 72, *The Constitution of Japan, 1947.*

44. Article 74, *The Constitution of Japan, 1947.*

45. Cabinet Law Article 4.

46. Cabinet Law Article 7.

47. Cabinet Law Article 8.

without the Prime Minister. Article 70 of the Constitution declares that the entire cabinet must resign in case there is a vacancy in the post of the Prime Minister. It falls within the special competence of the Prime Minister to fix the date of the Diet elections, to convene the Diet, and to conclude and ratify international agreements." With a constitutionalised office as the head of the Cabinet and the enormous powers which the Constitution conferred on the Prime Minister, his position is not a whit less than his prototype in England. Under the Meiji Constitution the Prime Minister was no more than *primus inter pares*, first among equals. His appointment was a matter of Imperial prerogative and all officers of the State, civil and military including the Ministers of State, were appointed and dismissed by the Emperor.<sup>48</sup> Now the Prime Minister is a member of the Diet and a leader of the party in majority. He is vested with the power to appoint his Ministers and they retain office at his pleasure, though the cabinet as a whole is collectively responsible to the Diet. In the appointment of Ministers, he has the right to select his own team which in his opinion would be able to ensure the solidarity and stability of the government. There may be certain political exigencies which may influence his choice, but the last word rests with him. It is his decision, choice and preference which the Emperor must accept. The Emperor simply performs a ceremonial function and attests the appointment and dismissal of ministers.

It is, thus, the constitutional authority of the Prime Minister to ask a colleague to resign and if he does not, to dismiss him from office as Prime Minister Katayama and Yoshida did. The Prime Minister can also reshuffle his Cabinet as and when he likes and this happens frequently in Japan. Prime Minister Yoshida is famous for the number of Ministers he had appointed. "Twice Mr. Kishi and twice Mr. Ikeda made wholesale changes in the personnel of their cabinets in such a way that the "re-constructed" cabinet (*Kaizo naikaku*) were virtually new ones."<sup>49</sup> There are two other powers which the Constitution vests in the Prime Minister. The cabinet resigns as a whole whenever there is a vacancy in the post of the Prime Minister,<sup>51</sup> and secondly, no legal action can be taken against Ministers, during their tenure of office, without the consent of the Prime Minister.<sup>52</sup> As head of the Cabinet, the Prime Minister calls the meetings of the cabinet and presides over its proceedings, "holding a tight rein over the members."

There are no rules, customs and precedents governing the transaction of business in the cabinet meetings. Nor is there a quorum fixed for the meeting, and votes are never taken. Decisions must always be unanimous. The members express their views on the issues before the cabinet, discuss pros and cons and strive to arrive on an agreement. The Prime Minister "sums up the results of discussion and determines the consensus of opinion." Being head of the cabinet and leader of the party in office, the Prime

48. *Statistical Handbook of Japan*, 1964, *op. cit.*, p. 104.

49. Article 10, *Constitution of Japan*, 1889.

50. Theodore McNelly, *Contemporary Government of Japan*, p. 85.

51. Article 70, *Constitution of Japan*, 1947.

52. Article 75, *Constitution of Japan*, 1947.

Minister enjoys a position of pre-eminence which enables him to impose his decision. He enjoys great power especially in emergency. The Prime Minister is empowered to proclaim national or local emergencies. He is also competent to issue direct orders to the public authorities in the areas involved in emergency proclamations.

The Prime Minister is the voice of the cabinet in the Diet. He alone is authorized by the Constitution to submit Bills and reports on general national affairs and foreign relations to the Diet. He also exercises control and supervision over various administrative branches. The Prime Minister is, thus, the Manager-in-Chief of the government's business. The Cabinet Law empowers him to decide disputes of jurisdiction between one Minister and the other, and may even suspend the official act or order of any administrative office pending action by the cabinet.<sup>53</sup> These powers of the Prime Minister together with the constitutional provision that all laws and cabinet orders require countersignatures of the Prime Minister eclipse the position of the Ministers. The Prime Minister is really the master of the government, for he makes and unmakes the government and determines the policies at the meetings of the cabinet of which he is the head. And for the members of the cabinet, he appoints them and can dismiss them. An apt description of the position of the Prime Minister of Japan is, therefore, in essence similar to the one Jennings gives to the British Prime Minister. "He is, rather, a sun, around which planets revolve."

### The Civil Service

The Civil Service in a modern State is the core of government. The cabinet formulates policies but the real work of administration is done by thousands of civil servants who staff the various Ministries or Departments of government. It is not the business of the Minister, who heads the Department, to work the department. His business is to see that the department pursues a determined policy and it functions efficiently in that particular direction. Those who actually run the department and implement the policies of the government constitute the civil service of the country. They have a permanent status and tenure and are selected for their administrative capacity alone and are graded accordingly. They have no interest in party politics and remain rigidly neutral and rigorously impartial in economic and political issues. Permanency of tenure gives them security of service and furnish to Ministers, who are amateurs in administration, and the legislature all necessary information for shaping and enacting policies on a multitude of subjects. Laski has aptly said that "every State is enormously dependent upon the quality of its public officials." The welfare of the people, therefore, normally depends upon the honest performance of the duties assigned to the civil servants, high and low. Their duties have become tremendously complex and onerous with expansion in the scope of governmental activities. The new responsibilities devolving on the civil servants demand greater expertise knowledge, promptness in the performance of their duties, efficient diagnosis of the social ills and

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53. Article 4, Cabinet Law.

54. Article 7, Cabinet Law.

55. Article 72, *Constitution of Japan*, 1947.

suggestion of appropriate remedies, and consequently rendering service with equal fidelity whatever governments may come and go.

### **The Civil Service Before 1946**

Japan had nothing like the civil service until the seventh century. The patriarchal clan system had seriously undermined the authority of the Emperor and in their bid to strengthen the political structure, the Japanese looked to China for inspiration, which was then at the height of her glory. They found that the most important factor that contributed to China's greatness and power was her highly developed administrative system. Japan, accordingly, imported from China a highly centralised administrative system with the Confucian tradition that conferred high prestige upon the government officials. But there was one major difference. Whereas in China the civil service had been instituted to destroy the old power structure based on the aristocracy, in Japan, "it was used to strengthen the political structure dominated by the aristocracy." For a little over five centuries the administration of national affairs was concentrated in the hands of a civilian aristocracy which operated out of the Imperial Court at the national capital.

Feudalism lasted for nearly seven centuries. The administrative system that developed during this period was dominated by the military and hierarchical organization and it was based upon the strong bond of fealty between the lord and the vassal. It was precisely not a civil service system "but a feudal bureaucracy based on status, and official posts were hereditary." In the early years of the Meiji era, the officials of the State were largely drawn from the old Samurai-class, but soon there spread a wrong feeling of discontentment against the government personnel and the method of entry into the service. It was complained that appointments went generally to friends of those already in the service and the able and talented youngmen were eliminated from entering public service. The agitation had the desired effect and in 1885 the foundation of a modern civil service was laid by adopting the principle that appointments to government posts should be based on competitive examination. The first examination for recruitment to second and third rank services was held in 1887. There was no competitive examination for recruitment to first rank service and it embraced Cabinet Ministers, ambassadors and highest judicial officers, accounting for less than five per cent of the total number of civil servants.

### **Civil Service under the Constitution of 1947**

Under the Meiji Constitution all government officials were appointed by the Emperor and they remained in service at the pleasure of His Majesty. Imperial Ordinances rather than laws enacted by the Imperial Diet determined the conditions of the Imperial Civil Service. Since it was an Imperial Civil Service, in "its dealings with the public the Japanese bureaucracy acquired the reputation of being arrogant and overbearing. Officials were, in theory, responsible to the Emperor, and therefore each official was vested with a segment of imperial authority."<sup>56</sup> At functions of the Imperial Court the officers of the first rank were placed in precedence with the President of the House of Peers and the Speaker of the

56. Kahin, George McT. (ed.), *Major Governments of Asia*, p. 197.



House of Representatives. And as the officials were responsible to the Emperor and not to the public, officialdom was never very much concerned with the matter of public relations."<sup>57</sup>

The constitution of 1947 has changed the very concept of public service. Article 25 provides that "the emperor shall be obliged to entrust their offices and to discharge their duties in accordance with the provisions of the law." The National Public Service Law, enacted in 1947, provides for "service with status" and "service without status." The National Personnel Authority, which was set up in 1947 and administers the National Public Service Law, is charged with the responsibility of introducing democratic methods, providing scientific personnel management, and creating a job classification system.

All public officials are now divided into two categories, Special Government Service, and the Regular Government Service. In the Special Government Service are included members of the cabinet, all such positions the appointment to which requires approval of the Diet, high officials in the Imperial Court, Judges, Ambassadors and Ministers. Diet employees, common labourers, and employees of State Corporations. The Regular Government Service includes the personnel of the National Government, administrative and clerical, except those classified belonging to the Special Government Service.

The National Public Service Law is essentially concerned with the Regular Government Service. The National Personnel Authority, modeled after the Civil Service Commission of the United States of America, administers the National Public Service Law. It functions independently of the Diet and the Cabinet and consists of three Commissioners, one of whom is the Chairman. The Chairman is appointed by the Cabinet with the approval of the Diet. The functions of the National Personnel Authority, *inter alia*, are to conduct the civil service examinations, classify positions, promote employee training and welfare, deal with employee grievances, fix hours of work, leave of absence, temporary retirement discipline, compensation for illness and injury while on duty, issue directives within the law, which are binding on all departments, and to recommend administrative and salary reforms to the Cabinet and Ministries.

Consistent with the demands of expanding governmental activities there has been an enormous increase in the size of the national government employees. Just before the War in 1940, the National Government had, excluding the military and certain temporary employees, a total of 231,898 persons on its pay roll. In 1960, the figure was 1,428,049, a more than fivefold increase. In 1963, for which the figures are available, it touched a total of 1,851,777. Out of this huge total of national employees a little more than five thousand belong to the higher civil service

57. *Ibid.*

58. Article 17, *Constitution of Japan*, 1947.

59. *Statistical Hand-book of Japan*, 1954, p. 107.

comprising the first, second and third grades in the administrative service. Access to these positions is usually restricted to persons who pass the Higher Civil Service Examination, and the training and preparation of this Service are rigorous.

Despite the institutional changes, referred to above, "the Japanese bureaucracy continues to be officious and given to feelings of self-importance."<sup>9</sup> Summing up the nature of the Japanese civil service, Robert E. Ward says, "Displays of individual initiative on the part of junior employees are not highly valued. Loyalty and obedience to superiors, tact, anonymity, patience, and a capacity for the endless details and rituals of administration are the normal virtues. Personal and job security is complete, accountability to the public is practically nil."<sup>10</sup> Confucianism had normally exalted the role of the government officials and this idea continues to prevail during the present time too. The public at large also stresses the superiority of the officials and obedience to their authority. And then the civil service is a step up the social ladder. Thus, it "hardly needs to be emphasised," remarks, Chitoshi Yanaga, "that, while under the new Constitution it has been made very clear that Government officials are public servants, it will be some time before the new legal status is accepted socially and psychologically by the officials themselves as well as the general public."<sup>11</sup>

Another feature of higher bureaucracy in Japan is that it is deeply involved in politics. Ever since the War such an involvement has become notable. It is now believed that one of the best ways to begin a political career is to enter the civil service. After retirement, which is comparatively at an early age and the pension is inadequate, an aspiring civil servant is apt seriously to consider a political career as the crowning of his ambitions. He has "already proved his administrative competence, and he enjoys a measure of prestige in his home community where people regard him as a home-town boy who made good, and they take a personal interest in his political career."<sup>12</sup> According to the analysis given by Robert E. Ward, in 1959, 84 members of the Lower House (18 per cent of the total membership) and 81 members of the Upper House (32 per cent) were former career civil servants. Some 35 per cent of the Cabinet members holding office between 1954 and 1961 were civil servants<sup>13</sup> and most of the post-War Prime Ministers have had long careers in the civil service—Shidehara, Yoshida, Ashida Kishi and Ikada. "Bureaucrats naturally regard their own opinion," concludes Theodore McNelly, "as more informed than that of the layman, and Cabinet Ministers with bureaucratic origins often take a scornful attitude towards legislators, the press and the general public. Ikada Hayato was notorious for his lack of tact before he became Prime Minister."<sup>14</sup>

9. Kahin, George McT. (Ed.), *Major Governments of Asia*, p. 198.

10. Ward and Macridis (Ed.), *Modern Political Systems: Asia*, p. 101.

11. *Japanese People and Politics*, p. 311.

12. Theodore McNelly, *Contemporary Government of Japan*, p. 93.

13. Ward and Macridis (Eds.), *Modern Political Systems: Asia*, p. 102.

14. *Contemporary Government of Japan*, op. cit., pp. 94-95.

## CHAPTER IV

# THE DIET

**The Diet.** The Constitution describes the Diet or Parliament of Japan as the highest organ of State power and the sole law-making organ of the State.<sup>1</sup> It further states that the Diet consists of two Houses, the House of Representatives (popularly designated as Lower House), and the House of Councillors' (Upper House). These two provisions are sharply distinguishable from the corresponding provisions of the Meiji Constitution. The Emperor, according to that Constitution, had alone the right of sovereignty and the sole ultimate repository of State power, and he exercised "the legislative power with the consent of the Imperial Diet." Moreover, the Emperor and the cabinet both had the power to issue decrees which had the force of law. The Constitution of 1947 vests sovereignty in the people and the Diet, which is the expression of the will of the people and is the sole law-making organ of the State. "The Government has thus been transformed from an Emperor-centred to a Parliament-centred mechanism," and the elected representatives of the people are charged with the task of deliberating on national policies, formulated by the cabinet, which collectively responsible to the Diet,<sup>4</sup> approving them finally, and enacting them into laws to make them valid for implementation and obedience.

Although the Diet reflects the opinion of the people, it also guides and leads public opinion. It is here that the representatives of the people ventilate grievances and seek redress. The Opposition opposes and criticises the policies and actions of the government while the party in office explains and clarifies in order to make issues intelligible to the people. It is a government by publicity and is subject to daily and periodic assessment. In other words, the Diet is the national forum where all kinds of matters are debated and discussed and it equips the people with sufficient political knowledge to determine what policies and politics they will like to own. Since the powers of the Diet extend to all aspects of government activity, its authority is all-embracing. It deliberates and legislates, sanctions and controls the finances of the State, designates the Prime Minister who forms the government and controls it through many processes. The government is ever under scrutiny of the Diet and the Constitution now vests it with investigative power<sup>5</sup> which the Imperial Diet did not possess under the Meiji Constitution.

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1. Article 41

2. Article 42.

3. Ward and Macridis (Editors), *Modern Political Systems: Asia*, p. 92.

4. Article 65, *Constitution of Japan*, 1947.

5. Article 62, *Constitution of Japan*, 1947.

## A Bicameral Legislature

Japan has a bicameral legislature since 1890. Under the Meiji Constitution the Upper House was named as the House of Peers and it consisted of 416 members made of Peers, representative Peer representatives of the highest expatriates, and Imperial appointees. It was natural, given its make-up, that House of Peers was limited in powers. But since its powers were equal to that of the House of Representatives it served for decades as a bulwark against radical action of the government.<sup>6</sup> The Lower House, the House of Representatives, was elected by a small electorate which met a high payment of tax. Originally it consisted of 300 members. Women had no votes. In 1902 tax qualification was reduced and the membership increased. With the enactment of universal suffrage in 1925, which entitled all males over 25 years of age to vote, the number was set at 466. The term of office of the members was four years. But there were serious limitations on the powers of the House of Representatives, particularly relating to finances.

The Occupation Authorities, especially General MacArthur, favoured a unicameral legislature by doing away with the House of Peers and nothing resembling with it was desired to be put in its place. There was also a strong objection to an Upper House constituted on the basis of vocations or economic groups. But the Japanese did not favour tampering with bicameralism. They felt that an Upper Chamber in any democratic set up was necessary as a check against hasty and ill-considered legislation. It was, accordingly, proposed that a House of Councillors be established consisting of "members elected for the various districts or professions and members appointed by the cabinet upon resolution of a committee consisting of members of both Houses."<sup>7</sup> The Occupation Authorities eventually agreed to retain bicameralism, but the Upper House consisting of only elected members, representing all the people and not of groups or any section of society.

## THE HOUSE OF COUNCILLORS

### Composition

The House of Councillors which replaced the House of Peers, consists of 250 members. The Constitution does not fix the number of the Councillors. It simply says, "The number of the members of each House shall be fixed by law." The Law fixed the number at 250 of whom 150 are elected on a geographical basis, that is, from forty-six electoral districts in which the country is divided and correspond with the prefectures, and the remaining 100 are elected by the nation at large. The former are known as local constituencies and the latter national constituency. The number of seats going to a prefecture is roughly in proportion to its population and it varies from two to eight seats. A voter exercises two votes, one for the candidate in the prefectural or local constituency and the other for the candidate in the national constituency.

6. Kahin, George McT. (Ed.), *Major Governments of Asia*, p. 189.

7. As cited in Theodore McNeilly's *Contemporary Government of Japan*, p. 102.

8. Article 43, *The Constitution of Japan*, 1947.

The Members of the House of Councillors are elected for six-year term with one-third elected every two years. There is no dissolution of the House. Since the terms are staggered, the expiry of every three years, 78 members are chosen. The House of Councillors constitutes one of the two branches of the national legislature. Since the post-war House of Councillors has been held in 1947, 1953, 1959, 1965, 1971, 1977, 1983, 1989, 1995, 2001, 2007, 2013, 2019, 2025, etc. The House of Councillors is a more stable body than the House of Representatives. The House of Representatives is more subject to the tumble of partisan politics.

Qualifications for membership in the House of Councillors and the House of Representatives are laid down in Article 50 of the Constitution itself emphasises that there shall be no discrimination because of race, creed, sex, social status, family connections, property or income. The idea is to stress that political considerations should be in the composition of the House of Representatives. The House of Councillors have been abolished altogether and the qualifications for the House of Representatives are fixed for a Council of State. The House of Representatives must fulfil all other qualifications which are prescribed for a member. But the Constitution prohibits anyone to remain a member of both Houses simultaneously.<sup>9</sup> The House itself decides disputes relating to qualifications of members and there is no appeal in this respect to any other authority. In order to deny a seat to any member, the House has to pass a resolution by a majority of two-thirds of the members present in the House.<sup>10</sup>

Members enjoy complete freedom of speech and they are not liable outside the House for speeches, debate or vote cast inside the House.<sup>11</sup> Moreover, except for causes provided by law, they are exempt from apprehension while the House is in session. Any member apprehended before the opening of the session shall be freed during the terms of the session upon demand of the House. The members receive annual payment as determined by law in addition to the daily allowance when the House is in session and free railway passes. They are also entitled to a special allowance to defray the expenses of mailing documents and carrying on correspondence when the House is in session. There is provision for retirement pension too. The Chairmen of the Standing Committees are provided with official automobiles.

### The Session

The House must meet once a year in a regular session.<sup>12</sup> It is usually

9. Article 46.

10. *Information Bulletin, Embassy of Japan, New Delhi, August 1, 1965.*

11. Article 43, *The Constitution of Japan, 1947.*

12. Article 48.

13. Article 55.

14. *Ibid.*

15. Article 51.

16. Article 50.

17. Article 49.



opened in December by the Emperor who delivers a brief message to a joint session of both the Houses. Extraordinary Sessions are called by the Cabinet whenever deemed necessary. If one-fourth or more of the total members of the House demand for convening an extraordinary Session, it becomes the duty of the cabinet to do so.<sup>18</sup> When the House of Representatives is dissolved, the House of Councillors is closed at the same time. The Cabinet may, however, convoke the House of Councillors in emergency session if the conditions of national emergency prevail in the country.<sup>19</sup>

The quorum for the transaction of business is fixed at one-third of the total membership of the House.<sup>20</sup> Deliberations of the House are open to public unless it is a secret meeting on the demand of two-thirds of the members present. The House is required to keep a record of its proceedings which must be published and made available to the general public, except such parts of the proceedings of the closed session as require secrecy. Upon demand of one-fifth of the members present, votes of the members on any matter must be recorded in Minutes.<sup>21</sup> All decisions are taken by a majority vote of the members present, except otherwise provided by the Constitution. In case of a tie, the Presiding Officer exercises a casting vote.<sup>22</sup>

### **The Presiding Officer**

The House of Councillors elects its own President and Vice-President. The President presides over the sittings of the House and controls its proceedings. In the absence of the President, the Vice-President presides. The House establishes its rules for the conduct of meetings, proceedings and internal discipline and may punish members for disorderly conduct. In order to expel a member from the House, a majority of two-thirds of members present must pass a resolution to that effect.<sup>23</sup> In case of a tie, the Presiding officer is entitled to a casting vote.<sup>24</sup>

### **Functions of the House of Councillors**

Functions of the House of Councillors are discussed under the following heads:—

#### **Legislative Functions**

The Constitution confers identical legislative functions on the House of Councillors and the House of Representatives. Article 41 says that the Diet is the highest legislative organ of State power and the sole law-making organ of the State. Article 59 further says that a Bill becomes

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18. Article 52.

19. Article 53.

20. Article 53.

21. Article 54.

22. Article 56.

23. Article 57.

24. *Ibid.*

25. Article 58.

26. Article 56.

a law on passage of both the Houses. It means that a legislative measure may be introduced in either of the two Houses and when passed by them separately, it becomes a law and must be promulgated accordingly. But after having conceded that much to the House of Councillors, the Constitution establishes the supremacy of the House of Representatives. It is provided that in case the House of Councillors makes a decision different from the House of Representatives and such a difference cannot be resolved in the Joint Committee of the two Houses, it becomes a law of the Diet when the House of Representatives passes the Bill for the second time by a majority of two-thirds of members present. The Constitution also provides that if the House of Councillors fails to take final action within 60 days after receipt of the Bill from the House of Representatives, it may be taken by the House of Representatives to constitute a rejection of the Bill by the House of Councillors. The final word, therefore, rests with the House of Representatives.

### Financial Functions

Consistent with the democratic theory and the practice of parliamentary system of government, Money Bills do not originate in the House of Councillors. The Constitution specifies that the budget must be submitted first to the House of Representatives and when it passes therefrom it goes to the House of Councillors. If the House of Councillors makes a decision different from that of the House of Representatives and when no agreement can be reached in a Joint Committee of both Houses, or when it fails to take final action within 30 days after receipt of the budget approved by the Lower House, the decision of the House of Representatives becomes approval of the Diet.<sup>27</sup> In matters of budget, therefore, the function of the House of Councillors is insignificant.

Final accounts of the expenditures and revenues of the State are required to be audited annually by a Board of Audit and submitted by the Cabinet to each House of the Diet for its acceptance. The House of Councillors, like the House of Representatives, is also responsible for approving the government's settled accounts.<sup>28</sup>

### Administrative Functions

The Cabinet is the creation of the Diet and is headed by the Prime Minister. The Constitution requires that all members of the Cabinet be civilians, and that a majority of their number, including the Prime Minister, be members of the Diet. Custom has, however, established that the Prime Minister invariably belongs to the House of Representatives and an overwhelming majority of the Ministers are chosen from the same House. Not more than three or four Ministers are taken from the House of the Councillors. The Prime Minister, of course, is designated by a resolution of the House of Representatives and the House of Councillors. If, however, the House of Representatives, and the House of Councillors disagree and if no agreement can be reached in the Joint Committee of

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27. Article 59.

28. Article 60.

29. Article 90.

both Houses, or if the House of Councillors fails to make designation within 10 days after the House of Representatives has made its designation, the decision of the House of Representatives is the decision of the Diet. The final determination in the designation of the Prime Minister is, therefore, that of the House of Representatives and to its choice the House of Councillors must submit.

The House of Councillors does not control the government and can bring no crisis by passing an adverse vote. According to Article 66 the "cabinet is collectively responsible to the Diet," which in terms of law means both the House of the Councillors and the House of Representatives. But when read with Article 69, responsibility really means to the House of Representatives. It specifies, that when the House of Representatives passes a resolution of no confidence in the cabinet, or rejects a confidence resolution, "the cabinet shall resign *en masse*, unless the House of Representatives is dissolved within 10 days." Thus, when the House of Representatives passes a no confidence motion against the government or rejects a vote of confidence in the government, it must either resign or advise dissolution of the House of Representatives to seek the verdict of the electorate. The House of Councillors is not dissolved. The new election of the House of Representatives will, then, determine the party to form the government.

It does not, however, mean that the Councillors have no hand in influencing administration. The members of the House of Councillors can seek information from the government on any aspect of administration through the medium of questions. "Question hour" in the life of the parliamentary government plays a significant role and it tends to keep the government within bounds. The members may also seek redress of grievances or bring to the notice of the government a matter of public importance of which the government has not taken any cognisance by passing a resolution to that effect. The Constitution enjoins on the cabinet to report at regular intervals and at least annually to both Houses of the Diet on the state of national finances, and the Prime Minister, representing the cabinet, on general national affairs and foreign relations." Finally, the House of Councillors together with the House of Representatives has been given investigative functions. According to Article 62, each House of the Diet "may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records." The House of Councillors in this way exercises a continuous supervision over the administration, particularly relating to efficiency and honesty of government.

### Judicial Functions

The House of Councillors, together with the House of Representatives, constitutes the court of impeachment for the trial of the Judges of the Supreme Court. Article 64 of the Constitution provides that "the Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal

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30. Article 67.

31. Article 72.

proceedings have been instituted.<sup>32</sup> Matters relating to the Diet are provided by law. The Court of Impeachment, as now constituted, consists of 14 members equally drawn from the House of Councillors and the House of Representatives. The members of the court elect one from amongst themselves to be a presiding officer. The court consists of an Impeachment Committee consisting of an equal number of members of both the Houses of the Diet which prefers charges for removal and a judge or judges to be impeached. A member of the Impeachment Committee cannot simultaneously be a member of the Court of Impeachment.

### Constituent Functions

The House of Councillors and the House of Representatives both exercise equal powers of amending the Constitution. Amendments to the Constitution can be initiated by either House of the Diet and then pass separately by a majority of two-thirds of the total membership of the House of Councillors and the House of Representatives and then, it is submitted to the people for their approval at a referendum.

### Electoral Functions

The House of Councillors together with the House of Representatives performs many electoral functions. The procedure adopted for the selection of the Prime Minister has already been described. The Constitution definitely prescribes the participation of both the Houses in the designation of the Prime Minister. The qualifications of the members of both the Houses and their electors are fixed by law of the Diet. The only limitation the Constitution places is that there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.<sup>33</sup> The Diet is also competent to enact laws regarding the formation of electoral districts, method of voting, and other matters pertaining to the method of election of members of both Houses. Each House is competent to judge disputes relating to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present.<sup>34</sup> The House of Councillors elects its own President and Vice-President, and other officials.<sup>35</sup>

### Evaluation of the House of Councillors

As said earlier, General MacArthur had desired a unicameral legislature and the first draft of the Constitution was accordingly formulated. But the Japanese leadership was strongly opposed to this proposal and the Constitution of 1947 established a bicameral legislature. Since the Constitution had set up a parliamentary system of government, it was, therefore, natural that the popular Chamber should remain the focus of authority and the Upper Chamber exercised only a restraining, moderating and dignifying influence, and it provided continuity and stability to

32. Article 67.

33. Article 44.

34. Article 47.

35. Article 55.

36. Article 58.

the Diet. The members of the House of Councillors are elected for a term of six years, one-half retiring after every three years. As the House is not subject to dissolution there is continuity in its life and the members usually serve for their full term of six years. The law of the Diet prescribes that members of the House of Councillors must at least be thirty years of age and they should be chosen from two different kinds of constituencies, 100 from the national constituency and 150 from the local or prefectural constituencies. The intention was to "combine the advantages of informed local representation with those of a panel of nationally eminent candidates. But after more than two decades of the working of the Constitution, "the House of Councillors is not greatly different from the House of Representatives either in terms of age or politics."<sup>37</sup> It has become practically as partisan a body as the House of Representatives. There are, no doubt, some eminent statesmen who are chosen from the national constituency, but "the bulk of those so chosen probably represent organizations having branches or influence in several heavily populated areas of Japan, e.g., labour unions, big business and nationally organized interest groups."<sup>38</sup> There are just a few independent candidates and the rest are the nominees of the political parties and subject to their rigid control. The party composition of the House of Councillors closely resembles to that of the House of Representatives. For example, the Liberal Democratic Party is in control of both the Houses. It commands 288 seats in the 486-member House of Representatives,<sup>39</sup> and 140 out of a total membership of 250 in the House of Councillors<sup>40</sup>

The House of the Councillors has in practice not fulfilled the purpose of exercising a restraining influence against hasty and ill-considered legislation. When the same party controls both the Houses and the party composition remains more or less the same at every election, there is no possibility of any disagreement between the two Houses and the Bills pass through *ipso facto*. Rigidity of party discipline does not permit opposition of any kind with the result that the House of Councillors has become a recording Chamber. There is a growing feeling among the Japanese that the House of Councillors as constituted at present makes little contribution to the role it is expected to play and, accordingly, some kind of reform is urgently needed in its composition. It has been suggested that the House should be made a Chamber representing professions and other elements of the electorate.

## THE HOUSE OF REPRESENTATIVES

### Composition and Tenure

The House of Representatives is the Lower Chamber of the Diet and consists of 467 members elected for a four-year term. Since the House is subject to dissolution, it does not run a full term. General elections

37. Theodore McNelly, *Contemporary Government of Japan*, p. 103.

38. Ward and Maeridis (Eds.), *Modern Political System: Asia*, p. 92.

39. As per elections held in December 1969.

40. As per elections of July 4, 1965. *Information Bulletin*, Embassy of Japan, New Delhi, August 1, 1966, p. 2.



have taken place at intervals ranging from six and half months to three years and eight months. Candidates are returned from a total of 28 so-called "medium sized" constituencies, each constituency returning from three to five members, on population basis, except the constituency of Amami Islands which is represented by one member. Despite that each constituency returns several members, each elector casting only one vote. The Japanese system is a form of "limited voting," that is, the voter is permitted to vote for fewer candidates than the number of seats to be filled from a constituency.

The Public Offices Election Law of April 1950, guarantees the right of vote to practically all Japanese citizens, male or female, who have reached the age of twenty. A candidate for membership to the House of Representatives must be twenty-five years of age and must have been resident of the locality from which he seeks election continuously for a period of three months. But locality rule in Japan does not mean actual residence in the constituency as the rigid practice in the United States is. "It simply means having a legal domicile and being registered there." A candidate for the House of Representatives must meet all other qualifications as those prescribed for voters. No one can be a member of both the Houses at the same time. Nor can he hold any other office under the government. Disputes relating to qualifications of the members are judged by the House of Representatives itself. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present.

As said earlier, members of both Houses enjoy complete freedom of speech and they are not held liable outside the House for speeches made or votes cast inside the House. Members of both Houses are exempt from apprehension, except in criminal cases, while the Diet is in session. Any member apprehended before the opening of the session is freed during the term of the session upon demand of the House. The Constitution provides that members of both Houses shall receive appropriate annual payment from the national treasury in accordance with law. The law provides for a handsome annual salary in addition to the daily allowance when the House is in session, free railway passes between Tokyo and homes of the members and some special allowances and other facilities. There is also a provision for retirement pension for members.

### Sessions

The Constitution specifically mentions two types of sessions of the Diet: the regular or ordinary session, and an extraordinary session. An ordinary session of the Diet is convoked once a year," but cabinet may convoke an extraordinary session whenever necessary, to take up emergency matters which cannot wait until the next regular session in December. If one-fourth of the total members of either House make a demand that the Diet should be convoked in an extraordinary session, the cabinet must summon it." There is also a provision for a special session. According to Article 54, when the House of Representatives is dissolved

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41. Article 52, *Constitution of Japan, 1947.*

42. Article 53, *Constitution of Japan, 1947.*

there must be a general election of members of the House of Representatives within 40 days from the date of dissolution, and the Diet must be convoked within 30 days from the date of the election. The purpose of such a special session of the Diet is to elect a Prime Minister who should form the government, and to dispose of the unfinished business left over because of dissolution. When the House of Representatives is dissolved, the House of Councillors must immediately go into adjournment. But in times of national emergency, the cabinet may convoke it in emergency session to take action on urgent measures. Measures adopted by the House of Councillors in emergency session are provisional and they become null and void unless assented to by the House of Representatives within a period of ten days after the opening of the next session" which is usually a special session.

Business cannot be transacted in the House unless one-third or more of total members of the House are present; that is, 156 members out of a total membership of 460 must at least be present for the valid transaction of business. All matters are decided by a majority vote of those present, except as provided for in the Constitution. In case of a tie, the Presiding Officer, the Speaker, and in his absence the Deputy Speaker, exercises a casting vote and decides the issue.<sup>43</sup>

There is a constitutional sanction that deliberations in each House of the Diet should be public. It means that the sessions of each House of the Diet are open to the public unless a majority of two-thirds of the members present in a House pass a resolution that a secret meeting of the House be held. Under the Meiji Constitution the cabinet could alone demand a secret meeting of the House. But under the Constitution of 1947, it is the House itself which decides by a two-thirds majority that there should be a secret meeting. The cabinet has absolutely no say in the matter. Each House of the Diet is required to keep a record of its proceedings. Such a record is, again, required to be published and made available to public, except such parts of the proceedings of a secret session as may be deemed to require secrecy.<sup>44</sup>

### Organization of the House

The organization of the House of Representatives is quite simple. The first business of the House when it assembles immediately after the general elections is to elect a Speaker and a Deputy Speaker or Vice-Speaker. The Speaker presides over the meetings of the House and in his absence the Vice-Speaker presides. It is, therefore, the first step in the organization of the House that the Presiding Officer may be elected, for it is only after his election that the business of the House can be transacted. The House makes its own rules pertaining to meetings, pro-

43. Article 54.

44. Article 56.

45. *Ibid.*

46. *Ibid.*

47. Article 57.

48. *Ibid.*

49. *Ibid.*

ceedings and internal discipline." For deliberative purposes, the House functions either in plenary session or in committees. There are 16 Standing Committees of the House and most of these committees correspond to Ministries or Departments of the government. The House may also appoint special committees for the study of particular problems or proposals. Each party is represented in the committees on the basis of party strength in the House. Each member must serve on at least one Standing Committee and on not more than three committees.

### **The Speaker**

Under the Meiji Constitution the members of the House of Representatives did not elect their Speaker. The House would nominate three members and the Emperor selected one out of them to act as the Speaker. The Constitution of 1947 definitely provides that each House shall select its own presiding officer, and empowers him in case of a tie to decide the issue by his casting vote. So important is the office of the Speaker that no business of the House can be transacted without him. Even the designation of the Prime Minister, urgent as it is, has to wait until after the Speaker and his Deputy are chosen.

Normally, the Speaker is the nominee of the party in majority in the House of Representatives and he is elected for the life of the House, that is, for four years provided it is not dissolved earlier. If the party in office does not command an absolute majority but only a working majority with the support of some other party or parties, the Speakership can go to a party other than the government party as it happened in the Fifth Yoshida Government. The Speaker of the House of Representatives is, accordingly, a party man and he does not renounce his party affiliations after his election to that office. Nor does it apply to him, as it does to the Speaker of the British House of Commons, once a Speaker always a Speaker. A Speaker of the last House may not be elected after the fresh elections by the new House even if the same party is returned in majority and forms the government. He may not be elected to the House at the general elections, for, unlike the practice in the United Kingdom, he is not returned unopposed. To ensure his re-election to the House, the Speaker must remain a partisan to further the interests of his party and aid the government party, of which he is the nominee, in pushing through its legislative programme. The Speaker in Japan, therefore, is not the impartial umpire in the House and custodian of the rights of its members whether they belong to the Treasury Benches or the Opposition. His role is very much akin to that of his counterpart in the United States of America.

The Speaker presides over the meetings of the House of Representatives. It is his foremost function to maintain order and decorum in the House so that the proceedings are conducted smoothly and efficiently and there is expeditious disposal of the business before the House. In case of disobedience to his orders or disorderly conduct or use of unparliamentary language, the Speaker may deny to such a member the right to speak. If the unruly behaviour still continues, he may adjourn the House. But in order to expel a member from the House for his disorderly conduct, the Constitution demands that the House should pass a resolution to that effect supported by a majority of two-thirds or more of the members present. If the visitors to the House exhibit disorderly

conduct, the Speaker is empowered to order expulsion of such visitors or order that the visitors' gallery be cleared in entirety.

The Speaker determines the order of business, fixes the time limit on debates and interpellations, gives floor to the members who wish to participate in debates, applies closure, and, thus, brings the debate to an end. He puts the motion to vote and announces the results. In case of a tie, he exercises his casting vote and decides the issue. Immediately after the Bill is introduced in the House, the Speaker as a rule refers it to the appropriate Standing Committee or a Special Committee of the House. The Speaker functions as the official representative of the House of Representatives with all other agencies outside the House. He proposes executive sessions and approves the appointment of government members for the purpose of assisting Cabinet Ministers in the Diet. He may appear before any committee of the House, including the Joint Conference Committee, and tender his views and opinion on the matter before the committee for investigation. The Speaker is empowered to accept the resignation of a member of the House when it is not in session.

### **Supremacy of the House of Representatives**

The Constitution definitely establishes the supremacy of the House of Representatives and it is in accordance with the theory and practice of the parliamentary system of government. In the creation of the cabinet and in its retention in office the House of Representatives is the dominant Chamber. In the process of law-making it has the final say. The House of Representatives can override the House of Councillors in the event of irreconcilable disagreement between the two Houses or delay or inaction on the part of the House of Councillors in legislative or financial matters. The exact role of the House of Councillors is to delay the enactment for a specified period of time.

### **Legislative Functions**

As said earlier, a legislative measure must pass through both the Houses in order to become a law. But if one House disagrees with the other and if the disagreement cannot be resolved in a Joint Committee of both the Houses, the Constitution vests the House of Representatives with an overriding power over the House of Councillors. Article 59 specifies that a legislative Bill which is passed by the House of Representatives and upon which the House of Councillors makes a decision different from the House of Representatives and the difference persists in spite of the efforts of the Joint Committee of both the Houses to resolve it, it becomes a law on its being passed a second time by the House of Representatives by a two-thirds majority of the members present. The Constitution empowers only the House of Representatives to call a meeting of the Joint Committee.<sup>51</sup>

The Constitution also provides that if the House of Councillors fails to take final action on a Bill passed by the House of Representatives within a period of sixty days after its receipt from that House, the House of Representatives may take such an inaction on the part of the House

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51. Article 59.

of Councillors as a rejection of the measure by it. If the House of Representatives again passes the Bill by a majority of two-thirds or more members present, it becomes a law of the Diet and is promulgated accordingly.<sup>52</sup> But a legislative measure which the House of Representatives rejects cannot be recognised or revived by the House of Councillors. The final authority of law-making, therefore, rests with the House of Representatives.

### Financial Functions

The House of Representatives has control over the purse along with the House of Councillors. But, here too, the Constitution unequivocally establishes the supremacy of the House of Representatives over the House of Councillors. This is, no doubt, the prerequisite of the system of responsible government. According to Article 60 the budget must first be submitted to the House of Representatives. It is further provided that the approval of the budget by the House of Representatives becomes the approval of both the Houses of the Diet, if the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached through a Joint Committee of both Houses, or when, it fails to take final action within 30 days after receipt of the budget approved by the House of Representatives. The same provision applies to the ratification of treaties.<sup>53</sup>

Chapter VII of the Constitution covering Articles 83 to 91 contains powers which the House of Representatives together with the House of Councillors exercises with respect to national finances: the Diet determines the manner in which the finances are to be administered, modifies the existing taxes or imposes new ones, authorizes the expenditure of money and assumes obligations by the State, considers and approves the budget for each fiscal year prepared and submitted by the cabinet, authorizes and approves expenditure from a reserve fund to provide for unforeseen deficiencies in the budget, approves the appropriation of expenses for the Imperial Household, receives from the Board of Audit, through the cabinet, the audited accounts of the expenditure and revenues of the State, and receives reports at regular intervals, but at least once a year, from the cabinet on the state of the national finances.

### Executive Functions

A third great function of the House of Representatives is controlling the executive. It creates the cabinet and the cabinet is collectively responsible to the House of Representatives. This is the basic feature of a cabinet system of government as established in Japan. The Prime Minister heads the cabinet. Legally, he is designated by the Diet, but in actual practice he is the choice of the House of Representatives. The Constitution provides that if the House of Representatives and the House of Councillors disagree and no agreement is reached even in the meeting of a Joint Committee of both the Houses, or, if the House of Councillors fails to make designation within ten days after the House of Repre-

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52. Article 59.

53. Article 61.



sentatives has made its choice, the decision of the House of Representatives is final and is deemed the decision of the Diet.<sup>54</sup> The Emperor "appoints" the Prime Minister as designated by the Diet.<sup>55</sup>

With the appointment of the Prime Minister formation of the cabinet begins. The Constitution simply says that a majority of the number of Ministers must be chosen from among the members of the Diet,<sup>56</sup> and all of them must be civilians.<sup>57</sup> In practice, however, except for three or four Ministers who belong to the House of Councillors, the remaining twelve or thirteen invariably have been chosen from the House of Representatives. And with the stability of the party system, they are taken from the majority party in the House of Representatives of which the Prime Minister is the head. The cabinet advises and approves all acts of the Emperor in matters of State and is responsible therefor.<sup>58</sup> Whereas the individual Ministers can be removed from office by the Prime Minister,<sup>59</sup> the cabinet as a whole can only be dismissed by the House of Representatives. Article 69 provides that if the House of Representatives passes a no-confidence resolution, or rejects a confidence resolution, the cabinet resigns *en masse*, unless the House of Representatives is dissolved within ten days.

It means that the cabinet remains in office so long as it can retain the confidence of the House of Representatives. As soon as confidence is lost, it must resign as a whole thereby providing an opportunity to the Opposition to form the government. If the government does not resign, it advises dissolution of the House of Representatives. The House of Councillors is never dissolved. There must be a general election of members of the House of Representatives within forty days from the date of dissolution.<sup>60</sup> The principle of collective responsibility of the cabinet can best be ensured if the cabinet has the power to dissolve the Chamber to which it is responsible. Collective responsibility of the cabinet is further emphasised by Article 70. It says that when there is a vacancy in the post of the Prime Minister, the cabinet shall resign *en masse*. The identity of the cabinet, of which the Prime Minister is the head, is unknown to law without the Prime Minister and in his absence it does not exist. And the Prime Minister is the leader of the majority party or parties in the House of Representatives.

Responsibility and control go together. There are two important methods by which the House of Representatives maintains its control over the executive. The first is through the medium of questions and interpellations. It provides an opportunity to the members of the House to seek information on various matters of administration and seek redress in case of abuse of authority. The late Professor Laski succinctly said

54. Article 67, *Constitution of Japan*, 1947.

55. Article 6, *Constitution of Japan*, 1947.

56. Article 68, *Constitution of Japan*, 1947.

57. Article 66, *Constitution of Japan*, 1947.

58. Article 3, *Constitution of Japan*, 1947.

59. Article 68, *Constitution of Japan*, 1947.

60. Article 54, *Constitution of Japan*, 1947.

that parliamentary government "lives and dies by publicity it can secure not only on governmental operations, but on all the knowledge it can obtain on the working of social processes." The Constitution of Japan requires the Prime Minister to report on general national affairs and foreign relations to the Diet. The cabinet also reports at regular intervals, and at least annually, to the Diet and the people on the state of national finances.<sup>61</sup> Report on national finances embraces all the aspects and problems of administration. All kinds of treaties must also be ratified by the Diet.<sup>62</sup>

The second instrument of controlling the executive is the criticism which is constantly aimed at the government in the House of Representatives. The House of Representatives is also a debating society and this is done when Bills before the House are being discussed and debated. In fact, the entire policy of the government is under review on all such occasions. Since the defeat of a Bill means the defeat of government, the Opposition makes a bid to expose the government and if possible to depose it. The government on its part makes all-out efforts to defend its policies and actions. Another opportunity for criticism is provided when the national finances are discussed by the House, more especially the proposals for expenditure.

The House of Representatives, spearheaded by the Opposition, accordingly, provides ample opportunities for controlling the cabinet which is vested with the executive power. The Constitution also provides for setting up committees of investigation by each House of the Diet. These committees may conduct investigation in any matter relating to government and demand the presence and testimony of witnesses, and the production of records.<sup>63</sup> Investigation by committees is an effective method of supervising and controlling administration, though it seems incongruous in a system of government in which ministerial responsibility is its basic element and is constitutionally provided. Moreover, investigation by committees in the United States has not much to commend.

### Judicial Functions

Article 64 provides that the Diet "shall set up an Impeachment Court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted." Article 78 further provides that "Judges shall not be removed except by public impeachment. . . ." The Court of Impeachment so set up consists of fourteen members, seven from each House of the Diet, and tries those judges against whom removal proceedings have been instituted by an Indictment Committee. The Indictment Committee, too, consists of an equal number of members from each House of the Diet. No one can be a member of the Court of Impeachment and the Indictment Committee simultaneously.

### Constituent Functions

Amendments to the Constitution can be initiated in either House

61. Article 72, *Constitution of Japan, 1947.*

62. Article 91, *Constitution of Japan, 1947.*

63. Article 73, *Constitution of Japan, 1947.*

64. Article 62, *Constitution of Japan, 1947.*

of the Diet and when the motion passes by a two-thirds majority of all the members of each House, it is submitted to the people for their approval at a referendum where it is required to have an affirmative vote of a majority of all votes cast. The House of Representatives and the House of Councillors can, thus, initiate constitutional amendments by a concurring vote of two-thirds or more members of each House.

### **Electoral Functions**

The House of Representatives together with the House of Councillors designates the Prime Minister. If both the Houses disagree and no agreement can be reached even through a Joint Committee, or the House of Councillors fails to make designation within ten days after the Lower Chamber has made designation, the decision of the House of Representatives is accepted the decision of the Diet. Both the Houses determine by law the qualifications of the members and their electors with the proviso that there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income. Each House is the judge of disputes relating to qualifications of its members. But in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present. Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses are determined by law of the Diet.

## **LEGISLATIVE PROCEDURE**

### **Peculiarities of the Legislative Procedure**

The legislative procedure in Japan is sharply distinguishable from the one prevailing in other countries with a parliamentary system of government. It is simple and matter of fact. There are just three stages which cover the career of a Bill: Introduction, Committee stage, and consideration in the plenary session of the House. The same procedure is followed in both the Houses. When both the Houses pass a Bill, it becomes an enactment of the Diet. The Emperor simply promulgates it. He has no power to veto it.

Normally the aims and objects of the Bill are not explained in the plenary session of the House on introduction. However, if the Committee on Ways and Means deems such an explanation necessary in respect of a particular Bill, the explanation is made before it is referred to a Committee. Another important feature of the legislative procedure is the Opposition's resort to obstructionist tactics, which take various forms and some of them are unprecedented in the legislative history. The never-decreasing majority commanded by the Liberal Democratic Party since 1955, has relegated the Socialists and their allies in a permanent minority. Since voting in the House of Representatives runs strictly on party lines, the Opposition puts determined obstruction to at least delay the enactment of Government Bills. They not only resort to filibustering, but even climax the obstruction by riots and use of violence on the floor of the House and the streets. There is another device of obstruction. The frustrated Opposition would block the corridors of the Diet in order to

prevent the Speaker of the House of Representatives in calling the House to order. On various occasions the Speaker had been compelled to call in the police to physically remove the members preventing him from convening the House. There is still another tactic of boycotting the plenary sessions of both the Houses and the Committee meetings.

### **Kinds of Bills**

Bills are of two kinds, Government Bills, and Members' Bills. A Government Bill and a Member's Bill may not differ in their content and both may relate to public matters. But a Government Bill is introduced in either House of the Diet by the Prime Minister himself or by one of the Ministers. A Member's Bill originates from a Member of the Diet. If a Government Bill is defeated, it brings crisis in the Government which may result into either resignation of the Cabinet or dissolution of the House of Representatives.

### **Introduction of the Bill**

A Government Bill is always in pursuance of the policy determined by the Cabinet and it may aim at either amending the existing law or bringing on the statute a new law. The proposal for either of it originates from one of the Ministries, where it undergoes through various stages and thorough grooming in the departmental channels. When finally approved by the Minister concerned, the draft Bill goes to the Bureau of Legislation where it is subjected to expert examination. From here it goes to the Cabinet Secretariat. Finally, it is submitted to the cabinet for its approval.

If the Cabinet approves the draft Bill, it is ready for introduction in either House of the Diet. It is submitted in the name of the Prime Minister to the Presiding Officer of the House in which the Bill is desired to be introduced, except for Money Bills which must be introduced in the House of Representatives. When a legislative Bill is introduced in the House of Councillors, its copy is required to be submitted to the House of Representatives within five days of its introduction. The same procedure is followed if it is introduced in the House of Representatives.

The Speaker of the House of Representatives or the President of the House of Councillors, as the case may be, refers the Bill to the proper Committee of the House on the recommendation of the Ways and Means Committee. If a Bill is considered urgent, its examination by the Committee may be omitted by the decision of the Steering Committee. "This procedure is employed especially in the case of a Member's Bill on which the understanding of the Committee that would have deliberated on it has been obtained in advance." Normally, a Bill is not considered in the plenary session of the House. If, however, the Ways and Means Committee considers it necessary the explanation is made in the plenary session before it is referred to a Committee of the House.

### **Committee Stage**

Committee stage is the most important stage in the career of a Bill. The Bill may be referred to either a Standing Committee or a Special

Committee of the House and it has the power to pigeonhole it if the Bill is deemed "not worthy, necessary or desirable." It is, thus, tantamount to killing the Bill. The Committee holds public meetings and may require the attendance of the Prime Minister, Ministers, and government officials. They are required to answer to questions directed to them and make explanations on the Bill. The Committee may also summon publicmen to express their opinions on the Bill. It may make "investigating trips including travels abroad," if considered necessary. The Committee has always at its disposal the services of the Diet staff, including experts and researchers, for advice and guidance. It may also use the services of the National Diet Library or a thorough study and scrutiny of the Bill, and may demand, as often as necessary, opinion of the Bureau of Legislation on matters legal, constitutional and administrative. If the Bill involves consideration by more than one Committee, it is jointly considered.

### **Consideration by the House**

After the Bill has been thoroughly examined, scrutinized and approved by the Committee, it is reported to the House for deliberation and a vote. The Chairman of the Committee presents the report together with the minority report, if any. The House then discusses and deliberates upon the report. Amendments can also be moved by the members. After all the clauses have been read and voted, the Bill as a whole is voted upon. In the event of a tie, the Presiding Officer casts a deciding vote.

### **A Bill Becomes a Law**

After the Bill has passed through one House it is immediately sent to the other where it undergoes the same procedure. If the second House approves it, it becomes an enactment of the Diet and is transmitted to the Emperor for 'promulgation.' It becomes a law. If the House of Councillors rejects the Bill passed by the House of Representatives and no agreement could be reached in a Joint Committee of both the Houses, or the House of Councillors fails to take action within 60 days of its receipt, it becomes an enactment of the Diet when passed for the second time by the House of Representatives by a majority of two-thirds or more of the members present.

### **The Budget**

A different procedure is followed in the enactment of the budget. According to Article 60, the budget must be submitted to the House of Representatives. It cannot originate in the House of Councillors. When the budget passes through the House of Representatives, it is transmitted to the House of Councillors. If the House of Councillors makes a decision different from the House of Representatives and when the Joint Committee of both the Houses fails to reach an agreement, or when the House of Councillors fails to take action on it within 30 days of its receipt, the decision of the House of Representatives is the decision of the Diet, that is, as if both the Houses of the Diet have approved the budget.

It is the constitutional duty of the cabinet to prepare and submit



to the Diet for its consideration and decision a budget for each fiscal year. The process of formulation of budget starts sometimes in September when the Finance Ministry examines the estimates submitted by the various Ministries. This is an arduous task as it requires close examination of all such estimates which are very often exaggerated and consequently require drastic trimming. The draft budget is ready by January for the consideration of the cabinet and its discussion may extend to quite a number of meetings. When full agreement has been reached in the cabinet, the budget proposals are referred back to the Ministries for corroborating their estimates. The Finance Ministry then receives the final estimates from each Ministry. The Finance Minister in the light of such estimates prepares the budget which incorporates the statement of revenues and expenditure for the ensuing financial year commencing from April. The draft budget is again submitted to the Cabinet for its final approval.

The budget Bill is introduced in the House of Representatives in the later part of January. Its introduction is followed by the speeches of the Prime Minister, the Foreign Minister, the Finance Minister and the Director of Economic Policy Board. The House of Councillors usually receives the budget Bill the next day after its introduction in the House of Representatives. However, according to rules its submission may not be delayed beyond five days. The Prime Minister, the Foreign Minister, the Finance Minister and the Director of the Economic Policy Board also address the House of Councillors and they explain the various aspects of the policy involved and implications of the budget.

After the explanations of the Prime Minister and other Ministers, the Speaker refers the budget Bill to the Standing Committee on the Budget which consists of 51 members. The Committee thoroughly examines all proposals relating to revenue and expenditure and probes into each item. The Prime Minister, Ministers and officials of the Finance Ministry appear before the Committee to answer to questions, make explanations, elaborate and remove ambiguities and doubts. The Committee meets as a whole, except for a day or two when it divides into sub-committees. The sittings of the Committee are open to public.

After the completion of its deliberations, the Chairman of the Budget Committee submits the report to the House of Representatives. The House discusses the Budget Bill for a period of three to four weeks. It may accept the recommendations of the Budget Committee *in toto* or accept them with amendments. "The decision of the plenary session may or may not be the same as that of the Budget Committee." But rejection of the Budget Bill by the House of Representatives brings the downfall of the government or the cabinet may decide the dissolution of the House.

The Budget Bill as passed by the House of Representatives is transmitted to the House of Councillors for its consideration. As pointed out earlier, if the House of Councillors does not agree with the decision of the House of Representatives and if the disagreement is not resolved even in the Joint Committee of both the Houses, or the House of Councillors fails to consider the Budget Bill within 30 days of its receipt, the decision of the House of Representatives is final and in terms of the Constitution,

it is the decision of the Diet. The budget becomes operative on April 1. If for certain reasons, the Budget Bill is not passed before April 1, then, it is necessary for the Diet to pass provisional budget on a monthly basis until such time as it is finally passed.

### Committees of the Diet

The Committees of the Diet are the core of the legislative process in Japan. Their origin goes back to the Meiji Constitution when five Standing Committees were set up in each House of the Imperial Diet. But these Committees did not play a vital role then as they do now since most of the legislative business was transacted in the plenary sessions of the two Houses. As under the Constitution of 1947, originally the House of the Councillors and the House of Representatives each had 22 Standing Committees. Their number was subsequently reduced to 16 and it stands now. There are in each House Standing Committees on: Cabinet, Local Administration, Judicial Affairs, Foreign Affairs, Finance, Education, Welfare and Labour, Agriculture, Forestry and Fisheries, Commerce and Industry, Transport, Communications, Construction, Budget, Accounts, Steering, and Discipline. Most of these committees correspond to the Ministries of the Government.

A Standing Committee may consist of thirty, forty or fifty members, except for Discipline, and Steering and Accounts Committees, which have a membership of 20 and 25 each respectively. Soon after both the Houses of the Diet have elected their Presiding Officers, the next step is the selection of the Committees. Members to each Committee are appointed by the Presiding Officer of the House concerned on the basis of the party strength in the House. According to the law of the Diet, each member must serve on at least one Standing Committee but not on more than three Committees. Chairmanships of the Committees are allocated to the parties roughly in proportion to the number of seats each party commands in the House. Since the Liberal Democratic Party commands nearly two-thirds of total membership in each House, the Government Party, therefore, monopolises the Chairmanships of almost all the Standing Committees. Committee Chairmanship is the most coveted since it carries with it great prestige. "Not only is a chairman able to influence the legislative programme of the government but is able to enjoy the prerequisites and compliments of his office which are considerable. As presiding officer, the Chairman not only opens and closes the meetings of the Committee but works out the agenda, determines the order of business and regulates the speed of deliberations. He is in control of the various stages of the Committee's work, questioning, debate, and decision. In his capacity as the spokesman and representative of the Committee in all its external relations and negotiations, he becomes a key figure."<sup>65</sup>

The Standing Committees are highly important organs of law-making and they have the power to kill legislative proposals or to enable them to succeed. Upon them devolves the "primary responsibility of selecting those legislative proposals submitted by the government and recommending them for approval and enactment." All proposals for legislation

65. Chitoshi Yanaga, *Japanese People and Politics*, p. 197.

undergo an onerous process of examination and scrutiny and in order to hammer them through the Committees hold public meetings, in which witnesses representing different shades of opinion and interests are summoned to tender evidence and to make available all kinds of material, exhibits and documents to authenticate their point of view. Refusal to appear before a Committee is subject to a contempt charge.

The Standing Committees have been subjected to a severe criticism, particularly with regard to their numbers and the manner in which they function. The Committees are, it is said, too numerous in each House and consequently the affairs of the nation are divided into rigid watertight compartments. The government is a single whole and it requires an integrated action to solve the national problems. As the real work of examination, investigation and determination is done in the Committees, many of the details of facts and other relevant information remain unknown to the legislators who are not Committee members. Even the aims and objects of a Bill, according to the rules of legislative procedure, are not explained in the plenary session of the House. There is, accordingly, lack of interest among the members of the Diet. "This makes it difficult if not impossible to effectively dramatize the general debates on the floor of the House. In fact, it can often lead to the minimizing of the usefulness as well as the effectiveness of the general floor debate. It has also contributed to extremely poor attendance at plenary sessions except for very special occasions."<sup>66</sup> Moreover, the Standing Committees more or less correspond to the Ministries and there is a close link between both. Many Japanese believe that this system of close linkage between the legislative and executive branches has tended to strengthen the role of the executive. "Typical of the system has been the appointment to the appropriate Committee of Diet members with backgrounds, if not careers, in the matching ministry or executive agency. This creates a situation in which the bureaucratic loyalties of the Committee members may outweigh their legislative responsibilities and their constitutional position as members of the highest organ of state power."<sup>67</sup>

Each House may establish Special Committees too by a special resolution of the House. They are *ad hoc* Committees set up to study particular problems or proposals and as soon as they complete their work, they become non-existent. The Standing Committees, on the other hand, are appointed for the duration of the session and a Bill appropriate to the subject-matter of the Committees is referred to it. The life of a Special Committee may extend beyond the session of the House in which it was created. The Chairman of a Special Committee is appointed by the members of the Committee itself and all matters before it are decided by a majority vote. The Chairman exercises a casting vote in case of a tie. Like the Standing Committees, the Special Committees too hold public hearings and can summon witnesses and demand production of any record or material. After the investigation is over the Committee reports to the House. If the report is not unanimous, both the majority and minority reports are submitted. Commenting upon the importance of the

66. *Ibid.*, p. 197.

67. Maki, John M., *Government and Politics in Japan*, p. 96.

Special Committees. Chitoshi Yanaga writes, "Actually, so far as the general public is concerned, it is the work of the Special Committees which attracts widespread attention and interest because of the emergency or sensational nature of most of the subject-matter handled"<sup>68</sup>

The Constitution establishes two other kinds of committees, the Joint Committee of both the Houses, and the Committees of Investigation. Article 59 provides that in case the House of Councillors and the House of Representatives make different decisions on a legislative Bill, the House of Representatives may call a meeting of a Joint Committee of both Houses for resolving the disagreement. Similarly, a Joint Committee may be set up for resolving differences between the House of Councillors and the House of Representatives with regard to the budget, treaties, designation of the Prime Minister and constitutional questions. A Joint Committee consists of 20 members, equally drawn from both the Houses, and elected by the members of each House from amongst themselves. The members elected from each House select their own Chairman and each Chairman alternately presides over the meeting of a Joint Committee.

Article 62 of the Constitution provides for setting up the Committees of investigation by each House of the Diet. These Committees are empowered to conduct investigations on affairs relating to Government and may demand the presence and testimony of witnesses, and the production of records. Since the Constitution became operative a few such Committees, such as the Committee on Illegal Disposal of Government Property, have been set up. "In most cases the Committees investigating government operations assemble facts and submit reports on their findings and are content to stop there. However, in some cases they go a step further and pass judgment or make recommendations."

The Legislative Committee is yet another Committee. It is a Joint Committee of both the Houses and consists of 18 members, 10 from the House of Representatives and 8 from the House of Councillors, elected by each House from amongst its own members. This Committee has nothing to do with legislation. Its function is to ensure effective operation of the Diet and to maintain a smooth working relationship between the House of the Councillors and the House of Representatives. The Committee submits its reports to the Speaker of the House of Representatives and the President of the House of Councillors at every session of the Diet.

## CHAPTER V

# THE JUDICIARY

### Judiciary under the Meiji Constitution

There was a complete transformation of the Judicial system in Japan during the Meiji period. The old antiquated concepts of legal system developed during feudalism were abandoned and new codes patterned on the Continental jurisprudence were enacted with the advice of German and French Jurists. Anglo-Saxon jurisprudence had no place therein. Judiciary was, accordingly, not an independent branch of the Government but an arm of the executive administered by the Ministry of Justice. Although judges were required to administer law impartially, but their dependence on the Ministry hardly guaranteed independence for them. There did not exist the rule of law and *salus populi suprema lex*, the welfare of the people is the supreme law, constituted the basis of the legal system. It was not within the competence of the courts to hold any law or executive order invalid. Nor could the courts safeguard the liberties and rights of the people. In case of disputes between the government and citizens the ordinary courts had no jurisdiction. Administrative adjudication was the concern of the Court of Administrative Litigation.

There were three kinds of courts. Ordinary, civil and criminal courts, Court of Administrative Litigation, and Military court. At the apex of the ordinary civil and criminal courts was the Supreme Court consisting of 45 Judges divided into 9 divisions of 5 Judges each. The Supreme Court exercised original and appellate jurisdiction. In cases of treason and serious offences against the Imperial Family, its jurisdiction was original. On the appellate side, it heard appeals both in civil and criminal cases from the lower courts.

Next to the Supreme Court were seven High Courts, one for each Province. The High Courts heard appeals from the lower courts. Then, there were 50 District Courts, at least one in each Prefecture. The District Courts tried more serious criminal and civil cases. At the bottom were Local Courts, a little more than 300 in number, which had the jurisdiction in minor cases.

The Court of Administrative Litigation was patterned after its French counterpart and was based on Prince Ito's belief that "if administrative activities were placed under the scrutiny and control of the judicature, and if courts of law were given the power to review and invalidate administrative acts, the executive would be subordinated to the Judiciary thereby impairing the integrity and effectiveness of the executive branch."

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1. Chitoshi Yanaga, *Japanese People and Politics*, p. 355 f.n.



### Features of the Judicial System under 1947 Constitution

Like various other institutions in Japan, the judicial system too was greatly changed under the impact of the Occupation Authorities. The changes effected related to the structure of the courts and judicial procedure and were in conformity with the democratic philosophy of law and jurisprudence as cherished by the Americans. "It is perhaps not surprising," writes Nobutaka Ike, "given the nature of the occupation, that many ideas and practices of Anglo-Saxon origin were incorporated into the judicial system, thereby changing its orientation which was formally predominantly Continental." Even the oath of office "has been introduced in both form and language very much like that which obtains in the United States."<sup>2</sup> Here is a summary of the changes which constitute the features of the Japanese Judicial system now.

(1) The Constitution separates the judiciary from the executive and makes it an independent branch of the government. Article 76 vests "the whole judicial power" in a Supreme Court and in such inferior courts as may be established by law. It further provides that no extraordinary tribunal shall be established "nor shall any organ or agency of the Executive be given final judicial power." In order to emphasise the independent status of the judiciary the Supreme Court actually controls all judicial affairs of the country. According to Article 77 the Supreme Court is vested with the rule-making power under which it determines the Rules of Procedure and of matters relating to attorneys, the internal discipline of the courts and the administration of Judicial affairs.

(2) The Constitution guarantees the independence of Judges and ensures the dignity of the judiciary. It ordains that all Judges shall be bound only by the Constitution and the laws.<sup>3</sup> The Chief Justice of the Supreme Court is designated by the cabinet and appointed by the Emperor.<sup>4</sup> This procedure is designed to place the Chief Justice on the same level of rank and dignity as the Prime Minister. Judges of the Supreme Court are appointed by the cabinet<sup>5</sup> whereas judges of the inferior courts are appointed by the cabinet from a list of persons nominated by the Supreme Court.<sup>6</sup> Judges are liable to removal only by impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges can be taken by any executive organ or agency.<sup>7</sup>

(3) The Constitution applies the principle of popular sovereignty on the Judges of the Supreme Court too. Their appointment is reviewed by the people at the first general election of the members of the House of Representatives following their appointment and every ten years thereafter. If the majority of the voters disapprove the appointment, the judge is dismissed.<sup>8</sup> Judges of the inferior courts are appointed for a term of

2. Kahin, George McT. (Ed.), *Major Governments of Asia*, p. 199.

3. Chitoshi Yanaga, *Japanese People and Politics*, p. 348.

4. Article 76.

5. Article 6.

6. Article 79.

7. Article 80.

8. Article 78.

9. Article 79.

ten years subject to re-appointment. No Judge of the Supreme Court has so far been voted out of office and the judges of the inferior courts are invariably re-appointed. Yet it is a constitutional fact that their tenure at both levels is subject to review.

(4) There is a complete separation of judicial administration from criminal investigation by, placing the Procurators (Prosecutor's) office under the control of the Ministry of Justice. The Judges and the Procurators consequently work independently of each other, both are separate and distinct functionaries. The Procurators are civil servants working under the supervision and control of the Minister of Justice whereas the judiciary is a separate and independent department of the Government.

(5) The principle of the Rule of Law has for the first time been introduced in Japan. There is now only one system of courts throughout the country and only one system of law to which all people are amenable. The whole judicial power is vested in the Supreme Court and other inferior courts and no extraordinary tribunal exists to administer justice. Nor is any organ or agency of the executive given final judicial authority. Accordingly, the Court of Administrative Litigation was abolished and administrative litigation is now placed within the jurisdiction of regular courts. Trials are conducted in open court and judgment is declared publicly. If the court unanimously determines that publicity of the trial proceedings is dangerous to public order or morals, the trial may be conducted privately. But trials relating to political offence, offences involving the press or cases wherein the rights of the people as guaranteed by the Constitution are questioned must always be held publicly.<sup>10</sup>

(6) The Code of Criminal Procedure and the Code of Civil Procedure assign to the courts a far greater role to play than was the case previously. Warrants for arrest and detention can now be issued only by the judges, the courts are to start with the presumption of innocence of the accused in criminal cases, and the legal validity of confessions has been greatly limited. Judicial decisions are now rendered in a simple colloquial language and, above all, the Constitution itself is couched in a simple and matter of fact language intelligible to the average Japanese.

(7) The Supreme Court is the Court of last resort with the power to determine the constitutionality of any law, order, regulation, or official act.<sup>11</sup> The Constitution is, therefore, supreme and the Supreme Court has been explicitly given the right of judicial review.

(8) The Constitution guarantees to the citizens Fundamental Rights and the courts are the Custodian of such rights. Article 97 declares that the Fundamental Rights are for all time inviolate and it is asserted in Article 98 that "this constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government or part thereof, contrary to provisions hereof, shall have legal force or legality."

(9) Another feature of the judicial system is the system of courts of

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10. Article 82.

11. Article 81.

Domestic Relations. These courts are half arbitral and half judicial tribunals composed of judges and laymen and they decide cases involving domestic relations and juvenile delinquency.

(10) Finally, the Supreme Court, as Maki remarks, "has adhered strictly to the principle of the separation of powers but has honoured equally the doctrine of legislative supremacy"<sup>12</sup>. The Court has insistently safeguarded its sole right to exercise the whole judicial power and resolutely resisted any interference on the independence of the courts. On the other hand, the Supreme Court has also consistently refused to declare legislative and executive acts unconstitutional. The Court has argued that to declare such acts as unconstitutional would be the violation of the principle of separation of powers as well as the doctrine of legislative supremacy. The proper remedy for legislation not clearly constitutional is a political one, that is, the sovereign people can pass judgment on the Diet and on the Cabinet by means of the ballot<sup>13</sup>.

### Organization and Functions of the Courts

The Judiciary consists of the Supreme Court, 8 High Courts, 49 District Courts (with 235 branches), and 570 Summary Courts. There are also 49 Courts of Domestic Relations or Family Courts (with 235 branches).

### The Supreme Court

At the apex of the judicial structure is the Supreme Court located at Tokyo. It consists of a Chief Judge and fourteen other Judges, fifteen in all. The Chief Judge is appointed by the Emperor upon designation by the Cabinet, while all other Judges are appointed by the Cabinet and "attested" by the Emperor. The law provides that ten Judges, out of a total of 15 including the Chief Judge, must be legal experts of not less than 20 years' professional standing and the remaining five Judges may be learned persons of experience but necessarily in the field of law. "This is designed to permit a more democratic and varied representation of expertise on the highest tribunal of the nation." The appointment of the Judges of the Supreme Court is subject to review at a national referendum, first at the time of the general elections following their appointment and then at the first general elections after a lapse of ten years. There has been no case of dismissal as such so far. But the system of popular review "could conceivably result in drawing the court into the rough and tumble of partisan politics."

Judges of the Supreme Court are required to retire at an age fixed by law, which is 70 years. The minimum age of a Supreme Court Judge is fixed at 40 years. Judges cannot be removed from office except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against Judges can be administered by any executive organ or agency. The Constitution demands that all Judges shall be independent in the exercise of their conscience and in order to ensure their independence adequate compensations are guaranteed, which cannot be decreased during their terms of office.<sup>14</sup>

12. Maki, John M., *Government and Politics in Japan*, p. 107.

13. Maki, John M., *Government and Politics in Japan*, pp. 107-108.

14. Article 79.

The Supreme Court is the Court of the last resort with powers to determine the constitutionality of any law, order, regulation or official act. The power of judicial review is, thus, explicitly vested in the Supreme Court. In all cases involving questions of constitutionality the Grand Bench of the court of all 15 Judges, 9 constituting a quorum, hears the appeals. In other cases in which issues of law are involved appeals are heard by a petty bench consisting of five Judges, three constituting a quorum.

The Supreme Court is vested with the rule-making power under which it determines the Rules of Procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs. Public Procurators are subject to the rule-making power of the Supreme Court. This is, indeed, a sweeping power. The Supreme Court may delegate some of its rule-making authority to lower courts. This is how the Supreme Court exercises supervision and control on the entire judicial system in the country. "A key organization through which the court exercises its broad powers of judicial control is the Legal Research and Training Institute, established by law under the jurisdiction of the Supreme Court. Among other things, the Institute is responsible for the training of every person interested in a legal career." No one can, thus, become a judge, a lawyer, or a public prosecutor unless he graduates from the Institute or has undergone a course of in-service training there. The Supreme Court also operates similar institutes for training of the clerks of the court and family-court probationers. Judges of the inferior courts are appointed by the Cabinet out of the list of nominations made by the Supreme Court.

### High Courts

In the second rank, below the Supreme Court, are the 8 High Courts. The jurisdiction of a High Court extends to the region to which it is assigned and, accordingly, it has a regional jurisdiction. The number of Judges differs from one High Court to the other. Tokyo has 64 Judges whereas Sapporo has only 7. The Court operates through a bench of three Judges, but in case of trial for crimes to overthrow the government the bench consists of five Judges. Judges are appointed for ten years, although there is no restriction on their being re-appointed. They are appointed by the Cabinet from a list of persons nominated by the Supreme Court. Judges must have at least ten years' experience in a judicial capacity, or as a Procurator or as a practising lawyer.

The jurisdiction of a High Court is essentially appellate and for a great many cases its decisions are final. The original jurisdiction of the court is limited to crimes to overthrow the government.

### District Courts

Beneath the High Courts are 50 District Courts (with attached courts of Domestic Relations), one in each of Prefectures except for Hokkaido which has four. The Judges of the courts are similarly appointed as Judges of the High Courts and they must possess similar qualifications. District Courts are the principal trial courts and exercise a general jurisdiction over all civil actions not specially given to other courts. A single

judge presides over the court, except for more serious cases when a panel of three judges conduct the trial.

The District courts have attached courts of Domestic Relations, 49 in number with 235 branches. These courts are peculiar to Japan and are designed to promote harmonious relationship within the family and among relations. A Court of Domestic Relations or a Family Court, as it is now popularly designated, is composed of one judge and two intelligent and experienced laymen. These courts provide facilities for the out-of-door settlement of disputes relating to probate and domestic disputes, such as, divorce, alimony, breach of promise, inheritance, property division, adoption, guardianship, and other similar matters. Normally, judicial procedure is not followed in every case as there are chances of settlement outside the court. To the best, Family Courts may be characterised half arbitral, half judicial.

### Summary Courts

The last are 570 Summary Courts which are at the base of the judicial pyramid in Japan. These courts handle minor civil and criminal cases. In civil cases the amount involved should be less than 5,000 Yens and in criminal cases the sentence awarded to an accused should be less than a month. The presiding officer has a broad latitude in the conduct of trials. Let it be repeated that Judges of the inferior courts, including High Court and District Judges, are appointed by the Cabinet from a list of persons nominated by the Supreme Court, and their appointment is for ten years, although there is no restriction on their being reappointed. They retire at the age of 70.



## CHAPTER VI

# POLITICAL PARTIES

### Historical Background

Political parties did not emerge in Japan as a result of the establishment of parliamentary system of government in 1947. Their origin goes back to 1874, though there were no political parties then in the real sense of the term. They were political clubs and societies. Early in January 1874, Itagaki organized a political association called the Patriotic Public Party to carry on a movement for the realization of liberty and attainment of popular rights. Immediately afterwards a "Memorial for the establishment of popular Representative Assembly" was presented to the Emperor. It caused a stir in the country and had a magnetic effect on the people. But the Emperor's Government undertook measures to suppress the movement and the Patriotic Public Party went out of existence after only two months of its existence. In 1878, the party was revived with the avowed object of pressing forward its original demand for the establishment of a representative assembly. It had somewhat an inflammatory effect. The government first used suppressive measures to crush the agitation, but soon realized the futility of the oppressive policy and ultimately bowed to the popular demand. An Imperial Rescript issued on October 18, 1881 declared that the national assembly would be established in 1890.

Six days after the issuance of the Imperial Rescript, the Liberal Party was established and it became the vanguard of the movement for popular government. Closely in its wake came the Progressive Party followed by the Imperial Party. The Progressive Party, popularly known as the Reform Party, advocated liberalism of the British type and freely preached the philosophy of Bentham and John Stuart Mill. The Government was alarmed by the activities and programme of both the Liberal and Progressive Parties and in order to counteract their influence on the people, it backed the founding of the Imperial Party. It was for all intents and purposes a Government supported party. Its membership comprised government officials, Buddhist and Shinto priests, and nationalist scholars who were the product of government schools.

All the three parties disbanded in 1885, partly as a result of Government's repressive policy directed against the Liberal and Progressive Parties and partly as a consequence of their internal dissensions. Ito, who had by then come back from Germany, was strongly opposed to political parties and he caused the liquidation of the Imperial Party. Ito became Prime Minister in 1885. He pushed ahead, with the support of Inoue, the Foreign Minister, his programme of Westernization, which strongly aroused the champions of civil rights, "as well as the nationalists and the chauvinists." Inoue's attempt in 1887 to make concessions in

the negotiations for treaty revisions was denounced by Agriculture and Commerce Minister Tani and it was followed by a scathing criticism of the Government by the various segments of the Japanese society. Goto strongly appealed to the sentiments of the people and exhorted them to join the forces against the Government. Members of the disbanded Liberal Party, the nationalists and the conservatives all joined together and formed a "Greater Coalition of Parties."

The Government accepted the challenge and issued on December 19, 1887, a Peace Preservation Ordinance which authorized the expulsion of all those engaged in anti-government activities from an area within a radius of seven and a half miles from the capital. Nearabout 600 people were expelled as a result of this ordinance. The movement then spread to the outlying areas. In the meanwhile Ito was successful in bringing Okuma, his old colleague with whom he had parted political company in 1881, in government as Foreign Minister. "In the succeeding government headed by Kurdo, Okuma became the mainstay of the Cabinet and actually came to lead if not dominate it."

Immediately after the Meiji Constitution became operative in 1889, Prime Minister Kurado declared his faith in the supra-party government and he was supported by Ito, who was then President of the Privy Council. The Prime Minister succeeded in winning over Inoue, Gato and Itagaki and they were taken in the Cabinet. "All these political leaders," observed Chitoshi Yanaga, "fought against the ruling oligarchy espousing the cause of liberalism and popular rights. Yet, when lured with government posts of sufficient prestige, they gave up their fight and gladly joined the ranks of those in power. Their devotion to the ideals of responsible government or even to political parties was not only weak and expedient but easily purchasable." That was the nature of political parties in Japan till 1890.

When Sino-Japanese War came in 1894 Opposition against the government ceased altogether. But soon after the cessation of hostilities the two leading Opposition parties realised "that for years they had been duped, bought and exploited by the government and it was imperative they abandon their useless and harmful struggle with each other and join forces in the fight against their common political enemy, the Satsuma-Choshu clique that was in control of the government." They founded a party in 1898, a merger of the defunct Liberals and Progressives.

Roundabout the century another dramatic development took place in the growth of political parties. Prince Ito, who had all through bitterly opposed political parties, became their supporter. He declared that for good and efficient government political parties were essentially necessary and, accordingly, in 1900, he founded a party known as the Association of Political Parties. Till 1913, those who had been affiliated with the Progressive Party did not regroup to form another party. They were content to form coalitions. It was only between 1913 and 1925 that the Constitutional Association, which had the support of elder statesmen and business leaders and advocated the establishment of constitutional govern-

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1. *Japanese People and Politics*, p. 221.

2. *Ibid.*

ment, was organised. World War had created an impact on the Japanese people in favour of democratic institutions and it appeared by 1920 that a full-fledged parliamentary government would soon be established. Beginning from Kato Takakira, the President of the Constitutional Association, till the assassination of Inukai Tsuyoshi in 1932, party leaders, except once for General Tanaka Giichi, headed the Government.

One important feature of this period was that the political parties depended heavily on the big industrial combines, Zaibatsu which supplied them with funds to fight elections. Some of the business magnates supported the opposing parties at the same time in order to win the support of the government, no matter which party came into power. This "alliance between the parties and the Zaibatsu naturally caused the public to be suspicious that the government was partial to the interests of the big business, and these suspicions seemed to be confirmed by the frequent charges of bribery and corruption that were aired in the Diet, principally by the party which happened to be in opposition at the moment."

There were some other reasons, like the growth of big cities and localisation of industries, formation of labour unions, spread of education, the growth of white-collar class, etc., which created a political awakening amongst the Japanese people and they demanded enlargement of the suffrage and consequently the right to vote. But paradoxical as it was, most of the Japanese leaders were reluctant to enlarge the electorate. The bureaucrats, too, considered it ominous. They thought that enlargement of the electorate would bring social instability which would prove highly injurious to the growth and development of the country and its people. But the popular demand could no longer be resisted and in 1925, all male Japanese people of 25 years of age and more were given the right to vote.

But with the extension of suffrage, the Diet passed the Peace Preservation Law which provided punishment extending to ten years for persons guilty of joining societies and organizations advocating a change in the Constitution, the Emperor institution and in the ownership of private property. This punitive legislation, however, did not deter the growth of radical parties. The Farmer-Labour Party was established in 1925 to achieve equality and the greatest good of the masses as its goal. Back in 1892, socialism had found its way in Japan when the radical faction in the Liberal Party separated and established the Oriental Liberal Party. After quite an upheaval in the career of the socialist parties with different labels, in 1922 the Japan Communist Party found its way. It was banned in 1923, but was again revived in 1927 followed by severe suppression in 1928, and by 1932 its central leadership was completely destroyed.

In spite of the fact that various socialist parties including the Anarchist and Syndicalist groups had come and gone during this period, but they had created an indelible impression on the working class. They, however, failed to carry the voters along with them primarily due to their internal strife and government's repression. In 1928 elections, the first on the basis of universal manhood suffrage, the four socialist parties ran 88 candidates but could capture only 8 seats in the House of Representa-

tives. After that they failed to enlist even this meagre support of the electorate and by 1930 suffered a great set-back.

The conservative parties, too, suffered from deep factionalism. Accordingly they commanded neither reasonable respect nor a continuous support from the electorate. None of them had a clear and definite programme. Lack of responsibility to the Diet made the Government irresponsible and the members had no effective means to control it. The militarists seized the opportunity. They attributed the distress caused by the economic crisis, political distress prevailing in the country, and diplomatic failures in the international field to the scandalous behaviour of the political parties and the politicians. People, too, had lost faith in the ability and integrity of the political parties to solve the national and international problems which confronted the country. The party government came to an end in 1932. The militarists who had come into power exercised such a pressure that ultimately in 1940, the political parties found their complete exit. From 1940 to 1945, there existed only one body in the country, the Imperial Rule Assistance Association, "a mild version of a totalitarian party."

## POST-WAR POLITICAL PARTIES

### Re-appearance of Political Parties

After the exit of political parties from the national scene for about a decade and a half they re-appeared in 1945, when as a prelude to the setting up a democratic set up of government the Occupation Authorities issued a directive to the Japanese Government on October 4, 1945 for removal of restrictions on political, civil and religious liberties. The Japanese Government was directed to immediately abrogate the operation of all provisions of laws, decrees, orders, ordinances and regulations which restricted freedom of thought, of religion, of assembly, of speech and press. The Directive also ordered the Japanese Government to release all political prisoners. A week later, General MacArthur desired that the Government should adopt, as rapidly as possible, the emancipation of women by granting them the right to vote, to encourage formation of labour unions, and endeavour to democratize economic institutions.

The Directive proved a green light for the resumption of political activities and consequently re-appearance of political parties. In the first general elections held in April 1946, there were as many as 260 "parties" excluding scores of organizations which could not be counted as political parties. After the first mushroom growth, four political parties—the Liberal Party, the Progressive Party, both conservatives in spite of their attractive labels, the Social Democratic Party, and the Japan Communist Party—finally stabilized themselves. In 1955, the Liberal and Progressive Parties merged into one and the new Party was named the Liberal Democratic Party. The reunification of the Socialists, who had hitherto been engaged in stormy conflict among themselves, alerted the conservatives to take stock of their future. Thus, in 1955 there emerged "what could be described as a formal two-party system. But the unification among the Socialists was only a temporary phase. There were again factional splits and in 1959, the Socialist Democratic Party was divided into two

separate parties, the Socialist Party (the old left wing) and the Democratic Socialist Party. The following table shows the party position in the House of Representatives for the elections held on December 26, 1960 and December 20, 1963.

<i>Parties</i>	<i>Dec. 26, 1960</i>	<i>Parties</i>	<i>Dec. 20, 1963</i>
Liberal Democratic Party	301	Liberal Democratic Party	294
Democratic Socialist Party	16	Democratic Socialist Party	23
Socialist Party	144	Socialist Party	144
Communist Party	3	Communist Party	5
Independents	3	Independent	1
<b>Total</b>	<b>467</b>	<b>Total</b>	<b>467</b>

In the elections held in December 1969, the Liberal Democratic Party won 288 seats in 486-member House with another 12 won by party members who were allowed to run as Independents, thus, making a total of 300. The seats secured by other Parties were: Buddhist Komeito Party 47, Democratic Socialist Party 31, Socialist Party 90, Communist Party 14, and other Independents 4.

The party position in the House of Councillors, after the elections held on July 4, 1965,<sup>4</sup> is as follows:—

<i>Parties</i>	<i>Seats held</i>
Liberal Democratic Party	140
Japan Socialist Party	73
Komeito Party	20
Democratic Socialist Party	7
Japan Communist Party	4
Daini-in club	0 <sup>5</sup>
Independents	5
<b>Total</b>	<b>249</b> (One seat vacant)

### Characteristics of the Japanese Party System

Here are some of the important characteristics of the Japanese party system:—

(1) The Meiji Constitution established a bicameral legislature. Though the House of Representatives was directly elected and was subject to dissolution, yet it did not establish a cabinet system of government. It only envisaged it. In 1900, when Prince Ito felt the political expediency of forming a party government and declared that the constitution nowhere prohibited a party government that political parties

3. *Statistical Handbook of Japan*, 1964, p. 106.

4. *Information Bulletin, Embassy of Japan*, August 1, 1965.

5. It held 4 seats before the election on July 4, 1965.



took a firm root in the administration of the country. From 1924 to 1932, party leaders headed the government.

The Constitution of 1947 clearly establishes the parliamentary system of government. The Emperor is the symbol of the State and the Cabinet is vested with the Executive power. The Constitution requires that the Prime Minister, who heads the Cabinet, should be designated from among the members of the Diet and a majority of the Ministers constituting the Cabinet must be chosen from among the members of the Diet. The Constitution also provides for the collective responsibility of the Cabinet to the Diet, and the Diet is subject to dissolution. All these are the characteristics of a party government which should come into office as a unit and go out of office as a unit. The Cabinet makes a team, the members of which play the game of politics under the captaincy of the Prime Minister. In order to put a united front they swim and sink together. Homogeneity is, therefore, the essence of their existence and solidarity ensures their stability in office. Party system is, as such, the basis of the Cabinet government. Yet, the Constitution does nowhere mention the party system. It is an extra-constitutional growth in Japan as it is in other democratic countries having parliamentary system of government.

(2) For the smooth working of such a system of government, it is desirable that there should be a two-party system, one in office and the other in opposition. But the bane of Japanese politics is the multiplicity of political parties. In the pre-war era there were as many as 360 parties at one time and when the Constitution of 1947 became operative the number was more than 260. They could not really be characterised as political parties. They were just various groups and associations and the result of various traits of Japanese character. Habits of nations like that of individuals seldom die and the multiple party system continues as before causing considerable complexity in the political life of the country.

(3) Splits and merger of the parties is a regular feature in Japan. Fondness of variety and newness have an admirable appeal to the Japanese and both these factors constantly account for the growth of splits and the multiplicity in the number of the parties. "Most if not all these mergers have been effected by incompatible groups for expediency and have been marriages of convenience. Even members who bolted the party, as well as splinter parties, have been re-admitted without much ado into the parties. Political parties change their labels with the greatest of ease and without changing their policies. More often than not, names are changed merely to accommodate the newly won members or simply to give the psychological effect and illusion that the party is making a fresh start."<sup>6</sup>

(4) The process of merger was highlighted in 1955, when the Conservatives and the Socialists both closed their ranks and formed two distinct political parties. Some optimists fervently predicted that the two-party system had finally been established in Japan. But factionalism soon plagued the unity of the Socialists and after a truce of only four

years they again divided and formed two separate parties. The Liberal Democratic Party remains, no doubt, united so far and it is the ruling party since 1955, but internal strife is as rampant now among the Conservatives as before. In fact, both the Conservatives and the Socialists are "congeries of factions," and if the latter have separated, the former remain united only as a matter of political expediency. If they separate their ruling position disappears. "It would, however, be risky to predict that such a condition will last indefinitely. It has been true since 1955, but we must remember that there have been years of unexampled prosperity and freedom from national crisis in Japan."

(5) None of the parties in Japan are mass organizations. They are largely associations of professional politicians who centre their activities in Tokyo. They operate among a coterie of professional politicians and administrators and their prime focus of attention is the House of Representatives which actually designates the Prime Minister and provides a majority of ministers. Seldom do they go in their constituencies to nurse them and lead the people. There may be scattered prefectural and local party offices, but their contribution in the basic party offices is negligible. All important work is done at the party headquarters. The Diet-centred nature of the political parties makes them essentially parliamentary parties. Here Japan is akin to France.

(6) Another important feature of the party system in Japan is the steady influx of the officials, serving and retired, into the parties and the Diet. A well recognized political axiom in Japan is to enter the civil service with a view to begin a political career. A civil servant who has ambition of becoming a minister must at some point run for a seat in the Diet. "Since about 1949, the number of ex-bureaucrats in the conservative parties have increased appreciably, until in recent years they represent about one-fourth of the members of the House of Representatives belonging to the Liberal Democratic Party." In four Cabinets between 1957 and 1960 the ex-officials had held about one-half of the Cabinet posts. Most of the post-war Prime Ministers have had long careers in civil service as Shidehara, Yoshida, Ashida, Kishi and Ikeda. The result is that the "Japanese politics has undergone a kind of bureaucratization," and, as such, there has come into being concentration of party activities in the Diet oblivious of the importance and role of the extra-parliamentary segment of the party.

(7) Localism is still a strong factor in the Japanese politics. The electors generally prefer to vote for a candidate who belongs to them rather than to a party and the programme it stands for. The theory of "friends and neighbours" determines the choice and it is an important aspect of the electoral behaviour. It is believed that the candidate who lives in the immediate vicinity is most likely to best represent the local interests.

(8) It, however, goes to the credit of Japan that religion has not provided a basis of organisation of political parties. There are no religious blocs and no religiously dominated parties. There is secularization of politics and politicians do not use religion for political purposes.

## PARTIES AND POLICIES

**Liberal Democratic Party**

The Liberal Democratic Party which is now in power, was established in 1955 as a result of the merger of conservative groups. The Liberal Party and the Democratic Party (previously the Progressive Party) united to counteract the unity of the Socialists. The Liberal Democratic Party stands for: the preservation of the principle of popular sovereignty, respect for and protection of the worth and dignity of the individual, his rights and freedoms, clean government, revision of the Constitution with a view to elevate the position and status of the Emperor as Head of the State in place of the symbol of the State, restoration of the right to defence of the country, limited rearmament for self-defence, educational and technological development, expansion in foreign trade and planned industrial growth, industrial peace and workers' welfare and application of social security on a broader national base, a diplomacy closely associated with the United Nations which will bring Asia closer to the rest of the world, co-operation with the free world and especially with the United States, a cautious approach to the normalization of relations with the People's Republic of China and Soviet Russia.

The Party considers itself a national party and seeks support from all strata of the population. But the Party is backed most heavily by rural communities, owners of commercial and industrial establishments in the towns and cities, and high level administrative personnel in government agencies and of corporation executives. The Party is headed by the President, who is chosen by a party conference consisting of Party members of the two Houses of the Diet, and delegates chosen by the prefectural branches of the Party. Other important Party officials are the Secretary General, the Chairman of the Executive Board, and the Chairman of the Political Research Committee, the National Organization Committee and the Party Discipline Committee. The Headquarters of the Party are at Tokyo and it is here that vast majority of the Party's work is transacted. In fact, for purposes of most policy decisions and day to day business, the Party is almost exclusively controlled by its higher membership normally resident in Tokyo, although ultimate authority rests with the Party Conference or Congress. The Party claims a total registered membership\* of approximately 1,500,000, but American commentators hold that it is in the neighbourhood of 300,000.<sup>8</sup>

The Liberal Democratic Party is in power since 1955, and since Socialists are sharply divided amongst themselves there is no possibility to oust them from office. But the Party itself is torn into factions and it is estimated that there are at present 13 factions," each having its own following, in the House of Representatives. It is, therefore, difficult, as Robert E. Ward observes, "to describe accurately the leadership of the Liberal Democratic Party. Superficially, the party is led by its President who, since this is normally the majority party, is also apt to be the Prime Minister of Japan. But when we look more closely, we soon see that the Liberal Democratic Party really has no single leader. In fact, it is in

8. Ward and MacLachlin (Editors), *Modern Political Systems: Asia*, p. 72.

9. Also refer to Robert A. Seidapino and Junnosuke Masumi, *Parties and Politics in Contemporary Japan*, pp. 83-85.

10. Theodore McNelly, *Contemporary Government of Japan*, p. 122.

some ways more accurate to view it as a loose coalition of factions united for purposes of campaign and legislative strategy rather than as a unified national party."<sup>11</sup>

### Japan Socialist Party

In October 1955, the Japan Socialist Party was established under the Chairmanship of Mosaburo SUZUKI. The Party resulted from the reunification of left and right-wing Socialists who had been split for years. But they again separated in 1959 and the Democratic Socialist Party was established on January 24, 1960 by dissident right-wing members of the Socialist Party. The Japan Socialist Party is now the second largest legislative Party in the Diet commanding 44 seats in the House of Representatives<sup>12</sup> and 73 in the House of Councillors. The chances for the Socialist Party to come to power are remote and it must play the role of **an opposition for many years to come.**

The platform of the Socialist Party may be described as follows:— Re-adjustment of Japan's foreign relations with emphasis being put on the establishment of a collective non-aggression and mutual security system including Japan, United States and the Soviet Union, demobilization of the present defence forces and creation of a democratic national police, establishment of democracy and the socialization of major industrial and financial institutions to create a welfare and cultural State, attainment of a self-sustaining economy and the development of land to absorb the unemployed. The Party aims to achieve its objective through peaceful revolution. That is, by obtaining an absolute majority in the Diet in accordance with democratic forms. A socialist administration would first be established and stabilised and the capitalist society would steadily be converted into a socialist society.

The Party claims to be class-mass party, with its nucleus the working class, and a union of toiling classes made up of farmers, fishermen, small and medium commercial and industrial enterprises, intellectuals and others constituting the great majority of the people. Socialist Party, too, is highly centralised in Tokyo, where an elaborate Party Headquarters is maintained. At the top is the national convention, which meets every year and is made up of delegates of local Party units and affiliated organizations. The convention elects a Central Executive Committee, its Chairman and Secretary-General. The convention is the ultimate source of policy and adopts the party platform.

### The Democratic Socialist Party

The reunification of the Socialists in 1955 did not eliminate the ideological and the personal feuds which had ever plagued the Socialist movement in Japan. They remained together for four years and the eventual split came in October 1959, when a group within the Japan Socialist Party led by Nishio Suehiro, issued a statement that "there is an urgent desire in Japan for a democratic socialist party which, while abiding by parliamentarianism, will fight both extreme leftists and right-

11. Ward and Maerdis (Editors), *Modern Political Systems: Asia*, p. 75.

12. As per elections on December 20, 1963.

13. As per elections on July 4, 1965.



ists and promote the general welfare of all sections of the working people, without special favour or partiality to labour unions." The members of the "Socialist Reconstruction League" led by Nishio formally seceded from the Socialist Party to organise a "genuine" Socialist Party. It actually came into being on January 24, 1960 and was named the Democratic Socialist Party.

At the time of their separation the dissidents had the support of some 35 Socialist members in the House of Representatives and their number increased to 40 before the General Elections in December 1960. They fared poorly in this election securing only 17 seats. In the General Elections in December 1963, the Party captured 23 seats and in December 1969, it won 31 seats. The organization of the Democratic Socialist Party resembles that of the Socialist Party. At the head of the Party is the Chairman of the Executive Committee with the Secretary-General who is in charge of administration. The ultimate authority is vested in the Party Congress.

The policy of the Democratic Socialist Party may be summarised as follows:

- (1) opposition to capitalism and totalitarianism of both the right and the left;
- (2) respect for the dignity of the individual;
- (3) pursuit of an independent foreign policy; and
- (4) establishment of a welfare State through planned economy and socialist means.

### **The Communist Party**

The Communist Party was formally organised in 1922, but it remained outlawed until after World War II. The Party has run candidates in all the General Elections since 1946, but its electoral and parliamentary successes have been modest. The Party reached the peak of its strength in the 1949 General Elections, when it polled 5.6 per cent of the total votes and won 35 seats in the House of Representatives. In 1960 elections it had 3 seats each in the House of Representatives and the House of Councillors. In the elections of 1963, the Communist Party won 5 seats in the House of Representatives. In 1969 elections it secured 14 seats. According to a recent survey membership of the Communist Party is about 47,000.<sup>14</sup> All Japan Congress constitutes the supreme authority within the Japan Communist Party. The Congress is now convened after every two years. Delegates to the Congress are elected by Party members through their local organizations. The Congress formulates the Party platform, discusses governing regulations, lays down the principles of political action. Since the Congress does not meet regularly, it does not actually initiate policy. The principle of democratic centralism rigidly operates. The Party Congress elects the members and candidates of the Central Committee. In 1961, 60 members and 35 candidates were elected. There is a Central Committee Directorate of eight members. The Central Committee meets at least once every three months. The Secretariat of the Central Committee consists of ten members and is headed by the Secretary-General. The Party Congress also elects a Central Control and Supervision Committee.

14. *Facts about Japan*, Public Information and Cultural Affairs Bureau, Minister of Foreign Affairs, Japan.



## CHAPTER VII

# LOCAL GOVERNMENT

### Pre-war Local Government

The pre-war system of Local Government was established shortly after the Meiji Restoration. The 250 fiefs in which the country was then divided were consolidated and replaced by prefectures. Governors were appointed to man the administration of the prefectures and it symbolised the assumption of authority by the Emperor. Care was also taken that none of the prefectures bore the names of the provinces of feudal era. In 1888 and 1889, before the convocation of the First Imperial Diet, several basic laws relating to Local Government were promulgated "in order to prevent the Diet from sharing in the formation of the system of local government." The object being to prevent popular control of local government and to centralise in the central authority the power over local government affairs. Consequently the impact of local autonomy was weak.

The Governor of each prefecture was appointed by the Emperor on recommendation of the Home Minister, and, as an Imperial appointee, he was the official and mouthpiece of the Government at Tokyo. Although there was in each prefecture a popularly elected assembly which deliberated and voted on the budget promulgated by the Governor, the power of the assembly was only advisory "since the Governor either dominated the assembly or could by-pass it if it refused to accede to his wishes." The Ministries of the Central Government, especially the Home Ministry and the Finance Ministry which were most concerned with prefectural affairs, had the authority to issue directives and instructions to Governors, and to suspend or cancel actions of the Governors. "Centralization and bureaucracy rather than local autonomy and democracy were the prevailing principles of local government in pre-war Japan."

In the beginning Mayors of towns and cities were nominated by the Ministry of Home Affairs. In the decade following 1920, however, the Mayor and his Deputies came to be chosen by the Municipal Assemblies. The Municipal Assemblies consisted of 30 members or more who were elected for a term of four years. The assembly met once a month but for the speedy transaction of business a Municipal Council, consisting of 10 to 15 members of the assembly and elected by the assembly itself, was established. The Municipal Council met as frequently as the exigencies of business demanded.

### Local Autonomy under the Constitution, 1947

The Occupation Authorities were intent to reverse the old order of

1. Kahin, George McT. (Ed.), *Governments of Asia*, p. 201.

2. Theodore McNelly, *Contemporary Government of Japan*, p. 155.

things and to democratise the political structure of the country at all levels. To the local Government they were determined to provide the greatest opportunity for democracy and "home rule." Accordingly, the Constitution of 1947 contains a separate chapter on Local Government and establishes the principle of local autonomy. Article 92 provides that the organization and operations of local public entities would be fixed by law "in accordance with the principle of local autonomy." Article 93 provides that the local entities shall establish assemblies as their deliberative organs and to enact their own regulations. The chief executive officers of all public entities and members of their assemblies would be elected by direct popular vote. Article 94 empowers local public entities the right to manage their property, affairs and administration and to enact their own regulations. Consistent with the democratic principle of local government, Article 95 explicitly stipulates that the Diet would not enact a special law applicable only to one local entity without the consent of the majority of votes of the local public entity concerned.

All matters relating to local public entities are determined and controlled by the provisions of the Local Autonomy Law of 1947, which has frequently been revised since then. There are, thus, three levels of government in Japan: the national government, prefectural government, and the municipal government. The term local government embraces the prefectural and municipal levels and the government at both these levels is governed by the provisions of the Constitution and the Local Autonomy Law of 1947, as amended from time to time.

Japan is today divided into 46 major political sub-divisions known as prefectures. Of the 46 prefectures one is a metropolis, one is a district, two are urban prefectures and 42 are rural prefectures. There were more than 3,700 cities, towns and villages in 1960, which were entitled to a municipal government. But recent legislation<sup>1</sup> has encouraged the amalgamation of municipalities, and very many of them have since merged for reasons of economy and efficiency. As a result of this process of merger in 1964, there were, in 1964, 559 cities, 1,971 towns and 874 villages.<sup>2</sup> Certain large cities have been designated as "special cities" and they enjoy considerable independence from control from governments of the prefectures in which they are located.

The functions of local government units are twofold: (1) to enforce certain national laws, and (2) to enact and enforce legislation of the local governments themselves. In the performance of functions relating to the first category, the local government acts as an agent of the national government and is under the supervision of the Ministry for which it acts. In the second category are included functions on which local entities are competent to legislate and enforce by-laws so enacted. These powers are delegated to local government entities by laws passed by the Diet. The Constitution does not enumerate functions of the local government. But it does not mean that local entities are entirely at the mercy of the

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3. Town and Village Merger Acceleration Law. The object is to increase the number of cities while the number of towns and villages should decrease.

4. *Statistical Handbook of Japan, 1964*, Bureau of Statistics, Office of the Prime Minister.

national government. Article 94 of the Constitution provides that local public entities have the right to manage their property, affairs and administration and to enact their own regulations within the law. Article 96 further provides that a special law, applicable only to one local entity, cannot be enacted by the Diet without the consent of the majority of voters of the local entity concerned.

The matters which local governments are competent to deal with, as per local Autonomy Law, include: maintenance of public order, protection of health and safety of the people inhabiting the locality, setting and management of parks, playgrounds, canals, irrigation and drainage waterways, water plants, sewerage system, electric plants, gas plants, public transportation, docks, piers, warehouses, schools, libraries, museums, hospitals, asylums for the aged, jails, crematories, cemeteries, disaster relief, protection of minors, indigents and the infirm, land reclamation, identification and registration of inhabitants, zoning, co-ordination of activities with other local bodies, and levying and collection of local taxes. Local governments are prohibited from dealing with matters relating to national affairs including judicial matters, penal punishment, national transportation and communication, post offices and national institutions of learning and research. They may not contravene the laws and cabinet orders and ministerial regulations authorised by law. A municipality may not contravene the by-laws of a prefecture. At the same time, the national government may not deal with matters within the jurisdiction of the local entities.

### Chief Executives

Each prefecture has a Governor as its executive head whereas a municipality has a Mayor. Both are elected by the voters of their respective units for a term of four years. They can be recalled from office by their respective voters or removed from office on a vote of no confidence passed by the relevant assembly. According to the Local Autonomy Law when a Governor acts on behalf of the national government to enforce national laws, he is subject to the directions and supervision of the Minister concerned. When a Mayor acts on behalf of the national government, he is subject to the directions and supervision of the Minister as well as the Governor of the prefecture of which the municipality is a unit. In case a Governor does not enforce the law or fails to obey directions, the Minister concerned may move a court with the request to order the Governor to perform the function as required. In the event of continued failure of the Governor to perform duties assigned and directions issued, the Minister concerned may enforce the law himself, and the Prime Minister may remove the Governor from office. Similarly, if the Mayor of a municipality fails to enforce national laws or by-laws of the prefecture or the directions issued thereto, the Governor of the prefecture concerned may compel him to obedience by an order of the court or may remove him from office. Thus, the local executive has to serve two masters. He is the agent of the central government in national matters and as an elected officer, subject to recall and removal from office, to the people of the locality and their representatives in local matters.

### Local Assemblies

Every prefecture has an assembly and a municipality a council. At

both levels it is a popularly elected deliberative body. The size of the prefectural assembly varies from 40 to 120, depending upon the size of the prefecture. Similarly, the size of a municipal council depends upon the population of the municipality and it varies from 12 to 100 members. Members of an assembly as well as a municipal council are elected for a term of four years, subject to dissolution by the Governor or the Mayor as the case may be. They may be recalled by the voters who may also demand a dissolution of the entire body.

The local legislative bodies, the assembly and the municipal council, have the power to make by-laws on all subjects assigned to the local jurisdiction by the Local Autonomy Law and as enumerated above. It must be carefully noted that the national Diet enacts "laws" whereas legislation enacted by local bodies is known as "by-laws." The subjects within the legislative competence of the local legislative bodies include the budget of the local government, the acquisition, management, and disposal of the entity's property, levying and collecting local taxes, and matters falling under the jurisdiction of the assembly and the Council in accordance with laws and Cabinet orders.

The Governor and the Mayor have the power to veto legislation passed by the assembly and the council respectively. But if the assembly or council again passes it by a two-thirds majority, it becomes a by-law. For a motion of no confidence to pass against the local chief executive of the prefecture or the municipality, there should be a quorum of two-thirds of the total membership and that three-fourths of the legislators vote for the no-confidence motion. When the motion for no-confidence is passed the local chief executive must either resign or dissolve the assembly or council as the case may be. If it is dissolved and the newly elected legislative body again passes a no-confidence motion, the local chief then must resign.

In addition to the executive and legislative wings of local government there are in the prefectures and in many cases on the municipal level, too, Boards of Education, Public Safety Commission, Inspection Commissions and Personnel Commissions. Members of the Commissions are usually appointed by the Governor or Mayor with the approval of the concerned legislative branch, and they are subject to recall.

There is a provision of direct devices of initiative, and recall in the Local Autonomy Law. If one-fifth of the registered voters of a locality demand the enactment of a by-law, the local chief executive must present such a demand along with his own opinion on it to the legislative body. The local chief executives, certain other executive officials, members of the assembly and councils, and members of the Commissions, can be recalled from office on a petition signed by one-third of the voters of the constituency concerned.

## Conclusion

This is a brief description of the legal position of the units of local government in Japan. But their "actual position deviates from this in several important respects. They are not really autonomous to anything like the degree anticipated by the law." In practice, there has been a steady increase in the Central control and supervision of local government

particularly in matters relating to education, police and local finance. In 1960, the Autonomy Agency, after having remained an agency of the Prime Minister's office, became an independent Autonomy Ministry charged with the duty of maintaining proper supervision of local government. None of the units of local government are self-supporting and to meet their deficits they depend upon subsidies and grants-in-aid from the Central Government. "This pronounced degree of fiscal dependency plus the long-ingrained bureaucratic habit of looking to Tokyo and the national government for guidance detracts greatly from the actual degree of autonomy enjoyed by the prefectures, cities, towns and villages of Japan."



# The Government of Pakistan

## CHAPTER I

# THE COUNTRY AND ITS PEOPLE

**The Genesis of Pakistan.** Pakistan was created in August 1947, to be the state organisation of the Muslim "nation" of the Indian sub-continent and it was the culmination of the two-nation theory the seeds of which go as early as 1888. Sir Syed Ahmed Khan, the founder of the Aligarh Movement, "had laid down the premises which lead naturally, perhaps even necessarily," remarks Penderel Moon, "to the idea of Pakistan." Sir Syed Ahmed Khan had asserted that India was inhabited by two different nations and there would necessarily be a struggle for power in the event of transfer of sovereignty to Indian hands. "Is it possible," he posed a question, "that under these circumstances two nations—The Mohammedan and Hindu—could sit on the same throne and remain equal in power?" Sir Syed himself answered, "Most certainly not. It is necessary that one of them should conquer the other and thrust it down. To hope that both could remain equal is to desire the impossible and inconceivable." Earlier on January 16, 1883, speaking in the Imperial Legislative Council on the Bill for providing the elective principle in the Municipal Committees, Sir Syed Ahmed Khan observed, "India, a continent in itself, is inhabited by vast populations of different races and different creeds: the rigour of religious institutions has kept even neighbours apart: the system of caste is till dominant and powerful. In one and the same district the population may consist of various creeds and various nationalities." He, accordingly, defended the principle of nomination of a certain number of municipal representatives.

Sir Syed Ahmed Khan was opposed to the Indian National Congress and dissuaded the Muslims from joining it. He unequivocally confessed that he had "undertaken a heavy task against the so-called Indian National Congress," and declared that the parliamentary system of government as demanded by the Congress was "unsuited to a country containing two or more nations tending to oppress the numerically weaker." He wrote to Badruddin Tyabji, the President of 1887 Session of the Indian National Congress, when the latter made earnest efforts to conciliate him with the Congress: "I do not understand what the words 'National Congress' mean: Is it supposed that the different castes and creeds living in India belong to one nation, or can become a nation, and their aims and aspirations be one and the same? I think it is quite impossible, and when it is impossible there can be no such thing as a National Congress, nor can it be of equal benefit to all the people." He further told Tyabji, "You regard the

1. Penderel Moon, *Divide and Quit*, p. 11.
2. As cited in Richard Symond's *The Making of Pakistan*, p. 31.
3. As cited in Khaliquzzaman's *Pathway of Pakistan*, pp. 269-70.
4. Graham, *Life and Work of Sir Sayed Ahmad Khan*, p. 178.
5. Ghosh, P.C., *The Development of the Indian National Congress*, p. 143.

doings of the misnamed National Congress beneficial to India, but I am sorry to say that I regard them as not only injurious to our own community but also to India at large. I object to every Congress in any shape or form whatever which regards India as one nation."<sup>6</sup>

Sir Syed, thus, made the major assertion that India had more than one nation and the Muslims were bound together not by linguistic or geographical ties, but by their religious brotherhood. The concept of secularism was attacked as it was completely alien to Islam. Religion and politics were inseparable for them. There was, therefore, nothing in common between the Muslims and the Hindus, two warring nations, who had not forgotten "the days of strife and discord which preceded the peace brought to India by the British supremacy."<sup>7</sup>

Sir Syed Ahmed Khan was not then asking for the partition of India and there was no possibility of the British leaving India at that period of her history. In fact, Sir Syed was a great admirer of English people.<sup>8</sup> He considered that the British rule in India "was the most wonderful phenomenon the world had ever seen." His object was to oppose the establishment of democratic institutions in India, for which the newly-founded Indian National Congress was hard pressing, as the numerically larger community would totally override the interests of the numerically smaller community. He feared that the introduction of democratic principles similar to the Western would inevitably involve the establishment of **Hindu Raj** and such a condition of perpetual bondage the Muslims were taught never to accept. In 1942, Choudhry Khaliquzzaman gave the copy of Sir Syed Ahmed Khan's speech to Prof. Coupland,<sup>9</sup> when he was brought from Allahabad to Lucknow by Sir Maurice Hallet, the Governor of the United Provinces, to discuss the political situation in the country with him. Chaudhry Khaliquzzaman, referring to Sir Syed Ahmed Khan's speech, observed, "This speech was delivered almost sixty years before it came under discussion between Prof. Coupland and me, but in content, appropriateness and vigour it appeared as fresh as if delivered a day previously."<sup>10</sup> For, "in propounding the two-nation theory and drawing attention so pointedly to the difficulties of majority rule in a country where the population is not homogeneous, he had not only put his finger on the main crux of the problem of Indian constitutional development, but also by implication had suggested a possible answer to it: for if two nations could not sit on the same throne, why should they not divide it."<sup>11</sup>

The British Principals of the Aligarh College played a key role in

6. As cited in Ram Gopal's *Indian Muslims*, p. 67.

7. Sir Syed Ahmed Khan's speech, January 16, 1883, Imperial Legislative Council.

8. Sir Syed in a letter from London, dated October 15, 1869, expressed a supreme contempt for the Indians. Refer to Graham's *Sir Syed Ahmed Khan*, pp. 183-84.

9. Prof. Coupland was awarded a scholarship by the Nutfield Trust and was sent to India to study the Indian constitutional documents of the past, survey the conditions of the present and the future constitution and report the results of his inquiry.

10. *Pathway to Pakistan*, op. cit., p. 270.

11. Penderel Moon, *Divide and Quit*, p. 12.

converting Sir Syed Ahmed Khan anti-Congress and anti-Hindu. They had been described the empire builders in the "far off lands."<sup>12</sup> The British policy of alienating the Muslims and using them as a counterpoise took a definite shape in 1888, when Hume, the founder of the Indian National Congress, started his mass movement. The Secretary of State, Lord Cross, wrote to Lord Dufferin on January 4, 1887, in reply to the Viceroy's report regarding the abstention of Muslims from the annual session of the Congress, that "this division of religious feelings is to our advantage." Lord Dufferin was responsible for initiating the theory of special importance of Muslims in Indian politics and also reminded them that "they themselves constituted a nation and a very powerful nation as their number was more than fifty millions."<sup>13</sup> The Partition of Bengal was used as a major device by Lord Curzon to drive a wedge between the Hindus and Muslims. In a speech delivered in the Nawab of Dacca's palace on October 1, 1905, the Viceroy outlined the scheme of the Partition of Bengal and said, "I am giving you a Muslim Province."

The strategy of Lord Curzon and his successors was to set one religion against the other and class against class in order to shatter the image of national unity and to disintegrate the feelings of national solidarity. Lord Minto on behest of the Secretary of State for India, John Morley, soon after assumption of office, began to elaborate the scheme of reforms, which should at least satisfy the Moderate elements in the Indian National Congress. But the Viceroy's main concern and interest in the scheme of reforms was to devise means for weaning the Muslims from the politics of the country and obliterating from their minds a sense of nationalism. Before the intended reforms could find a shape, a scheme for weaning the Muslims had taken a tangible form. A deputation of Muslims was engineered to meet the Viceroy and to present their demands. The main actors in the drama were Principal Archibald of the Aligarh College and Colonel Dunlop Smith, Private Secretary to the Viceroy.

A deputation consisting of thirty-five prominent Muslims drawn from different Provinces and led by His Highness the Aga Khan met the Viceroy on October 1, 1905 and presented him an Address in which they made two important demands on behalf of the Muslim community. The first was that the position accorded to the Muslim community in any kind of representation should be commensurate with their numerical strength and also with their political importance and the value of the contribution that "they make to the defence of the empire," and consistent with the "position they occupied in India a little more than hundred years ago. Secondly, that the method of nomination and election, as operative under the Act of 1892, had failed to give the Muslim community a proper type or adequate number of representatives and if the principle of election was to be accepted by the Government in the forthcoming reforms, they should be given the right of sending their own representatives by themselves through separate electorates comprising the Muslims alone.

Lord Minto expressed his entire agreement with the demands put for-

12. Strachey, A., *India: Its Administration and Progress*, p. 308.

13. *Indian Speeches of Lord Dufferin* (Modern Review, 1911), Vol. I, p. 303.

ward by the Aga Khan deputation and gave an assurance that in any system of "representation whether it affects the municipality or a district board or a Legislative Council in which it is proposed to introduce or increase an electoral organisation the Muslim community should be represented as a community." The Viceroy also sympathised with the extra-claims of the Muslim community and told the members of the deputation: "You justly claim that your position should be estimated not only on your numerical strength, but in respect of the political importance of your community and the services it has rendered to the Empire." He further remarked, "I am entirely in accord with you. Please do not misunderstand me; I make no attempt to indicate by what means the communities can be obtained, but I am as firmly convinced as I believe you to be, that any electoral representation in India would be doomed to mischievous failure which aimed at granting a personal enfranchisement regardless of the beliefs and traditions of the communities composing the population of this continent." Finally, the Viceroy gave a definite assurance to the Muslims that "their political rights and interests will be safeguarded in any administration" with which he was concerned.

Lord Morley did not initially approve the plan of separate electorates as recommended by the Government of India, but ultimately succumbed to the pressure of Lord Minto. Just ninety days after the Aga Khan deputation met the Viceroy, the Muslim League was founded with the avowed object of supporting, whenever possible, all measures emanating from the Government, to protect the cause and advancement of the interests of the Muslims, to controvert the growing influence of the Indian National Congress, and to attract the young educated Muslims for public life within the fold of the Muslim League.

The Morley-Minto Reforms conceded to Muslims as a community separate electorate and weightage of seats. The system of separate electorates was mischievous as it threatened to break India's political unity and it did actually divide the country in 1947. Curzon had kindled the baneful communal consciousness in partitioning Bengal and carving out Eastern Bengal and Assam as a separate Province with a Muslim majority. Morley-Minto Reforms gave it a more concrete form by spreading the fangs of communalism throughout the country and achieved the greatest victory for the British Empire in the twentieth century. Mahatma Gandhi aptly remarked that the "Minto-Morley Reforms have been our undoing. Had it not been for separate electorates then established, we (Hindus and Muslims) should have settled our differences by now."

The system of communal representation was opposed to history and all codes of political morality. It had nowhere existed before and perhaps nowhere else it had been thought to divide the people of a country in this manner even by the worst followers of Imperialism. But the British did it by dividing Indians by creeds and classes and thereby creating political camps against each other which taught the people to think as fanatic partisans and not as citizens. The results were disastrous. "A political barrier," said Jawaharlal Nehru, "was created round them (Muslims) isolating them from the rest of India and reversing the unifying and amalgamating process which had been going on for centuries.... This barrier was a small one at first for the electorates were very limited, but



with every extension of the franchise it grew and distorted the whole structure of public and social life like wine cankers which corroded the life system. It poisoned the municipal and local self-government and ultimately it led to fantastic divisions. There came into existence separate Muslim Trade Unions and Students Organisations and Merchants Chambers. These electorates first met among the Muslims, spread to other minorities and groups till, in a few months, they became separate compartments. Out of them have grown all manner of separate tendencies and, finally, the demand for splitting of India.<sup>14</sup>

The first clear expression of splitting the country is to be found in an address to the Muslim League in 1930 by Sir Mohammad Jinnah. He had mainly in mind what is now West Pakistan. In November, December, 1930 during the First Round Table Conference Choudhri Rahmat Ali had met many Muslim leaders in London and expounded to them his scheme of partition and gave it the name of Pakistan. But the Council of the Muslim League did not take any notice of the President (Sir Mohammad Iqbal) address nor put forward any concrete proposal touching the subject.<sup>15</sup> Later on a leaflet in the *Now or Never* written by Choudhri Rahmat Ali, Mohammad Aslam Khan, Shakh Mohammad Saadiq and Inayatullah Khan was privately circulated from Calcutta in January, 1933, claiming to be on behalf of thirty-three million brethren who lived in Pakistan, by which we mean five north-western areas of India, viz., Punjab, N.W.F.P., Kashmir, Sind and Baluchistan. They opposed the scheme of federation which had been decided upon in the Round Table Conference and maintained that "The Muslims of Pakistan a distinct nation with a homeland of the size of France and a population equal to the French, demand the recognition of a separate national status."

The Muslim delegates to the Joint Select Committee regarded Pakistan "only a student's scheme." One of them even said, "It is chimerical and impracticable." In 1933, Sir Mohammad Saad Nawaz of the Punjab Muslim League published a book entitled *Confederacy of India*, and anonymously ascribed it to "A Punjabi." His scheme divided India into five zones: (1) The Indus Region, (2) Hindu India, (3) Rajasthan, (4) the Deccan States, and (5) Bengal. Unlike the scheme of Pakistan as proposed by Choudhri Rahmat Ali, "A Punjabi" did not favour the idea of complete separation of the units. He advocated for a loose union between the different units. "Separate countries should be re-assembled in a confederacy of India." Some time after, Sir Sikander Hayat Khan, the Premier of Punjab, put forward *Outlines of a Scheme of Indian Federation*. He, too, proposed division of India into seven zones connected together by a limited authority of the Centre. Sir Sikander could foresee the dangers inherent in raising the bogey of Pakistan.

The Government of India Act, 1935, "took no account of the Pakistan 'chimera'. With the full concurrence of Jinnah and the Muslim League,

14. Jawaharlal Nehru, *The Discovery of India*, pp. 295-96. Also refer to the Report of the Indian Statutory Commission, Vol. I, p. 29.

15. P for Punjab, A for Afghanistan, K for Kashmir, S for Sind and Istari for Baluchistan.

16. Khaliqzaman, *Pathway to Pakistan*, p. 238.

Muslim interests were sought to be protected by other means." It envisaged the establishment of a federation under which the Provinces were to enjoy a large measure of Provincial Autonomy. Sind was separated from the Presidency of Bombay and made a separate Province thereby making four Muslim majority Provinces—Bengal, Punjab, North-West Frontier Province, and Sind—out of a total of eleven. The system of separate electorates for Muslims with weightage was continued. It was envisaged that the Princely States would be included in the federation and that their representatives would have a neutralising influence at the Centre. The Provinces and the Chief-Commissionership were to be the compulsory units of the Federation whereas it was voluntary for the Princely States. The Federal Part of the Government of India Act, 1935 could only become operative when the Rulers of States representing not less than half the aggregate population of the States and entitled to not less than half the seats to be allotted to the States in the Upper Federal Chamber had acceded to the federation and an address had been presented to the King by both the Houses of Parliament calling upon the establishment of the federation.

It was, thus, the Provincial part of the Government of India Act which came into operation on April 1, 1937. The federal part had necessarily to be deferred. Till 1939, negotiations with the Rulers of the States regarding the terms of their accession were still in progress when the Second World War came in September. The Viceroy suspended the federal part till the end of the War. It could not, however, be revived after the War due to many political developments in the country. On the Provincial side, the Indian National Congress contested the elections and won an absolute majority in the Provinces of Madras, Central Provinces, United Provinces, Bihar and Orissa. In the four Provinces of Bombay, North-West Frontier Province, Bengal and Assam it emerged as the largest single party. The Muslim League could not achieve resounding success in the Muslim-majority Provinces. Such success as it could achieve was in the Provinces in which Muslims were in a minority. Probably its greatest strength was in the United Provinces where the Muslims were only 16 per cent of the total population, and "had succeeded in retaining a political importance disproportionate to their numbers."<sup>17</sup> And it was from here that the cry of Pakistan really spread. It is interesting to note, says Javid Iqbal, "that Muslim national consciousness developed in the Hindu majority provinces before it came to the Muslim majority provinces; in the latter Islam was on the defensive. It was the Muslims of the Hindu majority provinces who made the whole of Muslim India conscious that Islam was in danger."<sup>18</sup>

The Congress agreed to form Ministries in June 1937, in the seven Provinces—North-West Frontier Province, the United Provinces, the Central Province, Bihar, Orissa, Madras and Bombay—on definite assurance from the Viceroy, Lord Linlithgow, that the Governors would not interfere in the day-to-day administration of the Provinces. In 1938, the Congress formed coalition ministries in Assam and Sind. Non-Congress min-

17. Penderel Moon, *Divide and Quit*, p. 13.

18. Penderel Moon, *Divide and Quit*, p. 15.

19. Spann, R.N. (Ed.), *Constitutionalism in Asia*, p. 135.

istries functioned in Bengal and Punjab. The Muslim League members of the Provincial Assemblies in some of the Hindu-majority Provinces and particularly in the United Provinces, had expected that they would be invited by the Congress to form coalition ministries. But it was not so. The Congress told the Muslim League Party in the Assembly that they must cease to function as a separate group. Penderel Moon wrote: "This proved to be a fatal error. The prime cause of the creation of Pakistan, but in the circumstances I would say the only cause, was the Muslim League leaders rejected the Congress plan and Mr. Jinnah was adamant that Muslims can expect neither office nor a place under Congress rule. A coalition and all none of communal peace had been struck on the basis of Congress-Leagueism." Since then it became allied with the Muslim League to preach that in any unified and independent government of India the Muslims would ever remain in a permanent minority and that, therefore, they must reverse.

The Congress ministries remained in power for nearly two years, between 1946 and 1949. India was implicated in the Kashmir dispute that consent and the Indian National Congress declared to be the cause of the war in which was conducted without the consent of the Indian people and which was meant to "establish Imperialism in the Indian case where". When the Congress ministries resigned in November 1947, the Muslim League celebrated their exit from office as a day of Deliverance and Thanksgiving. In 1949, the League issued three pamphlets containing details of atrocities that had been committed by the Hindus on the Muslims and brought serious charges against the Congress ministries. Referring to these charges Penderel Moon remarks that "these charges were made out of mole-hills and trivial communal incidents of everyday occurrence" were "painted in lurid colours so as to inflame popular feeling". Prof. Coupland's remarks in this respect are pertinent: "Hindu. An impartial investigator would come to the conclusion that many of these charges were exaggerated or of little serious moment, and that the case against the Congress Governments as deliberately pursuing an anti-Muslim policy was certainly not proved." However that may be the indictment of Congress rule was all too easily credited by the Muslim rank and file.

The Pirpur Report "with all the one-sided examples of hardships on Muslims inflicted by Hindus that had been selectively supplied to him (Raja of Pirpur), and with quotations from even little known persons who posing as Hindu leaders had inadvertently spoken ill of Muslims" became Jinnah's trumpeted and he was determined to have his Pakistan.

20. Penderel Moon, *Dr. Jinnah and Quid*, pp. 15-16.

21. *Ibid.*, p. 23.

22. Coupland, R., *The Constitutional Problem in India*, Part II, 11, 184-85.

23. The Muslim League Working Committee had appointed Mr. Henry Commager in March 1948, with Raja Sawai Mahendra Pratap of Pirpur as its Chairman. "So far as I am concerned," writes Commager, "I am not a member of the committee. I feel that it is the greatest task of the Government to collect material for a report on the collection of the Muslims in the Congress Provinces and the Raja had to travel from place to place in the discharge of his onerous duty." *Pathway to Pakistan*, p. 228.

24. Sri Prakasa, *Pakistan: Birth and Early Days*, p. 6. Sri Prakasa was the first High Commissioner accredited to Pakistan.

He told Sri Prakasa, "as soon as Pakistan is established, all possible problems would be immediately solved."<sup>22</sup> This happened in April 1939. When the Federal Part of the Government of India Act, 1935 was suspended on September 11, 1939, the Muslim League passed a resolution welcoming such suspension and demanded that the entire constitutional problem of India should be considered *de novo*, and that the League be assured that no declaration regarding the question of constitutional advance for India would be made without the consent and approval of the Muslim League. Nor any constitution would be framed and finally adopted by His Majesty's Government and the British Parliament without such consent and approval. On November 23, a day after the Muslim League celebrated the Deliverance Day on the resignation of Congress Ministries, the Viceroy, Lord Linlithgow, wrote to M.A. Jinnah, "His Majesty's Government are not under any misapprehension as to the importance of the contribution of the Muslim community to the stability and success of any constitutional development in India. You need therefore have no fear that the weight which your community's position in India necessarily gives their views will be under-rated." Jinnah again wrote to the Viceroy on February 23, 1940, demanding the assurance that "no commitment will be made with regard to the future Constitution of India or any interim settlement with any other party without our approval and consent."

Then, came the Lahore session of the Muslim League in March 1940. In his presidential address M.A. Jinnah emphasised the difference between Hinduism and Islam. He said, Hinduism and Islam "are not religions in the strict sense of the word, but are, in fact, different and distinct social orders, and it is a dream that Hindus and Muslims can ever evolve a common nationality. . . . The Hindus and Muslims belong to two religious philosophies, social customs, literatures. . . . To yoke together two such nations under a single State, one as a numerical minority and the other as a majority, must lead to growing discontent and final destruction of any fabric that may be so built up for the government of such a State." In a resolution passed on March 23, 1940, the League demanded a sovereign independent Pakistan. The resolution, *inter alia*, read, "Resolved that it is the considered view of this Session of the All-India Muslim League that no Constitutional Plan would be workable in this country or acceptable to the Muslims unless it is designed on the following basic principles, viz., that geographically contiguous units are demarcated into regions which should be so constituted, with such territorial adjustments as may be necessary, that the areas in which the Muslims are numerically in a majority as in the North-Western and North-Eastern zones of India should be grouped to constitute "Independent States" in which the constituent units shall be autonomous and sovereign." The Pakistan Resolution, thus, demanded in plain terms the partition of India and the grouping of regions in which Muslims were in majority, as in the north-western and north-eastern zones, into Independent States, that is, a federation of Punjab, North-West Frontier Province and Baluchistan with complete sovereign and autonomous powers, and of other States in the East with similar powers.

Penderel Moon is responsible for making the statement that "Privately Jinnah told one or two people in Lahore that this Resolution was a 'tacti-

cal move' and the fact that six years later he was ready to accept something less than absolute partition suggests that in 1940 he was not really irrevocably committed to it. In part, therefore, it may have been at this time a tactical move, designed to wring from Congress concessions which would make partnership more tolerable." Anyway, in 1947 the shape of things to come were never expounded. But Sir Sikander Hayat Khan "was gravely embarrassed by this resolution." He disliked the idea of Pakistan — "or Jinnistan as he irreverently called it." He had more than once publicly stated that if Pakistan meant 'a Muslim Raj here and a Hindu Raj elsewhere,' he would have nothing to do with it. Fazl-ul-Haq, the Premier of Bengal, was also opposed to Pakistan, though he had publicly not rejected the demand. Whatever be the extent of their inward or outward opposition it enamoured the Muslims. "To the Muslim masses this held out an ill-defined and alluring prospect of looting Hindus. With greater clarity of vision, ambitious politicians and civil servants, as also some professional men, perceived that under a Muslim Raj, with the crippling if not the elimination of Hindu competition, they could rise to positions of power and affluence unattainable in a single mixed Hindu-Muslim State. Thus the cry for Pakistan appealed to and excited powerful appetites and individual hopes, and these, once aroused, would not be readily assuaged."<sup>26</sup>

In 1940, Winston Churchill had become the Prime Minister of the National Government in England and I. S. Amery headed the India Office. On August 8, 1940, the Viceroy made a statement regarding the political future of India. He recognised the right of Indians to frame their own constitution subject to certain obligations and responsibilities which devolved on the British Government. The Constitution-making body, he declared, would be set up after the War. The statement of the Viceroy was pregnant of definite assurances to the Muslim League that the British Government would not transfer power to any system of government whose authority would be directly denied by "large and powerful elements in India's national life." As an interim measure for the duration of the War, the Viceroy would "invite a certain number of representative Indians to join the Executive Council and to establish a War Advisory Council." The Congress rejected the offer. The entry of Japan into War in November 1941, made the British Government to realise the gravity of the situation. Accordingly, on March 11, 1942, Churchill announced that Sir Stafford Cripps, a member of the War Cabinet, would go to India to explain certain proposals of constitutional reforms accepted by the British Government and "to satisfy himself on the spot, by personal consultation" that those proposals would "achieve their purpose."

The proposals which Cripps brought with him were published on March 30, 1942. They embraced an interim and long-term settlement. The goal of India was declared to be the Dominion Status. In order to implement them immediately after the War steps were to be taken to set up in India an elected body charged with the task of framing a new constitution for India. The Indian States were to be associated with the Constitution-making body. The Constitution so framed was to be implemented

26. Penderel Moon, *Divide and Quit*, p. 21.

27. *Ibid.*, p. 22.



by the British Government, but any Province of India had the right to reject the new constitution and retain its existing constitutional position, provision having been made for its subsequent secession, if it so desired. With the non-acceding Provinces, if they so desired, the British Government would be prepared to agree upon a new constitution giving them the same full status as the Indian Union. The Constitution-making body would then conclude a treaty with the British Government covering all necessary matters arising out of the complete transfer of responsibility from British to Indian hands and guaranteeing the protection of racial and religious minorities. The provision that any Province would be at liberty to reject the constitution and frame a new constitution for itself by an agreement with the British Government was tantamount to indirectly accepting the demand for Pakistan. Since the Cripps' proposals aimed to please both the Congress and the Muslim League, they could please none and were rejected.

The rejection of the Cripps' proposals was followed by a rapid deterioration of the political situation in the country. The Working Committee of the Congress, in its resolution of July 14, 1942, demanded that the British Government should immediately abdicate authority in India and if it was rejected the Congress would be compelled to launch a wide-spread non-violent struggle. This was "Quit-India" ultimatum. On August 9, 1942, the Government arrested Mahatma Gandhi along with all the members of the Congress Working Committee and some other top-ranking leaders of the Congress. The All India and the Provincial Congress Committees were declared unlawful and thereafter the wholesale policy of repression and suppression ensued. The repressive policy of the Government led to a spontaneous movement of widespread sabotage, violence and crime. M.A. Jinnah was alarmed on the happenings in India. He could not anticipate such an open revolt of the people animated with the fervour for freedom. Lest the fervour of the Muslim youth find the same expression for freedom, Jinnah tried to impress on the Muslims that the "Quit-India" movement was not directed against the British alone, but it had its objective to subjugate the Mussalmans of India to the perpetual domination of the Hindus. The Working Committee of the Muslim League declared that "this movement is directed not only to coerce the British Government in handing over power to a Hindu oligarchy and thus disabling them from carrying out the moral obligations and pledges given to the Mussalmans and other sections of the people of India, but also to force the Mussalmans to submit and surrender to the Congress terms and dictation." In October 1943, Lord Linlithgow was succeeded by Lord Wavell. On February 17, 1944, while addressing the Central Legislature the Viceroy said, "You cannot alter geography. From the point of view of defence, of many internal and external economic problems India is a unit." This note of India's unity was sharply opposed to the League's slogan of "Divide and Quit."

The persistence of the Muslim League on the division of the country produced the "separate and be done with it" mood with many in the Congress and C. Rajagopalachari was the first to give public expression to this feeling. In April 1942, just after the departure of the Cripps' Mission, at a meeting of the Madras Legislative Congress Party, he got a resolution passed conceding the demand for Pakistan. This was widely resented and

was deemed to have damaged the stand of the Congress and consequently Rajagopal had to resign from the Congress. On June 14, 1945, J. S. A. A. the Secretary of State for India, made a statement in the House of Commons and said that "the offer of March, 1945, stands in its entirety and without change or qualification." It was proposed to reconstruct the Governor-General's Council pending the settlement of main constitutional problems. With the exception of defence in the portfolios at the Centre were proposed to be transferred to the Indian members, and further assurances would be given that the Governor-General's veto over the majority decisions of the Council would be sparingly used. It was proposed that the composition of the reconstructed Executive Council would be based on the principle of communal parity which meant equality of seats in the Council for the caste Hindus and Muslims, leaving other communities including non-caste Hindus to get separate representation. Lord Wavell, the Governor-General, convened a conference at Simla of leaders of all important political parties, but there was no agreement on the composition of the Council. The Muslim League insisted that it alone had the right to recommend all the names of Muslim members to the Council. The Congress, as a national organisation, insisted upon the inclusion of two Congress Muslims. Lord Wavell thereupon announced the failure of the Simla Conference.

Lord Wavell made another announcement in September 1945, wherein he made clear the policy of the Labour Government which had then come into power. In a broadcast speech he announced the intention of "His Majesty's Government to convene as soon as possible a Constitution-making body." As a preliminary to the convening of a Constitution-making body new elections of the Central and Provincial Legislatures were to be held. After the elections, the announcement continued, steps would be taken to reconstitute the Executive Council with the support of the main political parties. In the new elections the Indian National Congress captured almost all non-Muslim seats in all the Provinces, majority of the Muslim seats in the North-West Frontier Province and some Muslim seats in the United Provinces, Central Provinces and Bihar. The Muslim League captured nearly all the Muslim seats except in the North-West Frontier Province. Congress ministries were formed in all the Provinces except Bengal and Sind. In the Punjab a coalition Ministry was formed of the Unionists, the Sikhs, and the Congress.

With the completion of elections and formation of ministries in the Provinces the next stage was the implementation of the second part of September 1945, announcement. In the winter of 1945-46 a Parliamentary Delegation drawn from different parties in Britain visited India with the object of going round the country and forming their own opinion as to the general political situation in the country. On their return home the delegation gave an informal account of their impressions to the British people in general and to the members of Parliament in particular. On February 19, 1946 the British Government made an important announcement in Parliament that a Mission consisting of three Cabinet Ministers—Lord Pethick Lawrence, the Secretary of State for India, Sir Stafford Cripps, the President of the Board of Trade and Mr. A. V. Alexander, the First Lord of the Admiralty—would visit India with a view to deciding in con-

sultation with the Viceroy and the representative elements in India, about setting up the machinery for framing India's Constitution. On March 15, 1946, Clement Attlee, the Prime Minister, in his speech in the House of Commons, while assuring the minorities that they should be enabled "to live free from fear," maintained, "we cannot allow a minority to place a veto on the progress of the majority."

The Cabinet Mission arrived in Karachi on March 23, 1946 and left for England on June 29. In May a Conference was held at Simla with the representatives of the Congress and the Muslim League. But there could be no compromise between the two and the Cabinet Mission announced its decision in an outline scheme on May 16, which had the approval of His Majesty's Government. The scheme put forward by the Indian National Congress for a united India was rejected. The proposal of the Muslim League to establish Pakistan was also rejected. The scheme proposed by the Cabinet Mission was an attempt to meet half way the points of view of the Congress and the League. It proposed to establish a weak federation for the whole of India, with power vested in the Provinces to form groups with executives and legislatures, thus creating what would have been in effect a three tiered federation. That is, the Provinces were to be divided into three separate groups—two blocs of Muslims majority Provinces, one in the North-West and the other in the North-East, and one bloc of Hindu majority provinces. Each Province was left free to come out of the Group, after elections under the new constitution, by a decision of the majority of votes in its legislature.

The scheme was to be worked by a constitution-making body, representative of British India and States. Each Province was assigned seats on a population basis, roughly in the ratio of one to a million and members representing each of the three major communities, that is, General, all persons who were not Muslims and Sikhs; Muslims; and Sikhs. The elections were to be by proportional representation by means of a single transferable vote. The representatives of each community were to be elected by the elected members of that community in the lower House of the Provincial Legislature. The method of choice of the representatives of the Indian States was to be determined by negotiations with the Princes. At the preliminary stages, the States were to be represented by the Negotiating Committee. On this basis the constitution-making body was to be composed of 296 members from British India (General 210, Muslims 78, Sikhs 4 and 4 from Chief Commissioners' Provinces) and not more than 93 from the Indian States.

After holding a preliminary meeting the constitution-making body was to be divided into three sections, each section corresponding to the three groups of the Provinces—Punjab, N.W.F.P. and Sind formed Group B, Bengal and Assam formed Group C, and Madras, Bombay, C.P., U.P., Bihar and Orissa constituted A Group. Delhi, Ajmer-Merwara and Coorg were to join Group A and Baluchistan Group B. The Provincial constitutions and Group Constitutions, if any, were to be settled by each section separately. After this, the sections were to reunite for purposes of determining the constitution of the Union. The interests of the smaller minorities were to be safeguarded by the establishment of an Advisory Committee to suggest a list of Fundamental Rights to be incorporated in the Central, Provincial and Group Constitutions.

The interim Government was to consist of the Governor-General and a Council in which all the portfolios, including that of a War Member, were to be held by the Indian leaders having the full confidence of the people of India. The constitution-making body would conclude a treaty with Britain "to provide for certain matters arising out of the transfer of power." On the attainment of independence by British India paramountcy over Princely States would neither be retained by the British Crown nor transferred to the successor government.

Neither the Indian National Congress nor the Muslim League could agree entirely to the Cabinet Mission proposals. Elections to the Constituent Assembly were held in July 1946, and the Congress was able to capture 205 seats whereas the League bagged 73. Thereafter, dramatic turn of events took place. The Muslim League, which had earlier accepted the Cabinet Mission scheme, withdrew its acceptance of the long-term plan and prepared a programme of "direct action" for the achievement of Pakistan to be launched as and when necessary. "This day," Jinnah announced, "we bid good-bye to constitutional methods." On August 6 the Viceroy invited Jawaharlal Nehru to form the interim government. Before the new Government had taken office or the names of its members had been announced, "the first fruits of the Cabinet Mission's failure were being gathered." On August 16, which the Muslim League celebrated as "Direct Action Day," there was a ruthless rioting and massacre in Calcutta and for four days it continued taking a toll of 5,000 innocent lives and 15,000 were injured. The Muslim League Government of Bengal and Chief Minister, Mr. Suhrawardy, against all advice declared "Direct Action Day" a public holiday "and though warned of the likelihood of trouble, had apparently not taken adequate precautions. After the rioting had started, there was an unaccountable delay in imposing a curfew and calling in troops. The British Governor remained imperturbable but inactive. Charged under the Constitution of 1935 with a special responsibility for preventing any grave menace to the peace and tranquillity of the province, his duty seemed to require that he should intervene promptly to remedy the negligence of the Bengal Government and suppress these terrible disorders. He did not do so. During the next year this apparent example of supineness was to be copied by others in humbler stations."<sup>2</sup>

The Viceroy thought that the dangers of the situation created by the "Direct Action Day" would be lessened if the League could be persuaded to join the Interim Government and once again to accept the long-term proposals by entering the Constituent Assembly. He was partially successful and the League joined the Interim Government on October 26, though it did not enter the Constituent Assembly and accept the long-term proposals too. But the Interim Government was a combination of strange bed-fellows. It was, in fact, a dual Government. There was, as Liaquat Ali Khan put it, "a Congress bloc and a Muslim bloc, each functioning under separate leadership." The result was, in the words of Sardar Patel, who was also a member of the Government, "the present Central Government during the transference of power is in a state of paralysis."



On February 20, 1947, Prime Minister Clement Attlee announced in the House of Commons that it was His Majesty's Government's "definite intention to take the necessary steps to effect the transference of power to responsible Indian hands by a date not later than June 1948." It was enjoined on all parties to sink their differences and formulate a constitution in accordance with the Cabinet Mission's proposals. But in case of failure to do so, His Majesty's Government would have to consider "to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Governments, or in such other way as may seem most reasonable and in the best interests of the Indian people."

This announcement, aptly observes Penderel Moon, "meant Partition, and Partition within the next seventeen months. Whatever London might think everyone in Delhi knew that the Cabinet Mission's proposals were as dead as mutton. No constitution be framed on their basis; and owing to the Hindu-Muslim feud there would be no Central Government capable of exercising authority over the whole of British India to whom the powers of the existing Government of India could be transferred. The power which the British held would have to be divided in order to be demitted, as indeed Mr. Attlee's statement itself vaguely foreshadowed."<sup>29</sup> Attlee's announcement was followed by widespread organised violence, murders and destruction of property in N.W.F.P., Punjab, Bengal, Assam and various other parts of the country. The Muslim League had become desperate, because, as Sir Syed Ahmed Khan had said, two nations—Muslims and Hindus—could not sit on the same throne.

Simultaneously to the announcement of February 20, 1947, Lord Louis Mountbatten was appointed Viceroy in succession to Lord Wavell so as to prepare the ground for the transfer of power. Mountbatten took over the Viceroyalty on March 24, 1947, and spent nearly two months in studying the political situation in India. During this period he had witnessed communal riotings of unprecedented severity and fires of frenzy lapped over the whole country, urban and rural areas alike. He came to the conclusion that there should be an immediate settlement, and transfer of power effected earlier than June 1948. He devised a plan for the partition of the country and communicated in strict secrecy its main outlines to the party leaders and obtained their concurrence in principle. The British Government's approval was then obtained and on June 3, it was publicly announced "and publicly accepted by Nehru, Jinnah and Baldev Singh."

**Partition and Pakistan.** The Mountbatten Plan was simple. India was to be divided into two Dominions, India and Pakistan. But it was not the Pakistan of Jinnah's dreams. It was to be of the truncated contiguous area variety involving the partition of both the Punjab and Bengal. In order to give to the partition a democratic complexion, different and complex arrangements were made for recording the popular will in the Muslim-majority Provinces. The issue to be put before them was whether the constitution should be framed by the existing Constituent Assembly or by a separate Constituent Assembly. The result was a fore-

29. Penderel Moon, *Divide and Quit*, pp. 62-63.



gone conclusion. The NWFP, Muslim-majority parts of the Punjab and Bengal, Sind and Baluchistan all decided for a separate Constituent Assembly. Sylhet District in Assam, which was predominantly Muslim, decided at a referendum to be merged with the Muslim Bengal. Pakistan thus, came into being. The rest was all a formality. A high level Partition Council was set up under the Chairmanship of Lord Mountbatten. Two Boundary Commissions were set up under Sir Cyril Radcliffe as their Chairman to demarcate boundaries of the two Punjab and Bengals.

**The Indian Independence Act, 1947.** On July 2, 1947, the Draft of the Indian Independence Bill implementing the political settlement according to the Mountbatten Plan was circulated to the leaders of the Congress and Muslim League for their consideration. The Bill was introduced in the British Parliament on July 5, and after passing through both its Houses, it received the Royal assent on July 18.

The Indian Independence Act provided for the creation of the two Independent Dominions, India and Pakistan, from August 15, 1947. Each of the two Dominions was to have a Governor General appointed by the King. The legislature of each Dominion was given full legislative powers and no Act of British Parliament extended to either of them. The authority of British Government over British India and the suzerainty of the Crown over the Indian States, all obligations of the Crown to the States and all powers, rights, authority, or jurisdiction exercisable by His Majesty in the States by virtue of treaty, grant, usage, sufferance and otherwise lapsed. The States became independent in their political relations with the Governments of the Dominions. By August 15, 1947, all the Princes had acceded either to India or Pakistan except Junagadh, Jammu and Kashmir and Hyderabad. Jammu and Kashmir eventually acceded to India and police action led to the accession of Hyderabad. The ruler of Junagadh fled to Pakistan after the people of the State had given their verdict in favour of admission in the Indian Union.

**The new State of Pakistan.** The State of Pakistan on its birth consisted of two wings, East Pakistan and West Pakistan both severed from the old India. One thousand miles of Indian territory separated these two wings. East Pakistan comprised East Bengal and Sylhet district of Assam. In West Pakistan were included North-West Frontier Province, West Punjab, Sind and Baluchistan, Bhawalpur, Khairpur and eight relatively minor States in Baluchistan and the Frontier also acceded to Pakistan. According to the census of 1961, Pakistan had a population of about 94 million. Of these, over 50 million belong to East Pakistan. The growth of population in Pakistan is as spectacular in Pakistan as it is in India.

East and West Pakistan are not only separated from each other by a long stretch of Indian territory, but there are other factors too which keep them apart. In East Pakistan the language is Bengali, a script derived from Sanskrit, whereas the languages of West Pakistan are Urdu, Punjabi, Sindhi, Baluchi and Pushto. They are mostly written in the Persian script and borrow heavily from Persian and Arabic. The Muslims of East Pakistan have resolutely resisted all attempts to any modification in their language and today Urdu and Bengali are the two official languages in Pakistan. There are also wide differences between the East and

West Pakistan Muslims in their habits, way of life, dress and even food. The cultural traditions of the two wings of Pakistan are in consequence substantially different. 22 per cent of the population in West Pakistan lives in cities whereas it is only 5.5 per cent in East Pakistan. East Pakistan occupies the delta of the Ganges and the Brahmaputra and every year this region is the victim of floods and the devastation caused therefrom. Industries are few and resources scanty. The principal cash crop is jute. Most of the industries are located in the West Pakistan and East Pakistan has a grouse that its interests have not been adequately safeguarded. The standard of living is, accordingly, much lower in East Pakistan.

**Religion.** Pakistan is an Islamic State and according to Mr. Y.K. Watoo, West Pakistan Minister, "a citizen of Pakistan who has no love for Pakistan cannot be true and loyal" to the country. Mr. Watoo contended that such a test of loyalty was required because Pakistan was established on the basis of, what he called, "these fundamental principles."<sup>30</sup> In 1949, shortly after the birth of Pakistan, the Constituent Assembly passed the Objectives Resolution according to which the future constitution of Pakistan was to be based on "the principles of democracy, freedom, equality, tolerance, and social justice as enunciated by Islam." It was resolved that under the future constitution the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam. Islam, therefore, permeates every aspect of individual and social life in Pakistan. Without Islam Pakistan has no meaning. Mr. Liaquat Ali Khan, the first Prime Minister of Pakistan, said, "Pakistan was founded because the Muslims of this sub-continent wanted to build up their lives in accordance with the teachings and traditions of Islam, because they wanted to demonstrate to the world that Islam provides a panacea to the many diseases which have crept into the life of humanity today."<sup>31</sup>

**The Minorities.** In 1947, about one quarter of the total population in areas covered by Pakistan consisted of non-Muslims. After the formation of Pakistan millions of Muslims migrated to Pakistan. Likewise millions of Hindus migrated to India for fear of their lives. The proportion of non-Muslims has since then been decreasing, because of the disability from which the Hindus suffer in the Islamic State, and greater Muslim fertility. According to the census of 1961, the non-Muslim population stood at 11.9 per cent of the total as compared with 14.1 per cent in 1951.

30. *Hindustan Times*, New Delhi, October 19, 1967.

31. Constituent Assembly of Pakistan *Debates*, Vol. II, March 7, 1949.

## CHAPTER II

# THE POLITICAL BACKGROUND

**Governor-General of Pakistan.** The first Constitution of Pakistan was adopted in 1956. For full nine years after Pakistan had come into existence on August 15, 1947, the government was organised and it functioned according to the provision of the Government of India Act, 1935 with some modifications as deemed necessary and expedient. Mohammed Ali Jinnah, the architect of Pakistan, was appointed the first Governor-General of the new Dominion. His authority resembled to that of the Viceroy and Governor-General of India who really ruled the country under the British regime. The Prime Minister was for all intents and purposes his first lieutenant, a role that Liaquat Ali Khan had played under the leadership of the Qaid-i-Azam Jinnah, in fact, personified the new State of Pakistan. "No constitutional ruler and few autocrats" observes Keith Callard, "have possessed such a plenitude of power. He had full authority over the civil administration and the armed forces. By his own order he could amend the existing constitution and promulgate laws that would be beyond the effective power of review of any court. All these powers which the Qaid-i-Azam, the Supreme Leader, exercised and the authority which he enjoyed, were not his nominal powers and on paper alone. No, were they limited "by the conventions of constitutional responsibility. On the contrary, Cabinet Ministers understood clearly that they held office as the agents of the Governor-General, and the Assembly, with its powerless Opposition, was in no mood to challenge any action of its own President." Jinnah was both the Governor-General and President of the Constituent Assembly of Pakistan. The Muslims were proud of their newly created Muslim State and their benefactor, the Qaid-i-Azam. They looked towards him to guide the destinies of the new nation and reposed complete faith in him to make the country strong and vigorous and sure of itself. "There was no one else, he was Pakistan; and wherever he went he was received by vast crowds with the adulation amounting almost to worship."

But Jinnah was not destined to pilot the ship of the State for long. He died in September 1948. Khawaja Nazimuddin, until then the Chief Minister of East Bengal, succeeded the late M.A. Jinnah. But he could never equal the stature, prestige, authority and power exercised by the Qaid-i-Azam. Liaquat Ali Khan endeavoured to improve the authority and prestige of the office of the Prime Minister and to enforce the conventions relating to the Parliamentary system of Government so as to reverse the previous practice of the Governor-General controlling the Cabinet. The powers of the Governor-General as under law still remain-

1. Keith Callard, *Pakistan: A Political Study*, p. 20.

2. *Ibid.*, p. 19.

ed there, but certain transitional sections of the Indian Independence Act, 1947, were allowed to expire. Tamizuddin Khan, the Deputy Speaker of the Constituent Assembly, was elected its Speaker. "This dispersal of the power of the Qaid-i-Azam among the Governor-General, the Prime Minister and the President of the Assembly was to have important consequences in 1953 and 1954."

**Making of the Constitution.** The Constituent Assembly of Pakistan met for its first meeting in Karachi on August 10, 1947. At the time of its inauguration the total membership of the Assembly was sixty-nine. This membership was increased at various intervals in order to give representation to the refugees who had migrated to Pakistan after the partition, and the Princely States of Bhawalpur, Khairpur, the Baluchistan States Union and the states of the North-West Frontier, thus, making a total of seventy-nine seats. The main task of the Constituent Assembly was to frame a Constitution for Pakistan, but in addition to it and until that Constitution were to become operative, it also acted as the Federal Legislature under the Government of India Act, 1935. This dual function of the Constituent Assembly and "During the period which immediately followed Qaid-i-Azam's death, there developed a fierce competition for influence, wealth, power and prestige between various interests and personalities which made political life. The arena in which the competition first manifested itself was the procedure for framing the Constitution which was to give formal expression to Pakistan's polity."<sup>3</sup> The course of the Constituent Assembly was, therefore, not smooth. It functioned tardily and its inhibitions were innumerable. It was only in March 1949, that the Objectives Resolution was passed. It, *inter alia*, provided that the future constitution was to be based upon the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam. It was resolved that under the future constitution the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam. The Assembly appointed a Basic Principles Committee to prepare a report on the main principles on which the future constitution could be framed. The Committee submitted its Report to the Assembly in 1952.

Provincial rivalries, language controversy and various other difficulties plagued the administration and the deliberations of the Constituent Assembly both as a Constitution-making body and as a legislature. "Few of my Pakistani friends," writes Rushbrook Williams, "seemed to realize that no Constitution can be of much use unless it suits the needs of the people of the country; and this, it appeared to me, was among the least regarded of the criteria which were being applied."<sup>4</sup> Jinnah had delivered a series of stern warnings against provincialism and linguism and both these curses, which were so zealously rather fanatically pursued by both the wings of Pakistan, haunted Liaquat Ali Khan throughout his tenure of Prime Ministership until his assassination in 1951. His forceful and too ambitious colleagues were hard to reconcile to his leadership as head of the Government and very often refused to listen to his advice. "Some

3. Rushbrook Williams, L.F., *The State of Pakistan*, p. 135.

4. *Ibid.*

of his Ministers began to form their own groups of supporters in the Assembly; and even to communicate their own views to the Press, when these differed from the majority opinion in the Cabinet, upon such controversial matters as whether Pakistan should follow India's example in devaluing the rupee in 1950-51.<sup>5</sup>

Such was the state of affairs when Khawaja Nazimuddin stepped down from the office of the Governor-General to succeed Liaquat Ali Khan. Ghulam Mohammed, the Finance Minister in the previous Cabinet, was elevated to the post of the Governor-General. The new Prime Minister retained most of the members of the previous Cabinet, and a former Civil Servant, Chaudhri Mohammad Ali, was promoted to become the Finance Minister. "Nazimuddin was a man of piety and integrity who gave little evidence in appearance or words or decisions that he was capable of imposing his will upon men or circumstances."<sup>6</sup> He was really incapable to grapple with the problems inherited from the previous government and with the set of ministers who had weakened the prestige of the Central Government during Liaquat Ali Khan's term of office. Some new problems had also arisen as a consequence of the food crisis due to the failure of crops, crisis in the balance of payments and budgetary difficulties due to the sharp decline in the prices of cotton and jute and the politico-religious upheaval which even threatened the stability of the government in West Pakistan.<sup>7</sup> The need of the moment was stern and prompt action. The Governor-General came to the rescue of the country and on April 17, 1953 dismissed Nazimuddin Ministry. In a statement the Governor-General accused the Cabinet of Khawaja Nazimuddin for having "proved entirely inadequate to grapple with the difficulties facing the country." In the emergency "which has arisen," the statement further said, "I have felt it incumbent upon me to ask the Cabinet to relinquish office so that a new Cabinet better fitted to discharge its obligations towards Pakistan may be formed."

The Governor-General invited Mohammad Ali, the Pakistan Ambassador to the United States, to become the Prime Minister and form the new government. Mohammad Ali Bogra, a Bengali, accepted the offer and formed his Government retaining six members of the outgoing Ministry. This action of the Governor-General was widely hailed both by the press and the public, but it brought a serious rift in the political life of the country. The new Prime Minister was the personal choice of the Governor-General. He was not a leader of a party or even of a substantial bloc within the Muslim League. Mohammad Ali Bogra was a dark horse unknown to the public and Parliament except that he was a member of the Assembly prior to his holding the ambassadorial office in the United States. The prestige of the Muslim League by ousting powerful political leaders from the Government received a rude shock. "The Constituent Assembly, though dubious about the constitutional propriety" of the Governor-General's action, "did not openly challenge the new government. Technically it was still a government of the Muslim League,

5. *Ibid.*, p. 138.

6. Keith Callard, *Pakistan, A Political Study*, p. 22.

7. Refer to the *Report of the Court of Inquiry into the Punjab Disturbances*, 1953.



which filled almost every Muslim seat in the central and provincial legislatures." But in practical politics it was not so. The Muslim League was split in many directions and there was no unanimity on the basic principles of the Constitution. Quite a plenty of them wanted a Constitution based upon Islamic principles and one of them even demanded that the prayers in mosques should be made compulsory for all Muslims and that those who failed to discharge this basic obligation should be punished. There were others who favoured secularism. Language was the major bone of contention. East Bengal stoutly advocated for provincial rights. Then, there were the supporters and opponents of the Governor-General and his Prime Minister.

The defeat of the Muslim League at the elections for the East Bengal Legislative Assembly in April 1954, led to rapid acceleration of the process of Constitution-making, but the proposals accepted by the Constituent Assembly were in many respects controversial. A Draft Constitution prepared in pursuance of the instructions of the Drafting Committee was ready for signatures on October 25, and scheduled to be reported to the Assembly on October 27. But on October 24, the Governor-General issued a proclamation dissolving the Constituent Assembly. The proclamation announced, "The Governor-General having considered the political crisis with which the country is faced has, with deep regret, come to the conclusion that the constitutional machinery has broken down. He, therefore, has decided to declare a State of Emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer function." It further announced that the elections would be held as soon as possible and that the Governor-General had called upon the Prime Minister to reform the cabinet "with a view to giving the country a vigorous and stable administration." Thus, after seven years the labours of the Constituent Assembly, which placated many interests and made substantial concessions to the demands of the religious groups, were brought to naught by the action of the Governor-General. Since "it (Assembly) had for a long time," aptly observes Rushbrook Williams, "represented nothing but the interests of those who happened to compose it, Mr. Ghulam Mohammad was probably correct in his estimate."<sup>9</sup>

A new Government was formed with Mohammad Ali Bogra as the Prime Minister, which *inter alia*, included Commander-in-Chief of the Pakistan Army, General Mohammad Ayub Khan, as Minister of Defence and Major-General Iskandar Mirza, top civil servant, as the Minister of the Interior. It had also contained representatives of the groups that had opposed the Muslim League. The President of the Constituent Assembly, Moulvi Tamizuddin Khan, challenged the power of the Governor-General to dissolve the Constituent Assembly and petitioned the Sind Chief Court to issue a writ of *mandamus*<sup>10</sup> and also a writ of *quo warranto* against the Ministers of the Central Government, who, he claimed, were not qualified as Ministers under Section 10 of the Government of India

8. Kahin, George McT., *Major Governments of Asia*, p. 436.

9. Rushbrook Williams, L.F., *The State of Pakistan*, p. 139.

10. Section 223A Government of India Act, 1935. This Article was inserted by the Government of India (Amendment) Act, 1954.

Act, 1935, as substituted by the Government of India (Fifth Amendment) Act, 1954.

The Sind Chief Court decided the case in favour of Moulvi Tamizuddin Khan. The Federal Court of Pakistan reversed the decision of the Sind Chief Court. The power of the Governor-General to dissolve the Assembly was upheld, but it was limited to the extent that it must be given a chance to fulfil its functions. It consequently became necessary to establish a new Assembly. The Governor-General then summoned the second Constituent Assembly which was to be indirectly elected by members of the Provincial legislatures. It was to consist of eighty members equally divided into two wings of Pakistan. The members elected to the new Assembly were divided into more than half a dozen separate groups, of which the Muslim League was the largest, but it did not command absolute majority.<sup>11</sup>

The first session of the new Assembly met at Murree (Rawalpindi) in July 1955. It could not, however, transact any business due to various difficulties. It also became apparent that the emergency Cabinet, headed by Mohammad Ali Bogra and which had held office since October 24, 1954, would have to be reconstructed. Accordingly, Chaudhri Mohammad Ali, the former Finance Minister, replaced Mohammad Ali Bogra as Prime Minister. Ghulam Mohammad, who had been ailing for some time past, was succeeded by Major-General Iskander Mirza as Governor-General. The Assembly met for its second session in August and plunged itself in right earnest in the Constitution-making. The draft Constitution was presented to the Constituent Assembly in January 1956 and adopted in February 1956. On March 23, 1956, the Constitution of the Islamic Republic of Pakistan became operative and the country ceased to be a Dominion. The second important act of the Constituent Assembly was the merger of the various territorial units, Punjab, North-West Frontier Province, Baluchistan, Sind and the Princely States into a single Province, with an executive and a legislature exercising authority over the whole area.

**Important features of the 1956 Constitution.** The Constitution of 1956 was entitled "The Constitution of the Islamic Republic of Pakistan" and the Preamble began with the words, "In the name of Allah, the Beneficent, the Merciful." Sovereignty, the Preamble declared, "belongs to Allah Almighty alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him as a sacred trust." In the Islamic Republic of Pakistan the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam, would be fully observed and the Muslims of Pakistan would be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy Quran and Sunnah. The minorities were assured to freely profess and practice their religion and develop their culture. Chapter II of the Constitution contained a list of Fundamental Rights which, *inter alia*, included abolition of untouchability, preservation

11. The initial party composition was: Muslim League, 26; United Front 16; Awami League, 13; Congress, 4; Scheduled Castes Federation, 3; United Progressive Party, 2; Others, 16.

of culture and language, the right to profess, practice and propagate any religion, and every religious domination and every sect thereof had the right to establish, maintain and manage its religious institutions. Article 22 vested the Supreme Court with powers to guarantee Fundamental Rights. Rights were, thus, justiciable. The Directive Principles of State Policy were enshrined in Part III of the Constitution and they were not justiciable. Article 24 directed the State to endeavour to strengthen the bonds of unity among Muslim countries, to promote international peace and security, to foster goodwill and friendly relations among all nations, to encourage the settlement of international disputes by peaceful means.

The Constitution established a Federation of territories then included in or in accession with Pakistan and such other territories as might thereafter be included in or accede to Pakistan. It adopted the Parliamentary system of Government both at the Centre and in the units of the federation, East and West Pakistan. The Parliament of Pakistan consisted of the President and one House designated as the National Assembly. Unlike the practice of a federal polity, Pakistan was to have one House of the legislature at the centre. The members of the National Assembly were to be elected on the basis of adult franchise with a five years tenure. The representation in the National Assembly from the East and West Pakistan was to be determined under the principle of parity. The Assembly consisted of three hundred members, though for ten years ten additional seats were provided for women. The President had the power to dissolve the Assembly and summon its session provided that at least one session in each year should be held at Dacca.

The President of the Republic was to be elected by both the members of both the National and Provincial Assemblies. He must be a Muslim and at least 40 years of age. He was to hold office for five years and would not have served for more than two terms. He could be removed by impeachment by National Assembly by a majority of three-quarters of its total membership. In the event of a vacancy or disability of the President, the Speaker of the National Assembly was to act in his place. There was to be a Cabinet of Ministers headed by the Prime Minister to aid and advise the President in the exercise of his functions. The President in his discretion was to appoint from amongst the members of the National Assembly a Prime Minister who, in his opinion, was most likely to command the confidence of the majority of the members of the National Assembly. The Cabinet together with the Ministers of State, was collectively responsible to the National Assembly. The Prime Minister held office during the pleasure of the President, but the President was not to exercise his power of discretion unless he was satisfied that the Prime Minister did not command the confidence of the majority of the members of the National Assembly. In the exercise of his functions the President was to act in accordance with the advice of the Cabinet or the appropriate Minister or Minister of State, as the case might be, except in cases where he was empowered by the Constitution to act in his discretion and except as respect of the appointment of the Prime Minister.

As for the Provinces of East and West Pakistan the Constitution provided for the appointment of Governors by the President and they held office during his pleasure. The Provinces had Cabinet form of Govern-

ment similar in all essentials to that provided for the Federation. As at the Centre so in the Provinces there was to be a unicameral legislature. Each Provincial Assembly consisted of three hundred members with the temporary reservation of ten additional seats for women. The general provisions governing the Provincial Assemblies were similar to those for the National Assembly. No person could be a member at the same time of the National Assembly and a Provincial Assembly. The executive authority of a Province applied to Excluded Areas and Special Areas but a degree of control over such areas was reserved to the Central Government.

The Constitution provided for three legislative lists: the Federal List, the Provincial List and the Concurrent List. In the event of conflict between the two, the law of Parliament prevailed. Parliament, however, could legislate on a Provincial subject with the consent of the Province concerned. Parliament had the power to enact laws for implementation of any treaty. The residuary powers rested in the Provinces.

At the apex of the Judiciary was the Supreme Court of Pakistan. It had original jurisdiction in disputes between the Federation and the Provinces and in certain disputes between the Provinces. The President could request an advisory opinion from the Supreme Court. Each wing of Pakistan had its own High Court which was invested with the power to issue writs of all kinds. If the President was satisfied that a grave emergency existed in which the security or economic life of Pakistan, or any part thereof, was threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he could issue a Proclamation of emergency. Under such a Proclamation, the President could assume the powers of Provincial Government and Parliament legislated for a Province. The President could suspend the Fundamental Rights during a national emergency. Under a state of national emergency the Federal Government was empowered to issue certain directions to a Province.

Islam was given practical legal significance in the Constitution. No person could be elected President unless he was a Muslim. Under Article 197 the President was under a constitutional obligation to set up an organisation for Islamic research and instruction in advanced studies to assist in the reconstruction of Muslim society on a truly Islamic basis. Under Article 198 the President was required to appoint (within one year of the promulgation of the Constitution) a Commission of experts to make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam. The Commission was to submit its report to the President within five years of its appointment. This report was to be placed before the National Assembly and the Assembly after considering the report was to enact laws in respect thereof. According to Javid Iqbal, "the position which Islam occupied in the 1956 Constitution reflected the attitude of hypocrisy and vagueness of the Muslim framers of a legal fiction. Islam was presented in the Constitution in the form of a legal fiction."<sup>12</sup> The Chief Justice of Pakistan, Muhammad Munir, in his farewell address, on the eve of his retirement, to the West

12. Spann, R.N. (Ed.), *Constitutionalism in Asia*, p. 144.



Pakistan High Court Bar Association, Lahore, said, "Our Constitution, though it purported to be a Constitution for the Islamic Republic of Pakistan, had hardly anything Islamic except the repetition of the words Islam, Quran and Sunnah."<sup>13</sup>

**The 1958 Revolution.** The Constitution of 1956 did not prove a panacea of the ills, political, social and economic, from which Pakistan had been suffering for full nine years. In fact, with the advent of the Government, both at the Centre and in the Provinces, under the new Constitution problems confronting the country became more aggravated. Unification of West Pakistan concentrated power and influence in Lahore. "Since the stakes were higher, and the prizes larger, competition for power became fiercer than ever." Political parties multiplied and votes were openly purchased and allegiance transferred within a wink. The West Pakistan Legislature, as Rushbrook Williams says, became "a byword for political intrigue."<sup>14</sup> The conditions in East Pakistan were not a wit better. Fierce internal rivalries reached such heights that the Speaker of the Provincial Assembly was badly beaten and the Deputy Speaker murderously assaulted and he died. Labour unrest was widespread and rioting a daily routine. There was open hostility against West Pakistan and the possibility of separation from Pakistan was publicly discussed and even canvassed. Karachi had become notorious for graft and corruption. "Smuggling grew to the proportions of an industry, carried on by highly organised rings with influential protection." Coalition Governments came and went in rapid succession both at the Centre and in the Provinces. "Sometimes a single person would manage to acquire power through his personal drive, skill or intrigue, at other times a group of individuals would manage to attain power and pull the strings from behind the curtain, or a small political party of alien ideology would become the decisive factor in the running of the government machinery."<sup>15</sup>

The state of the country's economy remained more or less stagnated and the major problems confronting Pakistan remained unresolved. The settlement of refugees and evacuee property, lack of basic necessities of life, such as food, clothing, housing, education and medical relief remained unsolved. "On the contrary, the system of permits, licenses and price control encouraged the growth of black-marketing, and smuggling, corruption and maladministration. All this inevitably resulted in the spreading of a sense of frustration and despondency in the country. Even the Islamic State idea appeared to peter out and was neglected and frustrated, leading to a mood of disillusionment."<sup>16</sup>

On the morning of October 8, 1958, the people of Pakistan woke up to find that a revolution had swept the country, the Constitution of the Islamic Republic of Pakistan had been abrogated, and Martial Law imposed. With the abrogation of the Constitution, the Central and Provincial Legislatures stood abolished. Political parties were dissolved. The

13. As cited in above, pp. 144-45.

14. Rushbrook Williams, L.F., *The State of Pakistan*, p. 141.

15. Javid Iqbal, *Islamic State in Pakistan, Constitutionalism in Asia* (R.N. Spann, Ed.), p. 145.

16. *Ibid.*



President assumed supreme power himself and appointed General Mohammed Ayub Khan as Chief Martial Law Administrator. "The relief of the whole nation was so profound, and their acclamation of the Revolution so enthusiastic, that political leaders everywhere could only throw their hand, retire into obscurity, and hope for the best. Some were, in fact, prosecuted for speculation; but in most cases they were given the choice, either of standing their trial, or of retiring from public life for a period of years. Many chose the latter option, and have remained unmolested."

But the President, and the Chief Martial Law Administrator did not see eye to eye "regarding the emergency which had brought them together. The President looked on martial law as a means of reducing to impotence the political leaders whom he disliked and despised, and of securing to himself the supreme executive power. General Ayub Khan, on the other hand, saw in martial law a true opportunity—in his own phrase—leading the country back to sanity, and setting on foot a complete moral, economic and administrative rehabilitation of the nation." Whatever be the fact, before the end of October 1958, President Iskander Mirza, an old friend of General Ayub Khan, "agreed to resign and to leave the country." General Mohammed Ayub Khan became both the Head of the State as well as the Government. Politics knows no friends.

## CHAPTER III

# THE CONSTITUTION OF 1962

**Political Background 1958-1962.** The Revolution of 1958 brought to an end the parliamentary system of government in Pakistan which had proved disastrous to the country for all these years. The Presidential Cabinet was appointed which included three Generals—Lieutenant-Generals Azam Khan, W.A. Burki, K.M. Sheikh and eight (later ten) civilians. Later, the Governors of East and West Pakistan became its ex-officio members. The Governors of the two Provinces were directly responsible to the President for the administration of their respective Provinces. "Backing for the civil administration was provided by a general as martial law administrator, commanding a hierarchy of martial law authorities that was gradually withdrawn into the background as the new order stabilised itself."<sup>1</sup> President, Ministers of his Cabinet, Governors and martial law administrators, aided by a few select high officials, met from time to time to make high-level policy decisions. The change that had come over the public services was remarkable. A regular drive against inefficiency and corruption was launched. The screening process resulted in action being taken against 133 Class I Officers, 221 Class II Officers, and 1,303 Class III employees. Dismissals, compulsory retirements and reductions in grade totalled 3,000. This shake up in the services had the result that the Government offices opened "at proper times: the officers attended to their duties honestly and conscientiously; the clerks were civil to the ordinary citizen and helped him in his difficulties. It was no longer necessary to give a bribe in order to make an appointment far ahead to see the right official: he was on the spot ready to be seen. There was a notable cutting of red tape: the transaction of official business was thoroughly speeded up."<sup>2</sup>

Drastic measures were taken to bring down prices by regulation, to punish the hoarders and the smugglers. To strengthen the hands of civil authorities military officers were put alongside them to ensure that the martial law regulations were obeyed. Special martial law tribunals were created for the trial of serious offences. The result was that in a few weeks' time "things had become normal enough to allow the ordinary civil courts to take care of the new regulations. The Government found the trading community co-operative: the trading community found the Government reasonable in allowing them working margins consistent with the public interest in the restraint of prices. The military withdrew more and more from day to day control: the civil administration resumed its functions; and the only remaining traces of martial law lay in the regulation which the ordinary courts were required to enforce."<sup>3</sup>

1. Kahin, George McT. (Ed.), *Major Governments of Asia*, p. 439.
2. Rushbrook Williams, L.F., *The State of Pakistan*, p. 189.
3. *Ibid.*, p. 188.

**The making of 1962 Constitution.** On the first anniversary of his Presidency, General Ayub promulgated the Basic Democracies Order, providing for the establishment of elected Union Councils. There were about 4,000 Basic Democracies in West Pakistan and about 4,200 in East Pakistan. In a referendum held on February 4, 1960, the newly elected Basic Democrats confirmed President Mohammad Ayub Khan in office for five years and authorised him to prepare a new Constitution for Pakistan. The President appointed a Constitution Commission headed by Mr. Justice Mohammed Shahabuddin, a former Chief Justice, to advise the Government how best a democracy adaptable to changing circumstances could be secured in Pakistan. Its terms of reference were "to examine the progressive failure of parliamentary government in Pakistan leading to the abrogation of the Constitution of 1956 and to determine the causes and the nature of the failure; To consider how best the said or like causes may be identified and their recurrence prevented; And, having further taken account of the genius of the people, the general standard of education and of political judgment in the country, the present state of a sense of nationhood, the prime need for sustained development and the effect of constitutional and administrative changes brought into being in recent months, to submit constitutional proposals in the form of a report advising how best the following ends may be secured: a democracy adaptable to changing circumstances and based on the Islamic principles of justice, equality and tolerance; the consolidation of national unity; and a firm and stable system of government."

The Constitution Commission consisted of eminent men in several walks of life. The Commission issued and distributed among the people a questionnaire which brought more than 6,000 replies. The Commission also personally interviewed more than five hundred people in both wings of the country. A group of prominent **Ulema** of Pakistan sent a reply which elicited a wide publicity and was representative of the conservative opinion in the country. The **Ulema** submitted that the future constitution of Pakistan should be based on the **Quran** and **Sunnah**. It was maintained that since the 1956 Constitution was never put to a test and the general elections were not held under the old Constitution, the question of failure of parliamentary system of government in Pakistan did not arise at all. On the other hand the people of Pakistan were fully familiar with the parliamentary system of government and it should continue in the future Constitution of Pakistan. Introduction of Presidential form of government would lead to many insoluble difficulties and should be rejected. The political leaders of Pakistan should be told to fear God and to perform their duties sincerely and honestly and that the Constitution of 1956 should be adopted after necessary amendments.

The Constitution Commission submitted its report in May 1961, and was later made public in full. Many committees of the Presidential Cabinet were appointed to examine its various aspects and it lasted till October 1961, when the Cabinet as a whole began the ultimate examination. The Cabinet ascertained the views of the senior administrative officers. The President had desired that the new Constitution should be drafted in simple language so that it should be intelligible to the ordinary citizen. He argued that the people of Pakistan could not be expected to work the Constitution unless they understood it thoroughly. In deference to the

wishes of the President this onerous task was entrusted to Mr. Manzur Qadir, who was assisted by an Australian expert, Mr. Quayle. The President signed the Constitution on March 1, 1962, and it was promulgated the same day. The Constitution enshrined President Ayub's constitutional ideas.

The first elections under the Constitution of 1962 for the National Assembly were held on April 28, and for the Provincial Assemblies on May 6, 1962. The National Assembly met for its first session on June 8, and, thus, ended the martial law. The conditional ban on the political parties was lifted with the passing of the Political Parties Act in July. The martial law ministers were replaced by the elected members of the National Assembly on June 8, except for three Departments, Finance, Law and Home.

**Salient Features of the Constitution of 1962.** The Constitution of 1962 is second since Pakistan was established in 1947. Like its predecessor the Constitution of 1956, it declared that the sovereignty over the entire universe belongs to Allah Almighty alone, and that the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust. The Preamble states that whereas Founder of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah, declared that Pakistan would be a democratic State based on Islamic principles of social justice, it is the will of the people that the State should exercise its powers and authority through the chosen representatives of the people. The principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam should be fully observed. The Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy Quran and the Sunnah.

The Constitution safeguards the legitimate interests of the minorities in Pakistan including the right to profess and practice their religion and develop their culture. It guarantees the fundamental human rights to all citizens, embracing the right of equality before law, freedom of thought, expression, belief, faith and association and social economic and political justice, subject to the security of the State and consistent with public interest and morality. The independence of the judiciary has also been guaranteed.

The Constitution establishes the State of the Republic of Pakistan. The Preamble specifically states that the Constitution was enacted by Field Marshal Mohammad Ayub Khan, President of Pakistan, in pursuance of the mandate given to him at a Presidential referendum on February 16, 1960. The President is elected for a term of five years by members of the electoral college. He can be removed from office by impeachment on the charge that he has "wilfully violated the Constitution or has been guilty of gross misconduct." He may also be removed from office on grounds of physical or mental incapacity. If the President has held office for more than eight years, he is not eligible for re-election unless his candidature is approved by a secret ballot at a joint sitting of the National Assembly and the two Provincial Assemblies.

The Central Legislature, the National Assembly, is unicameral, con-

sisting of 156 elected members' in equal numbers from the two Provinces of East and West Pakistan, that is, 78 members from each Province. The term of the Assembly is five years unless previously dissolved. The first Assembly elected in 1962, was to serve for three years. Each Provincial Assembly has 155 members, including five reserved seats for women, elected on the same basis as the National Assembly. The Governor of a Province can dissolve the Provincial Assembly, with the concurrence of the President, in case of conflict between a Governor and the Provincial Assembly.

The Constitution does not establish a Parliamentary system of government and President Ayub had always deprecated any system which gave the legislature unrestricted power to maintain, and to remove the executive. He firmly believed that Pakistan's reversion to Parliamentary system on the British model would again throw the country into disastrous regime of party politics which had plagued Pakistan since its coming into being. He had no dislike for democracy. In fact, he was convinced that democracy was essential to Pakistan because, without it, there could be no political stability. But he was also emphatic in his belief that the democratic apparatus to be set up in Pakistan must combine an assurance of political stability and what the Pakistanis could understand and work. He, therefore, decided to establish strong executive with a Head of the State elected by some sort of plebiscite; a sort of American President who stands in direct contact with the people. He should have his Cabinet, but they must be his ministers who serve at his pleasure and assist him in the performance of his functions. The President's Cabinet in Pakistan is not responsible to the National Assembly. The President is both the head of the State and the head of the government. The ministers come and go as and when it pleases the President. The real position of his Cabinet resembles to the Governor-General's Executive Council during the British rule. The Pakistan Presidency, therefore, is not precisely like the American Presidency. It "owes something to the American example, to de Gaulle's France, and, very clearly, to the viceregal heritage of British India."<sup>4</sup>

In the Provinces there exists Provincial Autonomy. But it differs from the system of Provincial Autonomy prevailing from 1937 until 1958, when the Governor, under normal conditions, was a constitutional head of the Province and he acted on the advice of his ministers responsible to the Provincial Assembly. Under the 1962 Constitution the Governor is appointed by the President for an indefinite period of time and is responsible to him. He is subject to the President's discretion. The Council of Ministers in the Provinces is in effect an Executive Council, appointed and dismissed by the Governor in consultation with the President. It is not responsible to the Provincial Assembly.

President Ayub Khan brought in the concept of Basic Democracies as embodied in the Basic Democracies Order of October 27, 1959. The

4. The strength was raised to 218, but the Constitutional amendment was to come into force in 1970.

5. The strength as was to be increased from 1970.

6. *Major Governments of Asia*, p. 450.



members of the Basic Democracies, Basic Democrats, constitute the Electoral College. There are more than 80,000 members of the Electoral College, half in East Pakistan and half in West Pakistan. Its foundation is the primary constituency containing 500 to 1,000 men and women and all those who have attained the age of 21 years are entitled to vote. Eight to ten, according to convenience, primary constituencies are grouped together to elect a Union Council in the countryside, a Town Committee in the smaller urban area and a Union Committee in the larger cities. Each Council or Committee is termed as a Basic Democracy. Altogether 8,266 Basic Democracies were set up in East and West Pakistan, of which 7,114 are Union Councils in the countryside, 218 Town Committees in the smaller urban centres and 816 Union Committees in the cities. There are also 75 Cantonment Areas and 43 special areas.

Pakistan has been described as a Federation, although the Constitution makes no pretence of being a federation. The powers assigned to the Central Government are enumerated in the Third Schedule of the Constitution. All other matters are assigned to the Provinces and they are autonomous in all such matters as far as it is consistent with the unity and interests of Pakistan as a whole. The National Assembly is empowered to make laws in the residuary field in the national interest. The Constitution, thus, permits the Centre to take action wherever it seems necessary without invoking emergency powers. There is no division of powers between the Centre and the units as it is always in a federation. "The central-provincial relationship has returned roughly to the devolutionary pattern of the Government of India Act of 1919." But in one respect Pakistan resembles a federation. An amendment which would alter the limits of a Province requires approval by a two-thirds majority of the Provincial Assembly before it can be introduced in the National Assembly. A Bill amending the Constitution need be passed by a two-thirds majority of the total membership of the National Assembly. After the amending Bill has been passed by the National Assembly it is presented to the President for his assent which he must signify within thirty days after its submission to him. He may either withhold his assent thereto, or return the Bill to the National Assembly with a message suggesting modifications. If the President withholds his assent and if it is again passed by the National Assembly, with or without amendments, by a three-fourths majority of its total membership, the President can either dissolve the National Assembly or refer the Bill to a referendum of the Electoral College. If an absolute majority of the total membership of the Electoral College vote for the Bill, it is deemed to have been assented to by the President and immediately becomes an amendment of the Constitution.

To avoid regional conflicts, which had plagued Pakistan from its very inception, the Constitution provides for the establishment of the seat of the National Assembly at Dacca in East Pakistan whereas the capital of Pakistan is located at Islamabad, near Rawalpindi, in West Pakistan. Dacca has also been declared the second capital of Pakistan. Bengali and

7. It was raised to 1,20,000.

8. Kahin, George McT. (Ed.), *Major Governments of Asia*, p. 462.

Urdu have been made the national languages of the country and parity between the Provinces in all spheres of the Central Government, as nearly as practicable, is emphasised.<sup>9</sup>

The Constitution sets forth certain basic principles which must be rigidly adhered to while making laws. These principles are described as the Principles of Law-making. It is the responsibility of the Legislatures, both Central and Provincial, to ensure that no law is enacted which disregards, violates, or is otherwise not consistent with or in accordance to these principles. If a doubt arises whether a particular legislation is consistent with and in conformity to the principles of law-making, the National Assembly, the Provincial Assembly, the President or the Provincial Governor may refer it to the Advisory Council of Islamic Ideology for advice and guidance. The validity of a law, however, cannot be questioned on the ground that the law disregards, violates or is otherwise not in accordance with the principles of law-making.

The principles of law-making enjoin that no law shall be enacted which is repugnant to Islam. All laws enacted should ensure equality before law, equal protection and equal treatment to all citizens of Pakistan. But departure from this principle may be made where in the interest of equality itself, it is necessary to compensate for existing inequalities, whether natural, social, economic or of any other kind. Departure may also be made in the interest of the proper discharge of public functions by giving to persons performing public functions powers, protections or facilities that are not given to other persons or impose on such persons obligations or disciplinary controls to which other persons are not subject to. It may also be departed in the interests of the security of Pakistan or otherwise in the interest of the State. It is, however, to be ensured that while making such departures no citizen gets an undue preference over another citizen and no citizen is placed under a disability, liability or obligation that does not apply to other citizens of the same category.

No law is to be enacted imposing restriction on the freedom of thought and expression of a citizen, unless it is necessary in the interest of the security of Pakistan, for ensuring friendly relations with foreign States, in the interest of public order or for purposes of ensuring the proper administration of justice, or for purposes of decency or morality or for the purpose of preventing the commission of offences. No law should impose any restriction on the freedom of assembly or the right to form associations or unions except for reasons of security of Pakistan, public order, commissioning of offences, in the interest of decency or morality, and for the purpose of protecting persons in relation to their health or property. The freedom of movement and the right to property are not to be restricted unless public interest demands otherwise. The right to vocation, trade, business or employment is not to be restricted by law unless security of Pakistan and decency or morality necessitated imposition of restrictions. Restrictions could also be imposed for the purpose of regulating any profession or trade by a licensing system or when a trade, business, industry or service is intended to be carried on by or on behalf of the State or for

the purpose of ensuring the development of Pakistan and its resources and industries.

No law should prevent the members of a religious community from professing, practising or propagating or from providing instruction in their religion, or from conducting the institutions for the purpose, or in connection with their religion. No law should require any person to receive religious instruction or attend a religious ceremony or religious worship, relating to a religion other than his own. No law should impose on any person a tax the proceeds of which are to be applied for purposes of a religion other than his own. No law should discriminate between religious institutions in the granting of exemptions or concessions in relation to any tax. No law should authorise the expenditure of public moneys for the benefits of a particular religious community or denomination except moneys raised for that purpose.

A law authorising the arrest or detention of a person should ensure that the person arrested or detained is informed of the grounds of his arrest or detention either at the time of his arrest or detention or immediately thereafter. The law should also provide for the immediate production of the accused person before a competent court of law, his release on bail, facilities for proper and adequate defence and such other facilities which should provide for a fair and judicious trial. This principle, however, does not apply to a law authorising the arrest or detention of enemy aliens or providing for preventive detention. But a law providing for preventive detention should be made only in the interest of the security of Pakistan or of public safety. The person so detained must be informed of the grounds of his detention either at the time of his detention or immediately thereafter. The term of detention should not be more than three months without the authority of a Board consisting of a Judge of the Supreme Court and other senior officers in the service of Pakistan nominated by the President in the case of a Central law and a judge of the High Court of the Province concerned and another senior officer nominated by the Governor of the Province in the case of a Provincial law.

No law should authorise the punishment of a person for an act or omission that was not punishable by law at the time the act was done or the omission was made. Likewise, no law should authorise the punishment of a person for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law at the time the offence was committed. No law should provide for the compulsory acquisition or compulsory taking possession of property except for a public purpose and on reasonable payment of compensation. The amount of compensation should either be fixed by law or it should provide the principles on which and the manner in which compensation would be determined. These principles may, however, be departed from for the purpose of permitting the destruction, the acquisition or the taking possession of property in order to prevent or reduce danger to life, health or property, for the purpose of ensuring the proper management, for a limited period, of any property for the benefit of its owner, or in relation to property which is or is deemed to be an evacuee property under any law. The term public purpose includes the purpose of acquiring, in the public interest, any indus-

trial, commercial or other undertaking which is of benefit to the public, any interest in such an undertaking or any land for use in connection with such an undertaking.

Law must not permit forced labour, except for persons convicted to imprisonment under law and the compulsory service of persons for public purposes or otherwise in the public interest, whether by way of conscription or in any other manner. No law should on the ground of race, religion, caste or place of birth, deprive any citizen of the right to attend any educational institution that is receiving aid from public revenue. This principle may be departed from for the purpose of ensuring for a class of citizens that is educationally backward shares in available educational facilities. No person should be denied access to a public place, other than a place intended solely for religious purposes, on the ground of race, religion, caste, or place of birth. No law should prevent any section of the community from having a distinct language, script or culture of its own. No person should permit or in any way facilitate the introduction into Pakistan of slavery in any form. No law should permit or in any way facilitate the introduction into Pakistan the practice of untouchability in any form.

In addition to the above Principles of Law-making, which are specific prohibitions to the law-making authorities in Pakistan, the Constitution also provides for Principles of Policy. The Constitution directs upon all organs of State authorities and the persons connected thereto to follow these Principles in the performance of their functions. These Principles of Policy are analogous to the Directive Principles of State Policy as provided in the Indian Constitution. Both the Principles of Policy in Pakistan and the Directive Principles of State Policy in India are non-justiciable and, accordingly, beyond the jurisdiction of the courts. The validity of an action of any organ of State authority or law cannot be called in question on the ground that it is not in accordance with the Principles of Policy as directed by the Constitution. The Constitution of Pakistan provides that the responsibility of deciding whether any action of an organ or authority of the State, or any person performing functions on behalf of organ or authority of the State, is in accordance with the Principles of Policy does not rest with the organ or authority concerned. Moreover, the observance of any particular principle of policy is dependent upon resources available for that purpose.

It shall be the policy of the State that the Muslims of Pakistan are enabled individually and collectively to order their lives in accordance with the fundamental principles and basic concepts of Islam and they are provided with all facilities whereby they may be able to understand the meaning of life in accordance with those principles and concepts. The teachings of the Holy Quran and Islamiyat to the Muslims should be compulsory. Unity and observance of Islamic moral standards should be promoted amongst the Muslims and the proper organisation of **zakat, wakfs**, and mosques should be ensured.

The State should endeavour to discourage parochial, racial, tribal, sectarian and provincial prejudices. The legitimate rights and interests of the minorities should be duly safeguarded and the members of the



minority communities should be provided adequate opportunities to enter the public services of Pakistan. Special care and interest should be taken to promote the educational and economic interests of the people belonging to the backward classes or who live in backward areas. All organs of Government should take steps to bring on terms of equality with other persons the members of under-privileged castes, races, tribes, and groups, and to this end, the under-privileged castes, tribes and groups within a Province should be identified by the Government of the Province and entered in a schedule of under-privileged classes. People of all areas of Pakistan and of all classes should be enabled, through education, training, industrial development and other methods, to participate fully in all forms of national activities, including employment in public services of Pakistan. Illiteracy should be eliminated and free and compulsory education should be provided to all as early as possible. Just and humane conditions of work should be provided, children and women should not be employed in vocations unsuited to their age and sex and benefit of maternity should be provided to women in employment.

The well-being of the people irrespective of their caste, creed or race, should be secured by raising the standard of living of the common man, by preventing the undue concentration of wealth and means of production and distribution in the hands of a few, to the detriment and interest of the common man and by ensuring an equitable adjustment of rights between employers and employees and between landlords and tenants. All men and women should have adequate opportunity to work and earn their living and also to enjoy reasonable rest and leisure. All persons employed in public services or otherwise employed should be provided with social security and means of compulsory social insurance or otherwise. The basic necessities of life such as food, clothing, housing, education and medical treatment should be provided for citizens, who, irrespective of caste, creed or race, are permanently or temporarily unable to earn their livelihood on account of infirmity, disability, sickness, or unemployment.

Administrative offices and other services should, so far as practicable, be provided in places where they will best meet the convenience and requirements of the public. No citizen should be denied entry into the public services in Pakistan on the grounds of race, religion, caste, sex or place of residence or birth. This principle of Policy, may, however, be departed from where in the public interest it is desirable that a person who is to perform functions in relation to a particular area should be a resident of that area and the person who is to perform functions of a particular kind should be of a particular sex. It may also be departed from if it is necessary to do so for the purpose of ensuring that, in relation to Central Government, persons from all parts of Pakistan, and, in relation to a Provincial Government, persons from all parts of the Province concerned, have an opportunity of entering the public services in Pakistan. Disparity in the remuneration of persons in the various classes in the public services of Pakistan should be, within reasonable and practicable limits, reduced. Parity between the Provinces in all spheres of the Central Government, should, as nearly as practicable, be achieved. Persons from all parts of Pakistan should be enabled to serve in the Defence Services of Pakistan.

**Riba**, usury, should be eliminated. Prostitution, gambling, and the



use of injurious drugs should be discouraged. The consumption of alcohol liquor, except for medicinal purposes and in the case of non-Muslims for religious purposes, should be discouraged. The bonds of unity amongst Muslim countries should be maintained and strengthened, international peace and security should be promoted, goodwill and friendly relations amongst all nations should be fostered. The settlement of international disputes by peaceful means should be encouraged.

The Constitution also provides for the establishment of an Advisory Council of Islamic Ideology. The Council shall not consist of less than five, and more than 12 members. The precise membership shall be determined by the President. The President shall, while selecting persons for membership of the Advisory Council of Islamic Ideology, shall give due regard to the person's understanding and appreciation of Islam and of the economic, political, legal and administrative problems of Pakistan. The term of office of a member is fixed for three years. A member may resign and may also be removed from office if a resolution recommending his removal is passed by a majority of the total number of members of the Council. The functions of the Council are to make recommendations to the Central and Provincial Governments as to the means of enabling and encouraging the Muslims of Pakistan to order their lives in all respects in accordance with the principles and concepts of Islam, and to advise the National Assembly, a Provincial Assembly, the President or a Governor on any question referred to the Council whether a proposed law disregards or violates, or is otherwise not in accordance with the Principles of Law-making. The Advisory Council of Islamic Ideology is required to inform within seven days to the authority concerned of the period within which it shall be possible for it to furnish that advice. In case, the National Assembly, a Provincial Assembly, the President or a Governor, as the case may be, considers that in public interest the enactment of proposed legislation is not expedient to postpone till the advice was furnished, the law may be made before such an advice is furnished. The rules relating to the transaction of business by the Council are made by the Council with the approval of the President.

The Constitution has also provided for the establishment of Islamic Research Institute. The function of the Institute is to undertake Islamic research and instruction in Islam for the purpose of assisting in the reconstruction of Islamic society on a truly Islamic basis.

## CHAPTER IV

# THE STRUCTURE OF GOVERNMENT AT THE CENTRE

### THE PRESIDENT

**Election and Qualifications.** The Constitution of 1962 provides for a President. The President must be at least 35 years of age and a Muslim. No non-Muslim can be elected as President of Pakistan. A candidate for the office of the President must be qualified to be elected as a member of the National Assembly. If the number of candidates exceeds three, the Chief Election Commissioner is required to inform the Speaker of the National Assembly of the fact and the Speaker shall thereupon forthwith convene a joint sitting of the National Assembly and the Provincial Assemblies to select three of the candidates for election. The members of the National and Provincial Assemblies present at a joint sitting shall select by secret ballot three of the candidates for election. A candidate or candidates not selected at a joint sitting, thus, become ineligible for election. A candidate for the Presidency may address the members present at the joint sitting and may be questioned by any of those members. Where the person holding office as President is a candidate for election, his candidature cannot be disregarded. The person who is and has for a continuous period of more than eight years been holding office as President is ineligible to be re-elected as President. If, however, such a person is a candidate for election to the office of the President, it is the duty of the Chief Election Commissioner to inform the Speaker of the National Assembly of his candidature and the Speaker shall thereupon forthwith convene a joint sitting of the National Assembly and the Provincial Assemblies to consider his candidature. If the majority of the members present at the joint sitting, by secret ballot, approve of his candidature, the President shall be eligible for re-election. But he will be in addition to three candidates selected by the joint sitting of the National Assembly and Provincial Assemblies if the candidates were numerous.

The right to vote in Presidential election is restricted constitutionally to the members of an Electoral College, at least 40,000 in each Province. The number of electoral units in each Province must be the same. An Electoral Roll must be maintained and established for each electoral unit. Any citizen of Pakistan, who has attained the age of 21 years, is a resident of an electoral unit and is of sound mind, is entitled to be enrolled on the electoral roll of that electoral unit. The persons enrolled on the electoral roll for an electoral unit are required to elect from time to time from amongst themselves a person who is not less than 25 years of age and the person thus elected becomes an elector of the Electoral College for that unit. The electors for all the territorial units in both the Provinces to-

gether constitute the Electoral College. The members of the Electoral College elect the President.

The Constitution provides that Presidential election must be held within four months before the end of the normal term of office which is five years. The results shall be declared not less than 14 days before that date, but the President-elect shall not enter his office before that office is vacant. When the President dissolves the National Assembly, new Presidential elections must be held within a period of three months after the dissolution of the National Assembly. But actual polling shall not take place until two months have elapsed from the date of dissolution. When a President ceases to hold office before the expiration of his normal term of office, new election of the President shall be held within the period of ninety days after he ceases to hold office. The President can resign from his office by writing to the Speaker of the National Assembly. There is no Vice-President. In the event of the absence of the President from the country, or a vacancy in the office, the Speaker of the National Assembly acts as President until he returns from abroad or a new incumbent is elected. The Constitution imposes certain limitations, for example, he may not dissolve the National Assembly, on the powers of the Speaker of the National Assembly when he acts as President.

**Removal from Office.** The President can be removed from office either by impeachment for wilfully violating the Constitution or on a charge of gross misconduct and on grounds of incapacity. The President is impeached before the National Assembly. If one-third of the total number of members of the National Assembly give a written notice signed by each of them to the Speaker of the National Assembly expressing their intention to move a resolution impeaching the President on a charge that he had wilfully violated the Constitution or he had been guilty of misconduct, the Speaker shall forthwith cause a copy of the notice to be sent to the President. The notice must set out particulars of the charge. The resolution impeaching the President cannot be moved earlier than 14 days and later than 30 days after the notice of the resolution had been given to the Speaker of the National Assembly. If the Assembly is not in session, the Speaker is required to summon it for consideration of the resolution within the specified period. The President has the right to appear in person and be represented before the National Assembly when the Assembly is considering the resolution of his impeachment. If the Assembly passes the resolution impeaching the President by votes of not less than three-quarters of the total number of members of the National Assembly, the President forthwith ceases to hold office and is disqualified from holding public office for a period of ten years. If less than one-half of the total number of members of the National Assembly vote in favour of the resolution, the members who gave notice of the resolution impeaching the President to the Speaker of the National Assembly cease to be members of the Assembly forthwith after the result of the voting on the resolution is declared.

The Constitution also provides for the removal of the President from office on grounds of incapacity. It is provided that not less than one-third of the total number of the members of the National Assembly may give a notice in writing signed by each of them to the Speaker of the National

Assembly for the removal of the President from office on the ground of his physical or mental incapacity. The notice must set out the particulars of the alleged incapacity. The Speaker shall thereupon forthwith cause a copy of the notice to be sent to the President, together with a request by the Speaker that the President shall submit himself to an examination by a Medical Board. The resolution of removal cannot be moved in the Assembly earlier than 14 days and later than 30 days after notice of the resolution had been given to the Speaker. The President has the right to appear and be represented before the National Assembly during the consideration of the resolution by the Assembly. If the President does not submit himself for examination to the Medical Board before the resolution is moved in the National Assembly, the resolution may be voted upon, and if it is passed by the Assembly by votes not less than three-fourths of the total membership of the Assembly, the President forthwith ceases to hold office. If before the resolution is moved in the Assembly, the President has submitted himself for examination to the Medical Board, the resolution shall not be voted upon until the Medical Board has been given an opportunity of putting its opinion before the National Assembly. If after consideration by the National Assembly of the resolution and opinion of the Medical Board, the resolution is passed by the Assembly, by votes not less than three-fourths of the total membership of the Assembly, the President forthwith ceases to hold office. If, where the President has submitted himself to an examination by the Medical Board, less than one-half of the total number of members of the National Assembly vote in support of the resolution demanding his removal on grounds of alleged incapacity, the members who gave notice of the resolution to the Speaker of the Assembly cease to be the members of the Assembly forthwith after the result of the voting on the resolution is declared.

**Immunities of the President.** Article 116 of the Constitution provides that no criminal proceedings whatsoever shall be instituted or conducted against the President during his tenure of office. No civil proceedings in which relief is sought against the President shall be instituted during the tenure of his office and in respect of anything done or not done or purporting to have been done or not done, by him in his personal capacity whether before or after he entered upon his office, unless at least 60 days before the proceedings are instituted, notice in writing has been delivered to him or sent to him in the manner as prescribed by law, stating the nature of the proceedings, the cause of action, name, description and place of residence of the party by whom the proceedings are to be instituted and the relief which he claims. No process whatsoever shall issue from any court or tribunal against the President whether in a personal capacity or otherwise while he is in office.

Article 117 further provides that the President shall not, except in respect of anything done or not done by him in contravention of the law, be answerable to any court or tribunal for the exercise of the powers, or the performance of the duties of his office, or for any act done or purporting to be done by him in the exercise of those powers or in the performance of those duties. But this Article should not be construed as restricting the right of any person to bring appropriate proceedings against the Central Government or a Provincial Government.



The remuneration and privileges of the President remain the same as the remuneration and privileges to which immediately before the commencing day of his office, the President of Pakistan was entitled.

**Powers of the President.** The President is both the head of the State as well as the head of Government. He is a single executive, a executive and the executive. The Constitution vests the executive authority of the Republic of Pakistan in the President which is exercised by him either directly or through officers subordinate to him, in accordance with the Constitution and the law. The President may specify the manner in which orders and other instruments made and executed in pursuance of any authority or power vested in the President shall be expressed and authenticated. The President may regulate the allocation and transaction of business of the Central Government and establish divisions of the Government for the efficient conduct of business. To assist him in the performance of his duties and functions, the President may appoint, from amongst persons qualified to be elected as members of the National Assembly, persons to constitute his Council of Ministers. The Council of Ministers so appointed is designated as the President's Council of Ministers. As a result of the pressure of the public the President issued an Order on June 14, 1962 enabling the members of the National Assembly to be appointed members of the President's Council of Ministers without loss of their seats in the Assembly. A Minister appointed by the President shall, before he enters upon his office, make before the President an oath in a prescribed form. He retains office at the pleasure of the President. Two points of importance emerge from these provisions. Firstly, according to the Constitution as promulgated ministerial office is incompatible with membership of the National Assembly. But as members of the Assembly, immediately after the promulgation of the Constitution, refused to vacate their seats from the Assembly in order to become Ministers, the President issued orders in June 1962, to remove the incompatibility. Secondly, the Ministers are not responsible to the National Assembly, either individually or collectively. They serve at the President's pleasure and, thus, a breath who has made them can also unmake them. The President may also appoint Parliamentary Secretaries, not exceeding in number the number of divisions of the Central Government, from among the members of the National Assembly. The Parliamentary Secretaries perform such functions in relation to the divisions of the Central Government as the President may direct.

The Supreme Command of the Defence Services of Pakistan is vested in the President to be exercised by him subject to law. Without limiting the generality of this power, the President is vested with the power, subject to law, to raise and maintain the Defence Services of Pakistan and the Reserves of those services. He is empowered to grant commissions in those Services and appoint Chief Commanders of those Services and also determine their salaries and allowances. The Constitution provides that for a period of twenty years the Defence Minister must be a retired officer of the rank of Lieutenant-General or its equivalent, unless the President himself has held such a rank. In his first Council of Ministers the President himself held the Defence portfolio.

The Provincial Governors are appointed by the President for an in-



definite term and they are subject to his direction. A Governor cannot remove a Provincial Minister from office without the concurrence of the President. Article 121 provides that if in the opinion of the President, a Governor or a Minister has been guilty of gross misconduct in relation to his duties he may disqualify him from holding public office in addition to his removal from the office of a Governor or Minister as the case may be. The President is required to inform him in writing that a Governor or Minister has the option of either agreeing to disqualification from holding public office for such period as the President may fix, but not exceeding five years, or of having the matter referred to a Tribunal for enquiry. If within seven days of the receipt of such an information a Governor or Minister agrees to the disqualification and informs the President accordingly, he stands disqualified from holding public office for the period fixed by the President. If he does not agree to disqualification, the President shall forthwith refer the matter for enquiry to a Tribunal consisting of a Judge of the Supreme Court appointed by the President in consultation with the Chief Justice of the Supreme Court. If the Tribunal holds that the Governor or Minister is guilty of gross misconduct he is dismissed from his office and also disqualified from holding public office for a period of five years.

The Constitution provides for the office of the Comptroller and Auditor-General of Pakistan who is appointed by the President. He may resign from his office by writing to the President. If the office of the Comptroller and Auditor-General is vacant at any time or he is absent or is unable to perform the functions of his office due to illness or some other cause, the President may direct any other person to act for him and perform the functions of that office. The President also appoints the Attorney-General of Pakistan and he performs such duties as the President may direct. He holds office at the President's pleasure.

The President has the power to dissolve the National Assembly at any time, but he must, at the same time, seek re-election. The President remains in office for four months from the date of dissolution. The President may address the National Assembly and send messages. Ministers of the President and the Attorney-General have the right to speak in and take part in the proceedings of the National Assembly or any of its Committees, but they are not entitled to vote therein. No Bill or amendment to a Bill providing for or relating to preventive detention can be introduced or moved in the National Assembly without the previous consent of the President. When a Bill has been passed by the National Assembly it must be presented to the President for his assent. It is required by the Constitution that within 30 days after the Bill has been presented to the President, he may give assent to the Bill or declare that he withholds his assent to the Bill or return the Bill to the National Assembly with a message that the Bill, or a particular provision of the Bill, be reconsidered and that any amendment or amendments specified in the message be considered. If the President does none of these three, the Bill is deemed to have been assented to after the expiry of 30 days. If at any time, a conflict with respect to any matter arises between the President and the National Assembly and the President considers that it should be referred to the referendum of the Electoral College, he may cause the

matter to be referred to a referendum in the form of a question that is capable of being answered by a simple "Yes" or "No." It is to be noted that the question is referred to the members of the Electoral College for their approval or otherwise and not to the referendum of the people.

The President has been vested with certain legislative powers when the National Assembly is not in session. If at any time the National Assembly is not in session or stands dissolved and the President is satisfied that circumstances exist which render immediate legislation necessary, he may make and promulgate such ordinances which appear to him necessary and expedient. The ordinances so promulgated shall have the same power of law, but they must be placed before the National Assembly as early as practicable. If by resolution it is approved, it shall be deemed to have become an Act of the National Assembly otherwise it ceases to have effect after the expiry of the specified period. If the National Assembly neither approves nor disapproves and the President does not repeal it before the specified period, it shall be deemed to have been repealed upon the expiration of that period. The prescribed period is the period ending 42 days after the first meeting of the National Assembly following the promulgation of the ordinance or the period ending 180 days after the promulgation of the ordinance, whichever is shorter. The power of the President to promulgate ordinances extends to matters within the legislative competence of the National Assembly.

This apart, there are the emergency powers of the President. Article 30 of the Constitution provides, "If the President is satisfied that a grave emergency exists: (a) in which Pakistan, or any part of Pakistan, is threatened by war or external aggression or (b) in which the security or economic life of Pakistan is threatened by internal disturbances beyond the power of a Provincial Government to control," he may issue a proclamation of emergency. Such a Proclamation must be laid before the Assembly as soon as it is practicable. It does not, however, require the approval of the National Assembly. The proclamation remains in force as long as the President is satisfied that the continuance of emergency is justified by the circumstances. When he is satisfied that the reasons which necessitated the issuing of the proclamation have ceased to exist, he may revoke it. During the continuance of emergency the President may promulgate ordinances even if the National Assembly is in session and the Assembly has no power to disapprove of them. Unless approved by the National Assembly or repealed earlier by the President ordinances promulgated by the President during the emergency end with the emergency itself. When the ordinance is approved by the National Assembly, as it is required to be laid before it as early as practicable, the ordinance becomes an Act of the National Assembly.

The President has the power to grant pardons, reprieves and respites, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority.

**President's Council of Ministers.** The President's Council of Ministers is not akin to the Council of Ministers in a Parliamentary system of Government. It is not even the semblance of it. In a Parliamentary system of Government the Council of Ministers is appointed from the majority party in Parliament and the leader of that party becomes the

Prime Minister, and the Prime Minister heads the Government. The head of the State possesses only constitutional powers and the real functionaries are the Ministers who are members of the Council of Ministers. They remain in office so long as they can retain the confidence of Parliament and they are responsible to that body and through it to the people for all their public acts individually and collectively. Responsibility to Parliament is the *sine qua non* of a Parliamentary Government.

The President of Pakistan appoints his own Ministers, but they need not be the members of the National Assembly, although they have the right to speak there if they are not members. This is a departure from the practice of the Presidential Cabinet in the United States of America. In America the President's Ministers do not sit in Congress, they have no right to address it, and introduce Bills as they are not its members. Another feature of the Pakistan Presidential Cabinet is that each Minister has a Parliamentary Secretary for his department, who is a member of the National Assembly, and he sits and votes in the House. This is not available in America. The President's Council of Ministers in Pakistan, therefore, vitally differs from the President's Cabinet under a Presidential system of Government as distinguished from the Parliamentary system. Of course, the President of Pakistan appoints Ministers, who serve at his pleasure, to assist him in the performance of his functions and it is for him to accept the advice tendered by his Ministers.

Apart from the power of removal of a Minister which the Constitution confers upon the President, he is also empowered to disqualify a Minister, for a period not exceeding five years, from holding any public office if in the opinion of the President a Minister has been guilty of gross misconduct in relation to his duties. If a Minister does not agree to the option of disqualification from holding public office, he can be dismissed from office as well as disqualified from holding public office for a period not exceeding five years if the Tribunal appointed by the President and enquiring into his misconduct holds him guilty. The President of the United States of America has no like powers. The grip of the President of Pakistan over his Council of Ministers is really tight. It does not constitute his family as it is in America.

**Position of the President.** The President of Pakistan is the head of the State as well as head of Government. This President's Council of Ministers is in effect a return to a Governor-General's Executive Council as in the British rule. In fact, the drafters of the Constitution of Pakistan in 1962, attempted to work out a pattern of institutions which "owes something to the American example, to de Gaulle's France, and, very clearly, to the viceregal heritage of British India." He not only makes and unmakes his Council of Ministers, who assist him in the performance of his duties, but can also make them to do what he wishes to be done. He has the mysterious weapon of removal and disqualification of a Minister, if in his opinion a Minister is guilty of gross misconduct in relation to his duties. To differ from the President or to offer a suggestion unpalatable to the President can be construed as a gross misconduct in relation to the duties of a Minister. Mr. Z.A. Bhutto, former Pakistan Foreign Minister, warned some top leaders of his country "to refrain from throwing mud on him otherwise he would be compelled

to tell the truth about them." What Bhutto implied is self-explanatory.

The Constitution of Pakistan has not been made by a Constituent Assembly. President Ayub has it made. The President can even send the amendments of the Constitution back to the National Assembly for reconsideration. The President has the authority to dissolve the National Assembly at any time. If at any time a conflict with respect to any matter arises between the President and the National Assembly, he may, if he considers desirable, send the matter to a referendum of the Electoral College. The cause of conflict is referred in the form of a question which should be answered by the members of the Electoral College either by a 'Yes' or 'No.' It is not a referendum of the people, but of the Basic Democrats, who constitute 15 per cent of the population of the country. The microscopic minority of the entire population is allowed to bear the responsibility of deciding how their country should be ruled and by whom. Many people in Pakistan, "notably the Lahore Bar, which has the reputation of thinking today what Pakistan thinks tomorrow, feel that Basic Democracy is neither basic nor democratic." Efforts were made to scrap it, but President Ayub was determined to retain it as he had strived to devise it.

The legislative powers vested in the President are really extensive and all-embracing. He may assent to the Bill passed by the National Assembly, withhold his assent or return the Bill to the National Assembly for its reconsideration as a whole or any of its provisions. He has also the power to promulgate ordinances, which have the power of law duly passed by the National Assembly, if the Assembly is not in session or stands dissolved. Then, there are the emergency legislative powers of the President. Whether there exists emergency or not, it is the satisfaction and decision of the President alone. The President is simply required to inform the National Assembly of such a proclamation by placing it on its table. And how long the emergency is to continue is again the decision of the President. The National Assembly does not intervene at any stage. During the emergency the President may promulgate ordinances even while the Assembly is in session, and the Assembly has no power to disapprove of them. Since the Fundamental Rights, as incorporated in the Principles of Law-making, are not guaranteed by the Constitution, a citizen has no means to seek redress even if his basic liberties are restricted. By not constitutionally guaranteeing fundamental rights, the obvious aim is to control all forms of political activity. No Bill or amendment to a Bill providing for preventive detention can be introduced and moved in the National Assembly without the previous consent of the President.

Two important matters of public concern have been removed from the jurisdiction of the National Assembly and placed directly under the President—Defence and Finance. The Constitution provides that for a period of twenty years the Defence Minister must be a retired officer of the rank of Lieutenant-General, or its equivalent, unless the President has

1. *Indian Express*, New Delhi, December 3, 1967.

2. Muhammad Alavi, "No Challenge of Status; Giant Still Supreme," *The Tribune*, Ambala Cantt., November 13, 1967.



himself held such rank. President Ayub held the Defence portfolio in his first Council of Ministers. The President is also the Supreme Commander of the Defence Forces of Pakistan and he has the power to raise and maintain the Defence Services and the Reserves of those Services. He can also grant commissions in those Services, appoint Chief Commanders and determine their salaries and allowances.

The Constitution provides for the impeachment of the President on the charge that he had wilfully violated the Constitution or had been guilty of gross misconduct. He can also be removed from office on grounds of physical or mental incapacity. But the Constitution imposes such stringent conditions on both these counts that no member of the National Assembly may dare venture it. In both cases the motion for removal must be brought by at least one-third of the total membership of the National Assembly and must be carried by a vote of three-fourths of the membership. If the removal motion is supported by fewer than half the members, then the original movers of the motion for removal of the President are automatically unseated from their membership of the National Assembly.

The President could, thus, have no rivals under the Constitution and there was none before the turmoil created by the People's Party launched by the former Foreign Minister, Z.A. Bhutto. The slogan of Bhutto's Party was "Islam, Socialism and democracy." In conjunction with other political parties the Pakistan Democratic Movement was launched to restore Parliamentary democracy in the country. Mian Mumtaz Daultana, a former Chief Minister and a prominent member of the Pakistan Democratic Movement, publicly defended the system of Parliamentary democracy as established in India.<sup>3</sup> In answer to questions by correspondents, Mian Mumtaz Daultana declared that difficulties faced in the practice of Parliamentary system in some of the Indian states "could be surmounted and it would serve no purpose in advancing them as an argument to run down the need for the same system for Pakistan." But President Ayub stood like a colossus, dwarfing all other political leaders. When the opposition to his regime became an open revolt the President agreed to some Parliamentary concessions. The intervention of the students in Pakistan politics made President Ayub's position critical and he, once again, handed over the administration to Martial Law Administration under his emergency powers.

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3. As reported in the *Statesman*, New Delhi, December 6, 1967.



## CHAPTER V

# THE STRUCTURE OF GOVERNMENT AT THE CENTRE (Contd.)

### THE NATIONAL ASSEMBLY

**Unicameral Legislature.** The Constitution establishes a unicameral legislature at the Centre, known as the National Assembly. A unicameral legislature is the negation of the democratic demand and the basic principle of federalism. Bicameralism is based upon an enduring principle that resolutions of government which have widespread results need a multitude of councillors. It is also indispensable for States having federal form of government. To give Pakistan a pretence of a federation, the membership of the National Assembly has been based upon parity of members between the two Provinces, East and West Pakistan. The reasons for creating a unicameral legislature are explicit in President Ayub's approach to the solution of Pakistan's political tangle. He was convinced that democracy was essential to Pakistan as without it there could be no political stability. But he was also emphatic in his belief that this democracy must be of the kind that Pakistanis could understand and work. He was particularly suspicious of any system of Government which gave to the legislature unrestricted power to remove, or to fetter the Executive, "because he feared that 'this might open the way to a reversion to the former disastrous regime of party politics, intrigue and corruption, which so 'nearly involved the country in ruin.'" The Constitution that the President enacted was, therefore, tailored for Pakistan's needs. He told the people, "Don't let us kid ourselves and cling to clichés and assume that we are ready to work such a refined system, knowing the failure of earlier attempts. It will be foolhardy to try it again until our circumstances change radically."

The Constitution of 1962, accordingly, not only established a unicameral legislature, but it also took a retrograde step by introducing the system of indirect elections. To give the National Assembly the complexion of responsiveness, lest the Pakistanis might resent the total obliteration of the democratic institutions, Ministers, who need not be the members of the Assembly, have the right to speak there, answer to questions and defend the actions and policies of the Government. The Government is not responsible to the Assembly and it has no power to overturn the Government by a vote on motion, but the Rules of Procedure relating to conduct of business in the Assembly provide for adjournment motions and resolutions to express the feelings of members on the actions and policies of the government. This the President agreed to reluctantly after the Constitution had been promulgated.

**Composition and Organisation of the Assembly.** The Central Legislature, which is no longer called a Parliament, consists of the President and one House, the National Assembly. The total membership of the Assembly is 156, including 6 women members, elected in equal numbers both from East and West Pakistan, that is, 75 general seats and 3 women seats from each wing. Three seats from each wing are reserved for women, though there is nothing to restrict their election for general seats. According to the Amendment which was to become operative in 1970, the membership of the Assembly was to be raised to 218. Ten seats were to be reserved for former Presidents, Speakers, Governors, Ministers or people who were distinguished in art, science or literature. There were to be two seats reserved for women. But with the abdication of President Ayub, General Yahya Khan, the Martial Law Administrator, abrogated the 1962 Constitution.

The normal term of the National Assembly is five years, but the First Assembly elected in 1962 was to serve for only three years. The President can dissolve the Assembly at any time, but he must at the same time seek re-election. The Assembly automatically stands dissolved after the expiry of its normal term of five years, but elections must be held within four months before the end of a normal term. If the Assembly is dissolved by the President, then, elections must be held within three months after dissolution. The President's own term of office expires four months from the date of dissolution. Casual vacancies occurring within the last six months of an Assembly's term are not filled, otherwise by-elections are conducted by the Election Commission.

A candidate seeking election to the National Assembly must fulfil prescribed qualifications. He must be a citizen of Pakistan, at least 25 years of age, and not disqualified by Constitution and law. No individual candidate may stand for more than one Assembly seat at one time, "in other words, the old practice of multiple candidacies for "insurance" purposes is forbidden." If a member of the National Assembly is elected to a Provincial Assembly, or is appointed as a Governor or to any other office which disqualifies him to be a member of the Assembly, or does not attend its sittings, without leave, for 30 consecutive days, the seat is declared vacant.

The National Assembly is required to meet at least once every six months. The Constitution provides that Dacca shall be the principal seat of the National Assembly. The President summons, prorogues and dissolves the Assembly. As a matter of abundant caution, the Constitution empowers the Speaker of the National Assembly to summon its session at the request of at least one-third of the members. In such an eventuality, the Speaker alone is empowered to prorogue it. If the offices of the President of Pakistan, Speaker and Deputy Speaker of the Assembly are vacant, then, the Chief Justice of the Supreme Court may summon the Assembly. As said earlier, the President may dissolve the National Assembly at any time. But his power of dissolution is subject to three limitations. Firstly, dissolution of the Assembly also means end of President's term of office. Both the members of the Assembly and the Pre-

ment go before the voters the Assembly within three months from the date of dissolution and the President within four months. Secondly, the Assembly cannot be dissolved within the last six months of its term. Finally, no dissolution can take place when a motion for the removal of the President of Pakistan is being considered by the National Assembly.

The National Assembly elects its own Speaker and he presides over its sittings. The Speaker is elected for the term of office of the Assembly, unless removed earlier by a majority vote, but he remains in office till his successor is elected by the new Assembly. Since there is no office of the Vice-President and in the event of removal of the President of Pakistan, either as a result of gross misconduct or physical or mental incapacity, or in the event of his death or his absence from the country, the Speaker acts as the President, the Constitution ensures that there will always be a Speaker to serve as acting President if need be. Moreover, it eliminates the controversy, which had polluted the politics of Pakistan, that who shall preside at the first meeting of the newly elected National Assembly. Though the Constitution itself is silent but a precedent has now been established that the Speaker and the President must not belong to the same Province, they should come from different Provinces.

To assist the Speaker in the performance of his duties the Constitution creates two Deputy Speakers, Senior and Junior. The Senior Deputy Speaker presides over the sittings of the National Assembly in the absence of the Speaker or acts as Speaker if that office falls vacant. In case of vacancy in any of these offices the new incumbent must be chosen promptly. The Assembly frames its own Rules of Procedure. The members of the Assembly are guaranteed freedom of speech and vote and the proceedings of the House may not be challenged in any court of law. The Rules of Procedure introduce an innovation by providing that the Speaker should "make such arrangements as are necessary to instruct the members of the Assembly in their obligations as legislators. But the Speaker has no means at his disposal to force the members to attend such "classes" of instruction if he contemplates to hold. The Speaker is empowered to control the proceedings of the House and maintain and enforces proper decorum. In the case of unruly members, he has the power to refer a matter of "gross misconduct" to the Supreme Court. If the Supreme Court holds a member guilty, he ceases to be a member of the National Assembly.

There are nineteen committees of the House and the principle of parity between East and West Pakistan is adopted in their Constitution. Sixteen of these Committees are departmental and the remaining three deal with Unspecified Matters, Rules of Procedure and Privileges, and the Public Accounts. The Public Accounts Committee consists of ten members whereas the Unspecified Matters Committee and Rules of Procedure and Privileges Committee have six members each.

**Functions of the National Assembly.** The main function of the National Assembly is to make laws. But its powers are restricted by the provisions of the Constitution as embodied in the Principles of Law-Making. The National Assembly has been made responsible for observing the Principles of Law-making. The Courts have been empowered to take notice of, and rectify, any breaches of laws so passed. It must, however,

be observed that the courts cannot challenge the validity of law itself. The legislative procedure is simple. A Bill, when introduced in the Assembly, is debated upon three occasions. On the first occasion, there is a general discussion on the principles involved in the measure. If the Assembly approves the measure and it is not referred to a Select Committee of the House, it goes to the second stage of discussion. Here the Bill is discussed clause by clause, and amendments to it may be moved. In the final stage, the Bill in its amended form is discussed once more and then votes are taken.

When a Bill has been passed by the National Assembly, it is presented to the President for his assent. Within a period of thirty days the President is required to give his assent or declare that he withholds his assent thereto, or return the Bill to the Assembly with a message that the Bill or its particular provision may be reconsidered, or any amendment specified in the message may be considered. If the President does none of these three, the Bill becomes law. If the President withholds his assent, the Assembly is competent to pass the Bill over the President's veto by a two-thirds majority. In such an eventuality the President must signify his assent within a period of ten days, dissolve the Assembly or refer the Bill to a referendum of the Electoral College. If absolute majority of the members of the Electoral College vote in favour of the Bill, it becomes law immediately. "Neither a general election nor a referendum," in case of conflict between the President and the National Assembly, "would seem to be a desirable method of dealing with particular legislative issues, and undoubtedly the President will use the utmost of his influence to prevent the mobilization of a two-thirds majority against him."<sup>3</sup>

With regard to the financial powers of the Assembly much need not be said. It cannot control the Government and its hold on the purse is lean. The Constitution provides that the President shall, in respect of every financial year, cause to be laid before the National Assembly the Annual Budget Statement of the estimated receipts into and the estimated expenditure from the Central Consolidated Fund for the year. The Constitution requires that the Annual Budget Statement must distinguish between the expenditure charged on the Consolidated Fund, recurring expenditure, and the new expenditure. The expenditure charged on the Consolidated Fund includes the salaries and allowances of the President, Ministry, Judges, and so on. The recurring expenditure is the normal expenditure of the Government incurred every year. The new expenditure includes new items and increases of more than 10 per cent on the previous year's recurring expenditure. The National Assembly may discuss the expenditure under all the three categories, but it votes only on demands for grants (appropriations) for new expenditure. Moreover, the Annual Budget Statement may include estimated expenditure in future years on particular long-term projects and this, too, requires the assent of the Assembly. But once it has approved such estimates of expenditure, the funds are committed and need not be approved again.

The discussion on the Budget is not crucial in the life of the Gov-

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3. Kahin, George McT., *Major Governments of Asia*, p. 455.



ernment. Disapproval of the Budget Statement does not involve the defeat of the Government. In fact, the National Assembly's control over the purse is negligible. It need not touch the expenditure charged on the Consolidated Fund. The recurring expenditure is safe in its hands and as for the long-term projects once the expenditure has been approved, it cannot be changed. The Assembly can only raise a storm while grants for the new expenditure are being discussed. But here too the powers of the members of the Assembly are limited, because neither demands for grants nor the "imposition, abolition, remission, alteration or regulation of any tax" may be moved without the recommendation of the President. Nor can any member of the Assembly introduce a Bill or move an amendment, if it involves expenditure from the revenues or other moneys of the Central Government without the recommendation of the President.

The discussion of the Budget too is a tame affair. There is no sharp criticism and anxious moments for tilting of the balance. Immediately after the presentation of the Budget discussion ensues, which takes two forms. First there is general discussion on the Budget. This is followed by individual demands for grants "though parliamentary time never permits every item to be debated." Discussion also takes place when approval is being granted to tax measures. This may be on general or particular issues. Following consideration of the Annual Budget Statement, the President causes to be prepared a schedule known as the Schedule of Authorised Expenditure and authenticates the same under his signatures. No moneys can be withdrawn from the Central Consolidated Fund except under the authority of the Schedule of Authorised Expenditure as authenticated by the President. The Schedule of Authorised Expenditure is laid before the National Assembly for its information.

Finally, are the deliberative functions of the National Assembly. The first opportunity is provided when a Bill is under discussion and as said earlier, there are three occasions for such a discussion. The members of the Assembly can ask questions and supplementaries and elicit the requisite information from the Minister concerned. Though a Minister cannot be compelled to give answers to the question asked, but it is generally done as the Government gets an opportunity to defend its policies and rebut the criticism. Adjournment motions against the policy of the Government or to highlight its failures can also be moved. The members of the Assembly may also move resolutions to express the feelings of the people on the policies or actions of the Government, or to draw its attention to matters of importance which need immediate solution.

**National Assembly examined.** A unicameral legislature with indirect elections and that too in a country with a federal polity professing democratic ideals is really a distrust of democracy and complete disregard of the basic federal principles. The National Assembly is, therefore, not a barometer of public opinion and its members do not hold any mandate from the people. When voters have no direct participation in the election of their representatives, they take only lukewarm interest in politics and eventually become negligent in public affairs. Nor does indirect method of election decrease the evils of party system, the main prop of



President Ayub. This system of election also increases chances of bribery and corruption and the members of the Electoral College can be easily tempted and as the conditions of political morality prevail, they do easily succumb to such temptations. Further, law, according to Aristotle, should be reason without passion. It means, in the first place, that those who are entrusted with the duty of making laws should avoid the dangers of rash, hasty and ill-considered legislation. A due amount of caution and reflection are the prerequisites of legislation, as passion is dangerous in law-making. Secondly, as laws are to affect all alike, it is necessary that the legislature should be a representative body of all people representing numerous interests in order to secure the consent of all sections of opinion. Both these objectives are secured by a legislature organised into two Chambers and the direct election of the representatives to the representative Chamber. The second Chamber provides a convenient means of giving representation to different classes and interests. The National Assembly does not fulfil any of these.

The National Assembly is essentially a legislative body. Legislative functions consist of two kinds of work, law-making and deliberative. The law-making function of the National Assembly is hedged by innumerable limitations and its deliberative functions are not of any serious consequence. In fact, the President controls the National Assembly. President's legislative powers, both in normal times and during emergency, eclipse the law-making powers of the National Assembly. The Constitution empowers the President to withhold his assent to a Bill passed by the National Assembly, or he may return it to the Assembly for reconsideration or make a request through a message for the consideration of certain amendments. The President has also the power to dissolve the Assembly at any time or he may refer the matter, which is the cause of conflict between the President and the National Assembly, to the referendum of the Electoral College. The Electoral College elects the President and the members of the National Assembly and their verdict can be obvious under a system of "tied democracy."

Certain legislative powers have also been given to the President to be exercised by him at a time when the National Assembly is not in session. When the Assembly is not in session or it stands dissolved, the President has the power to promulgate ordinances which have the same force as laws enacted by the National Assembly. An ordinance is required to be laid before the National Assembly when reconvened and if it is approved by the Assembly, it becomes an Act of the Central legislature. If it is disapproved by the Assembly, then, it expires six weeks from the day of the Assembly's meeting or six months after its promulgation, whichever is earlier.

Then, the President is armed with legislative powers during the period of Emergency. So far as the proclamation of Emergency is concerned, it is the exclusive prerogative of the President and the National Assembly does not intervene at any stage, except that the proclamation must be laid before the Assembly and that too for the sake of its information only. During the Emergency the President may promulgate ordinances even when the National Assembly is in session. These ordinances, unless approved by the Assembly or repealed earlier by the President,

lapse with the emergency itself. And these ordinances may embrace the entire life of the nation, political, economic and social, overriding even the rights as incorporated in the Principles of Law-making since they are not constitutionally guaranteed and are non-justiciable. Moreover, the members of the Assembly cannot introduce a Bill or move an amendment to a Bill providing for or relating to preventive detention without the previous consent of the President.

Responsibility and control go together and the legislative control over the Government has always centred upon the control of the purse. The National Assembly does not control the Government. In fact, the Government controls the National Assembly. The President's Council of Ministers are not responsible to the National Assembly. In terms of the Constitution ministerial office is incompatible with membership of the Assembly. The Ministers, no doubt, have the right to speak in the National Assembly, introduce Bills, defend the policy of the Government and answer to the questions and supplementaries directed by the members. The members can move adjournment motions and resolutions for the redress of grievances and even censure the Government, but they cannot bring to book the Government. Defeat of the Government even on crucial matters of policy does not mean the exit of Government from office. The office of the President goes by calendar unless he is removed either by impeachment or due to physical or mental incapacity. The Ministers are responsible to the President alone and they remain in office during his pleasure. They constitute, according to the Constitution, President's Council of Ministers.

The most important function of a legislature, as said above, is the control and regulation of national finances. The Constitution of Pakistan has severely limited the role of the Assembly in money matters. Whatever be the vote of the Assembly, "the government is assured of having in each fiscal year at least as much money as in the previous year and can plan for the future with confidence once a long-term project has been approved." The adverse vote of the Assembly by rejecting the grants on new expenditure does not mean the exit of the Government.

## CHAPTER VI

# THE SUPREME COURT

**Appointment and qualifications of Judges.** At the apex of the Pakistan judiciary is the Supreme Court of Pakistan. It consists of a Chief Justice and as many Justices as may be determined by law, or until so determined as may be fixed by the President. The Chief Justice is appointed by the President whereas other Justices are appointed by the President in consultation with the Chief Justice of Pakistan. A Justice of the Supreme Court must be a citizen of Pakistan and he has for a period of not less than five years been either a Judge of a High Court in Pakistan, or has for a period of not less than 15 years been an Advocate or Pleader of a High Court in Pakistan. Before entering his office, the Chief Justice has to take oath of office in the prescribed form before the President. Justices take the oath of office before the Chief Justice. A Justice of the Supreme Court, including the Chief Justice, holds the office till the age of 65 unless he resigns earlier or is removed from office in accordance with the Constitution. If the office of the Chief Justice becomes vacant or he is absent or unable to perform the functions of his office due to illness or some other cause, the President may appoint some other Justice of the Supreme Court to act for the time being. In the case of a Justice, the President may appoint a Judge of a High Court, who is qualified for appointment as a Justice of the Supreme Court, to act temporarily till the permanent vacancy is filled or the incumbent returns to his duty.

The Constitution also makes provision for the appointment of *ad hoc* Justices. If at any time the Supreme Court cannot hold its sittings, due to lack of quorum, or for any other reason and it seems expedient to increase the number of Justices temporarily, the Chief Justice of the Supreme Court, with the approval of the President and consent of the Chief Justice of the High Court concerned, may require a Judge of the High Court to act as an *ad hoc* Justice for such period as may be necessary. An *ad hoc* Justice so appointed exercises the same powers and jurisdiction as that are vested in a permanent Justice of the Supreme Court.

**Seat of the Supreme Court.** The permanent seat of the Supreme Court is Islamabad, Rawalpindi, but the Court must sit in Dacca, East Pakistan, at least twice in every year and for such periods as the Chief Justice of the Supreme Court may consider necessary. The Supreme Court may, from time to time, sit in such other places as the Chief Justice, with the approval of the President, may fix. Until provision is made for establishing the Supreme Court at Islamabad, the seat of the Court shall be at such place as the President may fix.

## POWERS AND JURISDICTION

**Original Jurisdiction.** The Supreme Court has exclusive original

jurisdiction in any dispute between one of the Governments and one or more of the other Governments. The term 'Governments' means the Central Government and the Provincial Governments. While exercising this jurisdiction, the Supreme Court pronounces declaratory judgments only.

**Appellate Jurisdiction.** The Supreme Court is vested with the jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of a High Court. An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court lies as a right. —

(1) where the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution,

(2) where the High Court has sentenced a person to death or to transportation for life;

(3) where the High Court has imposed punishment on a person in pursuance of the power conferred upon the Supreme Court by Article 123. Article 123 provides that the Supreme Court shall have power to punish any person who abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Supreme Court, or scandalises the Court or otherwise does anything which tends to bring the Court or a Justice of that Court into hatred, ridicule or contempt, or does anything which tends to prejudice the determination of a matter pending before the Court, or does any other thing which, by law, constitutes contempt of the Court.

The Constitution also provides that an appeal from a judgment, decree, order, or sentence of a High Court in a case not otherwise appealable to the Supreme Court, shall lie only if the Supreme Court grants leave to appeal. This provision is tantamount to the special leave for appeal as provided for in the Indian Constitution.

**Advisory Jurisdiction.** The Supreme Court of Pakistan is also vested with advisory jurisdiction. The Constitution provides that if at any time the President of Pakistan considers it desirable to obtain the opinion of the Supreme Court on any question of law, which he considers of public importance, he may refer it to the Supreme Court for its consideration and opinion. The Supreme Court reports its opinion on the question so referred to the President after due consideration.

**Additional Jurisdiction.** The Constitution also makes provision for vesting the Supreme Court with additional jurisdiction. Article 60 provides that in addition to the jurisdiction already conferred on the Supreme Court by the Constitution, the Supreme Court shall exercise such other jurisdiction as may be conferred on it by law.

**Processes of the Supreme Court.** Article 61 of the Constitution provides that the Supreme Court has the power to issue such directions, orders or decrees as it may find necessary for dispensation of justice in any cause or matter pending before the Court, including an order for the purpose of securing the attendance of any person, or discovery, or production of any document. All such directions, orders or decrees are enforceable throughout Pakistan and in case of their execution in a Province they will be executed as if they had been issued by the High Court of the Province.

concerned. In case of conflict, the decision of the Supreme Court shall be final.

**Power of Review.** The Supreme Court has been given the power to review its own judgments. Article 62 provides that the Supreme Court shall have power, subject to the provisions of any Act of the Central Legislature and of any Rules made by the Supreme Court, to review any judgment pronounced or any order made by it.

**Decisions of the Supreme Court are binding.** The decisions rendered by the Supreme Court, to the extent that they decide questions of law or are based on or enunciate principles of law, are binding on all other courts in Pakistan. It is further provided that all executive and judicial authorities throughout Pakistan must act in aid of the Supreme Court. The Supreme Court may, with the approval of the President, make rules regarding the practice and procedure of the Supreme Court.

**Estimate of the Supreme Court.** The Supreme Court of Pakistan does not enjoy the same position and status as its counterparts do in the United States of America and India. In fact, the Constitution has made no effort to make it at par with the Supreme Courts of these countries. President Ayub had never intended that the Supreme Court should become the final arbiter on the interpretation of the Constitution. His opinion about the power of judicial review, which in a federal polity a Supreme Court must possess, was rather peculiar. He asserted that the provision for judicial review was absolutely of no use to the common man as he had not the means to carry the question to courts. It was just a pass-time for the wealthy who would make the last bid to challenge the validity of laws in order to perpetuate their privileges and vested interests. It would, thus, retard all progress and development of Pakistan, he asserted. He further argued that it was wisdom to trust the legislators, who were representatives of the people, rather than to make judges, who represented none, the custodian of public interests and the Court a super-legislature. But it should be conceded that the National Assembly under the Constitution is not a sovereign body. Nor does it represent the people. In a "tied democracy" as established in Pakistan, the National Assembly is indirectly elected and the President of Pakistan has powers to override its decisions at every step.

Since the Supreme Court has no power of judicial review, no law can be challenged on the ground that the Legislature, Central or Provincial, had no power to do so or on the ground that the Legislature had made it in contravention of any of the Principles of Law-making which embody the fundamental rights. "In consequence, the role of the courts is now to interpret the law and to enforce rights under the law, but not to set limits to legislative action or to prevent the executive from implementing policies adopted by the legislature."



## CHAPTER VII

# PROVINCIAL GOVERNMENT

**Provinces of Pakistan.** Pakistan now consists of two Provinces, East Pakistan and West Pakistan. Immediately after the establishment of Pakistan in 1947, it consisted of eighteen units of government, heterogeneous in character and administration. There were the four Governor's Provinces, East Bengal, West Punjab, North-West Frontier Province and Sind. All these Provinces had their own legislative assemblies and enjoyed "Provincial autonomy." Baluchistan was administered by a Chief Commissioner who was directly responsible to the Central Government. There were also four Princely States which were soon merged into the Baluchistan States Union. The North-West Frontier, too, had four Princely States. Then, there were two larger and more developed States of Bhawalpur and Khairpur. Finally, were the extensive tribal areas administered by the Provincial Governments on behalf of the Central Government. In 1948, Karachi district was separated from Sind to become the federal capital.

It would, thus, be apparent that East Bengal was the only single Province and it was, therefore, West Pakistan which necessitated some kind of immediate change to bring some kind of homogeneity. There were conflicting opinions. The elements in power in the smaller units of West Pakistan were reluctant to lose their identity whereas others feared that local interests and traditions "might be overwhelmed by the predominance of Punjab in any merger or federation." Sind and North-West Frontier were more vocal in this respect. The issue had become so controversial that the First Constituent Assembly failed to come to a solution. After its dissolution the Government proposed to amalgamate West Pakistan by administrative order. The issue of dissolution was taken to the Court and it blocked the question of West Pakistan's finalisation. The measure was, then, taken to the Second Constituent Assembly. West Pakistan became a single Province on October 14, 1955. The status of Karachi remained controversial till it was decided in 1959 to shift the capital to Rawalpindi. Karachi was finally integrated in West Pakistan on July 1, 1961.

Parity between East and West Pakistan was the basis of the constitutional settlement in 1956, and it continues to underline the present structure. But there is a deep-rooted resentment amongst the various Opposition political parties against the existing structure and they demand disintegration of West Pakistan. The first loud voice of protest came from former Foreign Minister Z.A. Bhutto. Bhutto suggested that people inhabiting the various parts now comprising West Pakistan should be allowed to reopen the issue. The former West Punjab, however, wanted one unit to continue. There was also Sheikh Mujib-ur-Rehman's six-point plan for East Pakistan, which demanded greater autonomy for East Pakistan.

**Structure of Government in the Provinces.** Like India, Pakistan has one single Constitution for the whole country. Although Pakistan is organised on federal basis yet the Constitution makes no pretence at being federal. The division of powers between the Central and regional Governments is not exactly that a federation requires. There is only one Central list and that too a very short as contained in the Third Schedule of the Constitution. It includes defence, external affairs, external trade, national finance and economic planning, communications, nuclear energy, and gas and oil. All other unenumerated matters are left to the Provinces, but the Central Legislature is competent to legislate in the residuary field where the national interests of Pakistan in relation to the security of the country, including the economic and financial stability of Pakistan, planning or co-ordination, or the achievement of uniformity in any matter in different parts of Pakistan so requires. The Constitution also empowers a Provincial Assembly to authorise the Central Legislature by a resolution to make laws, for the Province on any matter within the jurisdiction of the Province itself. But any law made in pursuance of this power may be amended or repealed by an Act of the Provincial Legislature concerned.

The residuary powers, thus, are vested in the Provinces. The Constitution also provides that the responsibility of deciding whether it has the power to make a law on a subject not enumerated in the Third Schedule rests with the Provincial Legislature itself. But when the Constitution permits the Central Legislature to take action whenever it seems necessary in the "national interest" the residuary powers vested in the Provinces become insignificant. It will be more appropriate to say that the Central Government can invade the Provincial jurisdiction without the need to invoke "emergency" powers. Finally, when a Provincial law is inconsistent with the Central Law, the latter prevails and the Provincial Law is invalid to the extent of the inconsistency.

**Provincial Executive.** The executive authority of a Province is vested in a Governor, appointed by the President for an indefinite term and is subject to his direction. No person can be appointed a Governor of a Province unless he is qualified to be elected as a member of the National Assembly. If a Governor goes abroad, or is unable to perform his duties due to illness or some other cause, the President will appoint an Acting Governor and in that capacity he is to perform the duties of his office according to the directions of the President.

The Governor exercises the executive authority vested in him, either directly or through officers subordinate to him, in accordance with the Constitution, the law and the direction of the President. He may specify the manner in which orders and other instruments made and executed in pursuance of any authority or power vested in the Governor shall be expressed and authenticated. He may regulate the allocation and transaction of the business of the Government of the Province and establish departments of the Government. For the performance of his functions, the Governor, with the concurrence of the President, may appoint Ministers to constitute the Governor's Council of Ministers. These Ministers must be qualified to be elected as members of the Provincial Assembly, but they need not be its members. The ministerial office is, therefore, incompatible, as at the Centre, with membership of the Provincial Assembly. These

Ministers have the right to sit in the Assembly and participate in its proceedings, but they have not the right to vote. Nor are they responsible to it. The Governor's Council of Ministers is in effect an Executive Council, appointed and dismissed by the Governor in consultation with the President. In addition to the Ministers, the Governor may appoint, from amongst the members of the Provincial Assembly, persons, not exceeding the number of the Departments of the Government as established by the Governor, to be Parliamentary Secretaries. Their functions and Departments are determined by the Governor.

All these provisions are identical to the President's Council of Ministers and the Parliamentary Secretaries he appoints. Just as it is at the Centre, similarly, in a Province the Governor appoints an Advocate-General. The Advocate-General must be a person qualified to be appointed as a Judge of the High Court. He performs such duties as the Governor may direct and assign.

**The Provincial Legislature.** As at the Centre so in the Provinces there is a unicameral legislature designated as the Provincial Assembly. Its membership is 155 in each Province inclusive of five seats reserved for women. Women can, however, contest for general seats also.<sup>1</sup> The normal term of office of the Assembly is five years. The members of the Assembly must possess the same qualifications as members of the National Assembly and the Provincial Assembly has the same provision with regard to Speaker and Deputy Speakers, procedure, privileges, etc.

The Governor may summon the Assembly from time to time and may also prorogue it unless it has been summoned by the Speaker. The Speaker is empowered to summon the session of the Provincial Assembly if one-third of the members demand it. When the Speaker summons the Assembly, he can only prorogue it. The Governor alone has the power of dissolution. In case of conflict between the Governor and the Provincial Assembly the Governor has the power to dissolve it with the concurrence of the President. In case of a conflict between the Governor and the Provincial Assembly, the Constitution provides that either the Governor or the Speaker or both of them may request the President in writing to refer the matter to the National Assembly for its decision. If the Governor makes such a request its copy shall, at the time it is made, be sent to the Speaker and if it is made by the Speaker, then the copy is to be sent to the Governor. The President of Pakistan is required to send immediately after the receipt of such a request its copy to the Speaker of the National Assembly. The Assembly considers the issue involved in the conflict and is required to give its decision through a resolution within 30 days after the request received by the Speaker. It is the duty of the President to summon the session of the Assembly, if it is not in session, to enable it to give its decision within the specified time. If the President fails to do so, the Speaker shall summon the session of the Assembly. As said above, the Governor may, with the concurrence of the President, dissolve the Provincial Assembly if the National Assembly decides the conflict in favour of the Governor.

1. According to the amendment of the constitution which was to become operative in 1970, the membership of the Provincial Assemblies was raised. There were to be three more seats reserved for women in each Provincial Assembly.

The Governor may address the Provincial Assembly and also send messages to it. The Ministers of the Governor's Council and the Advocate-General have the right to sit in the Assembly and participate in its proceedings or any of its Committees, but they are not entitled to vote. No Bill or amendment of a Bill providing for or relating to Preventive Detention shall be introduced or moved in the Provincial Assembly without the previous consent of the Governor.

When the Provincial Assembly passes a Bill it goes to the Governor for his assent. The Governor must give his assent within thirty days, or withhold his assent or return it to the Assembly for reconsideration. If the Governor does not do either of the three, the Bill *ipso facto* becomes a law. If he withholds his assent the Assembly is competent to reconsider it. If it is passed again with two-thirds majority of the total membership, it is presented to the Governor for his assent. If the Governor returns the Bill for reconsideration and the Assembly again passes it, with or without the amendments as desired and specified by the Governor, by a majority of votes, it is presented to the Governor for his assent. When the Bill is again presented to the Governor, he must give his assent thereto within ten days or request the President to refer the Bill to the National Assembly for its decision. If within the period of ten days he fails to do either of the two things, the Bill is deemed to have been assented to by the Governor. If the National Assembly passes a resolution supporting the Bill, the Governor shall be deemed to have assented to the Bill from the date the National Assembly had passed the resolution.

The Governor also possesses legislative powers when the Provincial Assembly is not in session or it stands dissolved. If the Governor is satisfied that circumstances exist which render immediate legislation necessary, he may promulgate an ordinance which has the force of law. The ordinance so promulgated is required to be placed before the Assembly as soon as it is practicable. If the Assembly approves the ordinance by resolution before the expiration of the prescribed period, it becomes a law of the Provincial Assembly. The prescribed period is 42 days after the first meeting of the Assembly or the period of 180 days after the promulgation of the ordinance. If the Assembly disapproved the ordinance or does not approve it and it has not been repealed by the Governor before the expiration of the prescribed period, it shall be deemed to have been repealed upon the expiration of the prescribed period.

The financial powers of the Assembly are similar to those of the National Assembly, except that these relate to the Provincial jurisdiction alone. Article 89 of the Constitution provides that the provisions of Articles 40 to 47 shall apply to and in relation to a Province, except that the term 'President' is to be replaced by the term 'Governor' and for the term 'National Assembly' shall be read 'Provincial Assembly.'

**High Courts.** At the apex of the Provincial judiciary is the High Court and provision has been made for each Province to have its own High Court. A High Court consists of a Chief Justice and as many other Judges as may be determined by law or fixed by the President. A Judge of the High Court is appointed by the President after consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court concerned. A Judge of the High



Court must be a citizen of Pakistan and he has for a period of not less than 10 years been an advocate or pleader of a High Court or he has for a period of not less than three years served as or exercised the functions of a District Judge in Pakistan, or he has for a period of not less than 10 years held a judicial office in Pakistan. A Judge holds office until he attains the age of 60. He may resign earlier. A Judge is also subject to removal from office in accordance with the Constitution.

The permanent seat of the High Court of East Pakistan is Dacca. But the Chief Justice, with the approval of the Governor, may fix any other place for the High Court to sit. The permanent seat of the High Court of West Pakistan is Lahore. It has also its permanent seats at Karachi and Peshawar. A Judge of the High Court of West Pakistan shall not be transferred from the permanent seat of that court to another permanent seat of that court without the prior approval of the President. A Judge of that High Court who has served for less than five years at a permanent seat of that court, shall not, without his consent, be transferred to another permanent seat except where the transfer is necessary in order to ensure that the functions of the Court are properly carried out.

Article 98 of the Constitution deals with the jurisdiction of the High Courts. It provides that the High Court shall have such jurisdiction as is conferred on it by the Constitution or by law. The jurisdiction in the 1956 Constitution to issue writs of **habeas corpus**, **quo warranto**, **mandamus**, and **prohibition** has been replaced by the power to issue orders. The orders seem to have the same effect as the writs of various kinds, "but since the traditional names are not used, the common law scope is avoided." If a High Court is satisfied that no other adequate remedy is provided by law, it may make an order directing a person performing in the Province functions relating to the affairs of the Centre, the Province or a local authority, to refrain from doing that which is not permitted by law to do, or may declare that any act done or proceedings taken has been done without lawful authority and consequently is of no legal effect. The High Court may order that a person taken in custody should be produced before it in order to establish that he is not being held in custody without lawful authority or in an unlawful manner. The High Court may also require a person holding a public office to show under what authority of law he claims to hold that office. But no such order shall be made in respect of a person in the Defence Services of Pakistan regarding his terms and conditions of service or in respect of any action taken in relation to him as a member of the Defence Services. The same applies to any other person in the service of Pakistan in respect of his terms and conditions of service. The intent and result of these provisions is to limit the role of the Courts in administrative matters and to prevent writ petitions for interrupting the essential activities of the government.

The decisions of the High Courts, so far as they may decide the questions of law or are based upon or enunciate principles of law, are binding on other subordinate courts. A High Court, with the approval of the Governor of the Province concerned, may make rules regulating the practice and procedure of the High Court or of any other Court subordinate to it. A High Court supervises and controls all other courts that are subordinate to it.



## CHAPTER VIII

# AYUB GOES, CONSTITUTION ABROGATED

**Martial Law Again.** On March 25, 1969, Pakistan's soldier President, Field Marshal Ayub Khan, stepped down from power in the face of a massive wave of bloodshed and lawlessness which had swept the country. In a broadcast to the nation, President Ayub said that the situation in the country had come to such a state that the problems of Pakistan were being solved in the streets and road-crossings instead of the negotiating table and announced that he was handing power to the Army Commander, General Yahya Khan. With the sharp deterioration in law and order and mounting economic chaos this was perhaps inevitable. Whether President Ayub stood down voluntarily or under duress may not be known with certainty at least for some time.

With the imposition of Martial Law Pakistan went back where it was in 1958. General Yahya Khan's Martial Law Administration swung into action sternly. Twenty-five Martial Law regulations were brought into force covering almost every aspect of public behaviour and the penalties for their violation were stringent indeed. General Yahya Khan, who assumed the powers of the Chief Martial Law Administrator, appointed three Deputy Chief Martial Law Administrators, one each from the three wings of the Defence Services—Lieutenant-General Abdul Hamid Khan, Vice-Admiral S.M. Ahsan and Air Marshal M. Noor Khan.

**Partial Restoration of the 1962 Constitution.** The proclamation issued by General Yahya Khan on March 25, 1969 announced the abrogation of the Constitution of the Islamic Republic of Pakistan and persons holding offices of President, members of the President's Council of Ministers, the Governors of Provinces and members of their Council of Ministers ceased to hold office with immediate effect. The National Assembly and the two Provincial Assemblies were dissolved. All Courts and Tribunals in existence immediately before the abrogation of the Constitution were allowed to continue and exercise all their powers and jurisdictions which they would have exercised had the Constitution not been abrogated. But no Court could call in question any Martial Law regulation or order or any finding, judgment, or order of a military court and no writ or other order could be issued against the Chief Martial Law Administrator or any persons exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

But on March 31, 1969, just six days after the assumption of office as Chief Martial Law Administrator, General Yahya Khan assumed Presidency. In a proclamation the General said that he "has assumed office" of Presidentship since the day Field Marshal Ayub Khan relinquished his office. Thus, General Yahya Khan became the third President of Pakistan. In 1958, General Ayub Khan took over from Sir Iskander Mirza.

On April 4, 1969, Pakistan's "self-proclaimed" President and Chief Martial Law Administrator, General Yahya Khan, issued a provisional Constitution order restoring parts of the 1962 Constitution to give legal sanction to his assumption of office as President and empower himself to make such laws and constitutional provisions as he might deem fit for the management of the affairs of the State. The order said, "Notwithstanding the abrogation of the Constitution of the Islamic Republic of Pakistan brought into force on June 8, 1962, by the Proclamation and subject to any regulation or order made from time to time by the Chief Martial Law Administrator, the State of Pakistan shall, except as otherwise provided in this order, be governed as nearly as may be in accordance with the 1962 Constitution." The order specifically provided that paragraphs 2, 4, 5, 6, 7, 8, 9, 13, 14, 15 and 17 of the Fundamental Rights set out in Chapter I of Part II of the Constitution stood abrogated. There was no direct reference to the restoration of the office of the Governor, but it was implied in the order when it said that an ordinance promulgated by the President or the Governor of a Province would not be subject to the jurisdiction of any court of law.

General Yahya Khan had become wiser from Pakistan's experience of the Ayub regime and, accordingly, he tried to give semblance of constitutional government in the country. The government announcement of March 31, 1969 declaring General Yahya Khan's assumption of Presidency said that he would remain President only until "a new Constitution is framed by the elected representatives of the people." Although the announcement gave no indication how long it would take to frame a Constitution, but the new President made it abundantly clear that he had no ambition other than creating conditions conducive to the establishment of constitutional government. He also pledged himself to the restoration of democracy and the transfer of power to the representatives of the people elected freely and impartially on the basis of adult franchise. It was, thus, clear that unlike Ayub Khan, Yahya Khan had no intention of imposing a Constitution of his own. Pakistan's new Constitution is to be drawn up in a democratic way.

**Towards a new Constitution.** On November 28, 1969, President Yahya Khan took a step forward and announced in a surprise broadcast to the nation that elections to the National Assembly would be held on October 5, 1970 on the basis of one-man-one-vote and set the time limit for the newly elected National Assembly to frame a new Constitution for Pakistan within a specified period of 120 days. If the National Assembly failed to complete its task within the time-limit of 120 days, it would be dissolved and new elections held to accomplish the task. Elections to the Provincial Assemblies, it was announced, will be held on the basis of the new Constitution. The legal framework for elections was to be completed by March 31, 1970.

The restoration of the former provinces of Sind, Baluchistan and the North-West Frontier was the highlight of President Yahya Khan's announcement. The dissolution of one-unit would give East Pakistan, which has a bigger population than that of West Pakistan, a larger share in national affairs and also end the parity of representation as between the western and eastern wings provided for in the Constitution of 1962.

In pursuance of his declared policy, President Yahya Khan announced on March 28, 1970, the legal framework for the general election to be held next October. A 330-member National Assembly will draft Pakistan's new Constitution following general elections on October 5, 1970. The Assembly will include 13 women. The elections will be held on the basis of adult franchise and each Province will be represented in the National Assembly on the basis of population. The representation in the National Assembly for each Province has been fixed and also the strength of each Provincial Assembly. East Pakistan will have the largest block of members in the National Assembly—169 in a House of 313.

July 1, 1970 has been fixed for the dissolution of the one-unit West Pakistan Province. According to the Press release in Rawalpindi on April 1, 1970, Islamabad and the Tribal Areas will be centrally administered. Karachi will be in Sind, but Lasbela formerly in Sind will go to Baluchistan. Bhawalpur Division, comprising a former Princely State, will form part of Punjab. The names of the Governors have also been announced: Lieutenant-General Rahman Gul, Sind; Lieutenant-General Khawja Mohomed Azhar, North-West Frontier Province; Lieutenant-General Riyaz Husain, Baluchistan. The Governor of West Pakistan, Lieutenant-General Atiqur Rahman, would continue as Governor of all four Provinces until the newly-appointed Governors of Sind, North-West Frontier Province and Baluchistan took office. Thereafter General Atiqur Rahman would continue as Governor of West Punjab. It is significant to note that none of the four Governors is a civilian.

President Yahya Khan announced that Pakistan's new Constitution be based on the Islamic ideology—the country would become an Islamic Republic—and provide for an independent judiciary. The proposed Provincial elections would be on the basis of the 1961 census and that the Provincial elections would be held not later than October 22, 1970.

In order to enable the peaceful transfer of power to the elected representatives of the people, political parties were allowed to resume their activities from January 1, 1970. With a view to ensuring impartial and free elections, the President said that the authorities would not interfere in the normal political activities, but he warned that violence and other lawless activities should not be resorted to.

**Appraisal of the Proposals.** The constitutional proposals of President Yahya Khan came for sharp criticism from some of the Pakistani politicians immediately after they were announced on November 28, 1969. Voicing his disappointment, Z.A. Bhutto, former Foreign Minister and Chairman of the Pakistan People's Party, called them as only "a half road" towards constitutional settlement. He expressed his strong doubt if the Constituent Assembly would be ever able to solve problems like the extent of autonomy to be enjoyed by different units of Pakistan, and the question of bicameralism. It may be noted that East Pakistan leaders have vehemently been demanding a uni-cameral legislature. General Yahya Khan has declared that such issues will be settled by the Constituent Assembly. But Bhutto is of the view that on all such matters the President should have given clear verdict. Former Chief Minister of East Pakistan Aftab Khan has also criticised some of the provisions of General Yahya Khan's announcement. He has expressed his disappointment over the

fact that the question of autonomy has been left unsettled. He has expressed his fear that the Constituent Assembly would be bogged down in settling such matters. He has also demanded complete internal autonomy. Maulana Bhashani, who insists on class representation in the legislature, has said that he will oppose the elections if they are held within the framework announced by President Yahya Khan.

But the announcement bans any propaganda against the elections and any expression of opinion "prejudicial to the ideology, integrity and security of Pakistan." Again on March 28, 1970, President Yahya Khan said, "Every one has the right to offer his solution to the constitutional, political, economic and administrative problems of the country. But no one has the right to offer a solution which would adversely affect the solidarity of the people of Pakistan. This no one would tolerate. We will refuse to be silent spectators to any attacks against Pakistan's entity as a nation." This is the President's answer to the demand for the regional autonomy of East Pakistan made by Sheikh Mujibur Rehman, the leader of the Awami League. General Yahya Khan has made it plain that he has the power of veto over any constitutional scheme proposed by the Assembly.

The National Assembly has to frame the Constitution within 120 days, or it will stand dissolved. President Yahya Khan has rejected the contention of political leaders that the 120-day limit set by him for the National Assembly to finalise the new Constitution was too short. The President blames the political parties for the lack of a consensus on the future Constitution of Pakistan. General Yahya Khan holds that the National Assembly would not be starting from a scratch. It would have before it two or three drafts in the form of previous Constitutions.

When this is supplemented by the fact that the Assembly will be automatically dissolved if the President does not authenticate the constitutional Bill, and that only the President and not the National Assembly can amend the constitutional framework announced on March 30, 1970, shows that the Assembly will not be a sovereign body. It means that even if all East Pakistani members of the National Assembly—169 in a House of 313—unitedly back the Awami League's demand of internal autonomy, they might not be able to have their own way.



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GOVERNMENT OF  
THE  
INDIAN REPUBLIC

## CHAPTER XXI

# THE CONSTITUTION OF THE INDIAN REPUBLIC

### MAKING OF THE CONSTITUTION

**Development of the idea of Constituent Assembly in India.** The right of the people to determine the form of Government under which they would live and to frame their own Constitution was first conceived by a few advanced Indian nationalists during the First World War. This claim was cemented by the declaration of the Allies, conceding self-determination to all nations, big or small. But after the war had been won, the British Government denied the right of self determination to the people of India. The Preamble to the Government of India Act, 1919, categorically stated, "And whereas the time and manner of each advance can be determined only by Parliament, upon whom the responsibility lies for the welfare and advancement of the Indian people."

But it did not put an end to the Indian demand for self-determination. In 1922, Gandhi asserted in most unequivocal terms the future of the country. He said, "Let us see clearly what **Swaraj**, together with the British connection, means. It means an undoubtedly India's ability to declare her independence if she wishes. **Swaraj**, therefore, will not be a free gift of the British people. It will be a declaration of India's full self-expression. That it will be expressed through an Act of Parliament is correct and true. But it will be merely a courteous ratification of the declared wish of the people of India even as it was in the case of the union of South Africa. Not an unnecessary adverb could be altered by the House of Commons. The ratification in our case will be of a treaty to which Britain will be party. Such **Swaraj** may not come this year, may not come within our generation. But I have contemplated nothing less. The British Parliament, when the settlement comes, will ratify the wishes of the people of India as expressed not through the bureaucracy but through her freely chosen representatives."

At the same time, Liberal members of the Central Legislature, under the inspiration of Mrs. Annie Besant, decided to call a National Convention "in order to obtain for the Commonwealth of India Dominion Status in her external relations and **Swaraj** in her internal affairs." A National Conference was held in New Delhi on February 12-13, 1923 for purpose of making arrangements for the calling of the National Convention after the election of 1923. The scheme, however, did not fructify. The newly formed **Swaraj** Party in the Central Legislature put forward in the Legislative Assembly a demand for the Round Table Conference or Convention for recommending a scheme of Constitution for India. This de-

mand was reiterated in 1925, when the Report of the Muddiman Committee was being discussed in the Legislative Assembly. The demand of the Swaraj Party was not analogous to that of a Constituent Assembly, but the germs were there.

The appointment of the Statutory Commission was considered by Indians an open challenge to their patriotism, and it was at this stage that M.N. Roy put forward, for the first time, the idea of a Constituent Assembly. But it remained only an isolated suggestion. No political party owned it and, as such, it did not attract much public attention at that time. Even when in January 1930, the Indian National Congress declared full independence as India's goal, no mention was made about the Constituent Assembly. The resolution of the Congress Working Committee simply said, "we believe, therefore, that India must sever the British connection and attain Purna Swaraj or complete independence."

**Demand for a Constituent Assembly.** The demand for a Constituent Assembly entered Indian politics in 1934. On April 7, 1934, Gandhi approved the proposal to revive the Swaraj Party. The Swaraj Party was formed at Ranchi early in May and it placed before the country a programme which, *inter alia*, claimed for India, "in common with other nations, the right of self-determination." The Party maintained that the only method of "applying that principle is to convene a Constituent Assembly representative of all sections of the Indian people to frame an acceptable Constitution." The policy of the Swaraj Party was approved by the All-India Congress Committee at its Patna Session in May, 1934. The demand for the Constituent Assembly from that time onwards became the platform of the Congress, although many Congress leaders did not understand its full meaning and significance. They took it as synonymous to an All-Parties Conference.<sup>1</sup> Jawaharlal Nehru took note of it and apprised his colleagues of the implications of the concept of a Constituent Assembly. They did not realise, wrote Nehru, "that the whole idea behind the Constituent Assembly is that it should be elected on a very wide mass basis, drawing its strength and inspiration from the masses."<sup>2</sup> The Indian National Congress embodied the demand for the Constituent Assembly, explaining its meaning and significance, in a resolution passed at the Faizpur session on December 28, 1936. The resolution stated, "The Congress stands for a genuine democratic State in India where political power has been transferred to the people as a whole and the government is under their effective control. Such a State can only come into existence through a Constituent Assembly elected by adult suffrage and having the power to determine finally the Constitution of the country...."

This demand was subsequently ratified in resolutions passed by the Provincial Legislative Assemblies in which the Congress commanded a majority. When the Congress Ministries resigned in November, 1939, the Working Committee<sup>3</sup> reiterated its demand for the Constituent Assem-

1. Jawaharlal Nehru, *An Autobiography*, p. 574.

2. *Ibid.*

3. Resolution of the Working Committee of the Indian National Congress, November 19-23, 1939. *Congress and the War Crisis* (The All-India Congress Committee, Allahabad), pp. 137-38.

bly and asserted that the right of Indians "to frame their Constitution through a Constituent Assembly, is essential in order to remove the taint of imperialism from Britain's policy ... They hold that the Constituent Assembly is the only democratic method of determining the Constitution of a free country, and no one who believed in democracy and freedom can possibly take exception to it. The Working Committee believed too that the Constituent Assembly alone "is the adequate instrument for solving the communal and other difficulties.

**Demand conceded.** During the next two years the idea of an Indian Constituent Assembly was prominently before the country and its pros and cons were actively discussed. Many were sceptical about its political efficacy. The Liberals were opposed to it as they deemed it an extremely democratic device and the people of India, they thought, were not politically equipped to realise its significance. They favoured and believed in the more aristocratic conference method, which had proved so useful in the British Dominions. The Princes, the Europeans, the landlords, and other vested interests were also opposed to it, as they apprehended their privileged position might disappear. Then, there was the avowed opposition of the Muslim League as they thought that the process of the Constituent Assembly would undermine the special rights and interests of the Muslims. After the Lahore resolution on Pakistan in 1940, the Muslim League changed its stand. The League adopted a favourable attitude towards the idea of the Constituent Assembly, but it demanded two separate Constituent Assemblies, one for Pakistan and the other for Hindustan. The Constituent Assembly, for framing the Constitution, thus, became the demand of the Congress and the Muslim League both, though the former demanded a single Constituent Assembly and the latter demanded two separate Constituent Assemblies, one for 'Hindu India' and the other for 'Muslim India.'

The demand for the Constituent Assembly was accepted by the British Government for the first time in March, 1942, when Sir Stafford Cripps brought to India His Majesty's Government's proposals for reforms. The Cripps proposals were rejected, but they had one redeeming feature, namely, that the right of Indians to frame their own Constitution through a Constituent Assembly was accepted. This was reiterated in March 15, 1946 statement of the Prime Minister. The Prime Minister, while recognising India's right to independence, said, "Is it any wonder that today India claims as a nation of 400 million people that has twice sent her sons to die for freedom that she should herself have freedom to decide her own destiny? What form of government is to replace the present regime is for India to decide, but our desire is to set up forthwith the machinery for making that decision."

**The making of the Constitution.** As already said, the elections to the Constituent Assembly were held, under the Cabinet Mission Plan, in July 1946. Out of 210 general seats the Congress won 199 and the Muslim League captured 73 seats out of a total of 78 Muslim seats. It was a galaxy of top-ranking leaders of the Congress and the Muslim League, veteran statesmen, seasoned administrators, eminent jurists, in fact, people drawn from all walks of life and all parts of the country. The Constituent Assembly was scheduled to meet on December 9, 1946, but the Mus-

lim League boycotted its deliberations, although the December 6 statement of His Majesty's Government had accepted the League's interpretation of the grouping classes of the Cabinet Mission Plan. The League demanded two Constituent Assemblies. Then came the February 1947 statement of His Majesty's Government and the Mountbatten Plan of June 1947, which brought about the partition and the setting up a separate Constituent Assembly for Pakistan.

The representatives of the States of Baroda, Bikaner, Udaipur, Jaipur, Jodhpur, Rewa and Patiala entered the Constituent Assembly of India in April 1947. Rulers of other States, except Jammu and Kashmir and Hyderabad, had nominated their representatives and they participated in the deliberations of the Constituent Assembly. The representatives of Jammu and Kashmir and Hyderabad took their seats after the accession of these States to India in October, 1947 and November, 1948 respectively.

In the first session of the Constituent Assembly Pandit Jawaharlal Nehru moved the Objectives Resolution and described it as a solemn pledge to the people "which they would redeem in the Constitution they would frame." The fundamental propositions laid down in the Resolution, Pandit Nehru said, were not controversial. No body challenged them in India "and no body ought to challenge them, and if anybody does challenge, well, we accept that challenge and we hold on to our position." These utterances were greeted with wild enthusiasm. Thus, the foundations of the Constitutional structure was laid by the Objectives Resolution. It read:

"(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent, Sovereign Republic and to draw up for her future governance a Constitution"

.....

(4) Wherein all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) Whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations; and

(8) This ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind."

The Objectives Resolution was adopted on January 22, 1947. It



sought to set forth fundamental objectives which were to guide the deliberations of the Assembly. Its main ingredients were:

- (1) that India is to be an independent sovereign Republic;
- (2) that it is to be a democratic Union with equal level of self-government in all the constituent parts. "There cannot be", as Nehru emphasised, "different standards of freedom as between the peoples of the states and the people outside the states."<sup>5</sup>
- (3) that all power and authority of the Union Government and Governments of the constituent parts is derived from the people;
- (4) that the Constitution must strive to obtain and guarantee to the people justice based upon social, economic and political equality, equality of opportunity and equality before the law;
- (5) that there should be freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality;
- (6) that the Constitution should provide just rights for minorities, backward and tribal areas, and depressed and other backward classes so that they may be equal participants in and recipients of social, economic and political justice; and
- (7) to frame a Constitution which should secure for India a due place in the comity of nations and to contribute to the promotion of world peace and the welfare of mankind.

The bricks and mortars of the constitutional structure were provided by the Report of the Union Powers Committee, the Provincial Constitution Committee, the Advisory Committee on Minorities, the Fundamental Rights Committee, Committees on Chief Commissioners, and Financial Relations between the Union and States, the Advisory Committee on Tribal Areas, and the *ad hoc* Committee on the Supreme Court. The final shape and form were given by the Drafting Committee consisting of seven members with Dr. B.R. Ambedkar as Chairman.<sup>6</sup> While presenting the Draft Constitution to the President of the Constituent Assembly, Dr. Ambedkar observed, "The Drafting Committee was of course expected to follow the decisions taken by the Constituent Assembly, or by the various Committees appointed by the Constituent Assembly. This the Drafting Committee has endeavoured to do as far as possible. There were, however, some matters in respect of which the Drafting Committee felt it necessary to suggest some changes.<sup>7</sup> There was one important change in the Draft from the Objectives Resolution which provided, "wherein the said territories... shall possess and retain the status of autonomous units, together with residuary powers...." The Draft, on the recommendations of the Union Powers Committee, proposed that the residuary powers should vest in the Union (except as regards the Indian States). The original idea of autonomous units of the Union of India was substituted by

5. *Ibid.*, p. 60.

6. The other members were: N. Gopalaswami Ayyangar, Alladi Krishnaswami Aiyar, K.M. Munshi, Saiyad Mohd. Saadulla, N. Madhava Rau, and D.P. Khaitan. Sir B. L. Mitter, though originally appointed a member of the Committee, was unable to attend after the first meeting as he ceased to be a member of the Constituent Assembly.

7. *Draft Constitution of India*, p. iii.

that of a strong centre and it was essentially necessitated by the partition of the country."

The Drafting Committee was appointed by the resolution of the Constituent Assembly on August 29, 1947, and it submitted its Report on February 21, 1948. The Draft Constitution was presented to the Constituent Assembly on November 4, 1948, for consideration, thus, providing a sufficiently long opportunity to the public, the press and the Provincial Legislatures to discuss it and focus public opinion. Its first reading comprised general discussion which commenced on November 4 and continued till November 9. Then, began the second reading or consideration of the clauses of the Draft and it continued from November 15, 1948 to October 17, 1949. As many as 7,635 amendments were tabled out of which 2,473 were actually moved and discussed. The Assembly again sat on November 14, 1949, for the third reading of the Draft and it concluded on November 26. On this date the Constitution received the signatures of the President of the Constituent Assembly and it was declared passed.

The final session of the Constituent Assembly was held on January 24, 1950. It unanimously elected Dr. Rajendra Prasad the first President of the Republic of India under the new Constitution which came into force on January 26, 1950. This date was specifically chosen for the inauguration of the Indian Republic, as it was on January 26, 1930 that the Indian National Congress had passed the historic resolution at its Lahore session to win independence. Since then this resolution was repeated every year at public meetings all over the country till India became independent in 1947. It was, therefore, deemed apt and reverential to synchronise the inauguration of the Republic of India with the "Independence Day" celebrations on January 26, 1950.

**Task of the Constitution-makers.** The task of the Constitution-makers was tremendous and arduous. The problems they had to tackle were many and really difficult to resolve. They had to devise a Constitution for 400 million people in no way homogeneous and alike. There were scores of communities speaking different languages, professing different faiths, practising different customs, following different traditions and emphasising different cultures. The demand of the Muslim League for the division of the country on religious basis, culminating ultimately in slicing of territories in the West and in the East, had completely changed the pattern of the political set up contemplated for the country. The first task of the Constitution-makers was to adequately provide for the integrity of the country in the presence of a foreign State within the very compound of India.

Then, there was the baffling problem of the Indian States. The declaration of lapse of paramountcy on the transfer of power had created an intriguing situation. The States were left free "to enter into a federal relationship with the successor Government or Governments or failing this, enter into particular political arrangement with it or them."<sup>8</sup> Interpreted

8. The Objectives Resolution was moved on December 13, 1946 and adopted on January 22, 1947. The partition of India was agreed to on June 3, 1947.

9. Memorandum of the Cabinet Mission on 'States, Treaties and Paramountcy', May 12, 1946.

in terms of law, the Memorandum prepared by the Cabinet Mission on 'States, Treaties and Paramountcy' and endorsed by the Mountbatten Plan, left any Prince or combination of Princes free to declare his or their independence and even to enter into negotiations<sup>10</sup> "with any foreign power and thus become islands of independent territory within the country." In fact, some Princes had begun to flirt with foreign States and declared their independence.<sup>11</sup> The unity of what had been left as India after the partition was so vital that the "Government of India could not view with equanimity any trifling with it."<sup>12</sup> Professor Coupland had very correctly remarked, "India could live if its Muslim limbs in the north-west and north-east were amputated but could it live without its heart?" The foremost concern of the new Government of India was to conserve the heart of India and the heart of India was the Princely States. The makers of the Constitution had to devise means to fit the States into the constitutional structure of India as viable and sizeable units with democratised institutions. Indian independence, as the White Paper on Indian States said, would have no meaning if the people of the States did not have the same political, social and economic freedoms as those enjoyed by the people of the Provinces.

Provisions had also to be made for the backward people and areas, like tribes and tribal areas.<sup>13</sup> The task of the Constitution-makers was, therefore, stupendous. They had to forge unity out of the diversities, natural and artificial. The Constituent Assembly succeeded admirably in framing a Constitution which covered all these difficult and diverse problems confronting the country.<sup>14</sup>

**Sources of the Constitution.** The framers of the Constitution had drawn widely and wisely upon the mature experience of advanced democratic countries. The Draft of the Constitution was prepared "after ransacking all the known Constitutions of the world." Its authors had also with them the Government of India Act, 1935 and it constituted the basis of the working Constitution. The new Constitution derived in great from the Act itself. Professor Srinivasan says, "Both in language and substance it is a close copy of the Act of 1935 and its description as a palimpsest of that Act is not incorrect."<sup>15</sup> This may be an exaggeration, yet quite a major portion of the new Constitution owes origin to that Act, subject to the modifications necessitated by the new conditions and in the light of the experience gained by the working of the Act.

The ideological portion, namely, the Fundamental Rights, was inspired by the Constitution of the United States of America "coloured by the provisions of the later Constitutions, such as that of Eire." The federal form, as the authors of the Draft Constitution themselves explained, was primarily based upon the Canadian model and the Drafting Commit-

10. Refer to V.N. Shukla's *The Constitution of India*, p. xvii.

11. For example Jungadh and Hyderabad.

12. *White Paper on Indian States*, July 1948, p. 18.

13. Dated March 15, 1950.

14. Refer to the speech of Dr. Rajendra Prasad in the Constituent Assembly, November 26, 1949.

15. Srinivasan, N., *Democratic Government of India* p. 143.

tee preferred "to follow the language of the preamble to the British North American Act", though there are sprinklings of Australian touches as well. The Parliamentary system of Government is the British heritage and it was adopted both for the centre and the units of the Union.

### SALIENT FEATURES OF THE CONSTITUTION

**Longest and ponderous Constitution.** The Constitution as it emerged from the Constituent Assembly consisted of 395 Articles and Eight Schedules. It has been amended twenty-two times during the last nineteen years. The Ninth Schedule was added by the Constitution (First Amendment) Act, 1951. No other Constitution in the world is so long and detailed, even ponderous, as the 1950 Constitution of India. H.V. Kamath humorously said in the **Constituent Assembly**, "The emblem and the crest that we have selected for our Assembly is an elephant. It is perhaps in consonance with that that our Constitution is the bulkiest that the world has produced."

Many factors are responsible for it. The first was the overshadowing influence of the Government of India Act, 1935. It was the lengthiest Statute ever enacted by the British Parliament for the governance of India. This Act served the basis for the new Constitution. The Constitution makers borrowed profusely from the working Constitution and in many cases entire sections from the Act were transferred to the new Constitution. Dr. Ambedkar, Chairman of the Drafting Committee, admitted in the Constituent Assembly that "the Draft Constitution has reproduced a good part of the provisions of the Government of India Act, 1935. . . . There is nobody holds any patent rights in the fundamental ideas of a Constitution. What I am sorry about it is that the provisions taken from the Government of India Act, 1935, relate mostly to the details of administration. I agree that administrative details should have no place in the Constitution. I wish that the Drafting Committee could see its way to avoid their inclusion in the Constitution. But this is to be said on the necessity which justifies their inclusion. . . ."<sup>16</sup> Whatever be the justification for their inclusion, it served to add to the enormity to the size of the Constitution of India.

Then, the task of the Constitution-makers was pre-conditioned by inescapable factors of the previous regime and politico-economic set up of the vast sub-continent. Highly divergent elements had to be welded together and widely differing units from each other were to be brought together in an organic unification. These differences created difficulties in the legislative and administrative set up and the Constitution originally provided for four distinct types of units—Part A, Part B, Part C and Part D States of the First Schedule—on a different constitutional level. Moreover, the unity of what was left as India after the partition<sup>17</sup> was so vital a necessity for the political strength, full economic development, and the cultural expression of the Indian people that the Constitution-makers fol-

16. *Constituent Assembly Debates*, Vol. VII, p. 1042.

17. *Constituent Assembly Debates*, Vol. VIII, p. 47.



lowed the precedent of Canada and prescribed in the federal polity they established a full-dressed Constitution for the States comprising the Indian Union. The Constitution also elaborately deals with the complicated problem of relations between the Union and the States as well as inter-State co-ordination and adjudication of disputes relating to water of inter-State rivers or river valleys. The problems relating to public services, special classes, like Anglo-Indians, scheduled castes and scheduled tribes, required, in the opinion of the Constituent Assembly, special constitutional enactments and they were, accordingly, provided for. Similarly, the question relating to official language and regional languages has been specifically dealt with in the Constitution. With the re-organization of the States, in 1956, was introduced a hitherto unknown institution into the Constitution, the scheme of Regional Committees in the States of Andhra Pradesh and the Punjab.

"The centrifugal character of political forces," says Morris Jones, "is the oldest and newest feature of the Indian public life."<sup>18</sup> The makers of the Constitution were not oblivious of the centrifugal forces that had worked in India since the dawn of her history. They had witnessed themselves the partition of the country, its aftermath and they could anticipate the future. Dr. Rajendra Prasad gave a matter of fact analysis in his observations to the Constituent Assembly on November 26, 1949. He said, "India today needs nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences and so forth". The Constitution, accordingly, goes into greater details regarding the distribution of powers between the Union and the States and allows the Centre to function effectively whenever any grave threat, internal or external, appears or is likely to appear threatening the unity and security of India. Referring to this important aspect of the Indian Constitution, Dr. Rajendra Prasad observed, "The Constitution has gone into great details regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other activities. I do not wish to pass any judgment on this criticism and can only say that we cannot be too cautious about our future, particularly when we remember the history of the country extending over many centuries."<sup>19</sup>

The Constitution embodies an elaborate list of Fundamental Rights as also the Directive Principles of the State Policy. Some of these rights are unknown to other Constitutions and their inclusion was necessitated by the peculiar conditions and circumstances prevailing in India. The Authors of the Constitution also thought it desirable to deal with the organization, jurisdiction, functions and powers of the Union Judiciary as well as Judiciary of the States even at their lower levels.

Finally, the makers of the Constitution sought to incorporate the accumulated wisdom and experience of the working of all other countries which merited their consideration. "Thus it was, that an elaborate Bill of Rights was engrafted upon a Parliamentary system of government and a

18. *Parliament in India*, p. 16.

19. C. A. D., X, p. 891.



federal system was supplemented by provisions for centralisation of power whenever national interests demanded the strength of a unitary system." It also codified the judicial decisions made in other countries in order to minimise the possibilities of references to the courts and judicial interpretation.

The Constitution of a country cannot be divorced from the facts of history. It is, therefore, not surprising that the Constitution-makers would have produced quite a comprehensive document which at places entered into comparatively detailed provisions. The predominance of the lawyer-element in the making of the Constitution might have been another contributory factor. But as Dr. Wheare said, "In the long process by which the Government of India Act of 1935 was framed, people in Britain learned much of the difficulties of making a Constitution of India, and any one who followed the discussions of these years, in which Indians and British alike strove to devise a good government for India will be slow to criticise the work which the Indian Constituent Assembly has done. It has been a tremendous task and to have produced any Constitution at all which can command so wide a measure of agreement is a great achievement."<sup>20</sup>

**A Sovereign Democratic Republic.** The Preamble to the Constitution declares India to be a sovereign democratic Republic. It means India is a sovereign State subject to no other authority either in her internal affairs or external relations and transactions. Its power is absolute within its own sphere. The Indian Independence Act, 1947, had continued the constitutional relationship of the Crown of Britain and the Dominion of India by providing that the Governor-General of India would be appointed by the King and he represented His Majesty for the purposes of the Government of the Dominion. The India Constitution brought to an end this constitutional relationship and with its inauguration India became completely independent and sovereign as from January 26, 1950. The Objectives Resolution of the Constituent Assembly contained the words "Independent and Sovereign." Later on the word "Independent" was dropped "simply to avoid tautology."

India is a democratic Republic. Two principles flow from the concept of democracy. The first is that India is governed by her people, that is, the representatives of the people elected by them on a universal franchise and this principle is the foundation of the system of government the Constitution establishes both at the Centre and in the States. Secondly, democracy implies the maintenance and preservation of the rights of man. The Indian Constitution contains an elaborate list of individual rights as also provision for their adequate protection by means of constitutional remedies.

It has been argued that the word "Democratic" used before the word "Republic" is redundant. But really it is not so, for democracy does not involve the existence of a republican form of government. It may be obtainable under a hereditary monarchy as well, as in Britain. A republic

20. Durga Das Basu, *Commentary on the Constitution of India*, Vol. I, p. 16.

21. Ref. Madan Gopal Gupta, *Aspects of the Indian Constitution*, p. 79.

can government, according to Madison, "derives its power directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period or during good behaviour."<sup>22</sup> The President of India is indirectly elected by the representatives of the people for a period of five years. The expression "democratic republic", therefore, does not only emphasise the elective principle governing the Head of the State, but it also provides the means for the realization for all citizens of India justice, liberty, equality and fraternity, the four pillars of democracy. In other words, the Preamble establishes in form as well as in substance a government of the people, for the people and by the people. Sirdar D.K. Sen characterises the Indian Constitution as pseudo-republican and he assigns three reasons to support his conclusion.<sup>23</sup> First, the term "republic" is not a term of constitutional law and has no definite content or meaning. Second, the term appears only in the Preamble to the Constitution and is not to be found anywhere in any of its operative provisions. Third, under the Indian Constitution, the term does not signify anything more than that the Head of the Indian Republic does not hold a hereditary office. But these conclusions seem to be far fetching the issue. Justice M. Hidayatullah has aptly said that the "Preamble resembles the Declaration of Independence of the United States of America, but is really more than a declaration. It is the soul of our Constitution and lays down the pattern of our political society which it states is Sovereign Democratic Republic. It contains a solemn resolve which nothing but a revolution can alter."<sup>24</sup>

**India's Commonwealth Membership and her Sovereign status.** India's membership of the Commonwealth of Nations was agreed to at the Prime Ministers' Conference which met in London in 1949. This decision was embodied in the Declaration of the Conference released on April 27, 1949, and was ratified by the Constituent Assembly of India<sup>25</sup> on a resolution moved by Prime Minister Nehru. The resolution read, "This Assembly do hereby ratify the Declaration agreed to by the Prime Minister of India on the continued membership of India in the Commonwealth of Nations as set out in the official statement issued at the conclusion of the Conference of the Commonwealth Prime Ministers in London on April 27, 1949." The Declaration stated, "The Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon whose countries are united as members of the British Commonwealth of Nations and owe a common allegiance to the Crown which is also the symbol of their free association have considered the impending constitutional changes in India. The Government of India have informed the other Governments of the Commonwealth of the intention of the Indian people that under the new Constitution which is to be adopted, India shall become a sovereign Republic. The Government of India have however declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of free association of its independent member nations

22. Federalist, No. XXXIX.

23. *A Comparative Study of the Indian Constitution*, pp. 56-59.

24. *Democracy in India and the Judicial Process*, p. 51.

25. May 17, 1949. *Constituent Assembly Debates*, Vol. VIII, pp. 2-72.

and as such, the Head of the Commonwealth. . . . Accordingly, the Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations freely co-operating in the pursuit of peace, liberty and progress."

The King, thus, assumed a triple personality; in addition to being the King of Britain, His Majesty was also the King of each of the Dominions, and the Head of the Commonwealth. The Royal Titles Act was, accordingly, changed and Queen Elizabeth II today is styled as "Queen of the United Kingdom and of her realms and territories, Head of the Commonwealth." India accepted the latter aspect only. Prime Minister Nehru said in the Constituent Assembly, "In this Declaration, nothing very much is said about the position of the King except that he will be a symbol. It has been made perfectly clear—it was made perfectly clear—that the King has no function at all. He has a certain status. The Commonwealth as such is not a body, if I may say so; it has no organization through which to function and the King also can have no functions."

There was a spade of criticism on India's membership of the Commonwealth. It was argued that acceptance of the King as Head of the Commonwealth was incompatible with the Republican status and sovereign character of India. Some regarded the Commonwealth membership as a great betrayal and "the greatest mistake committed by the Congress Party after the partition of India." This accusation has since been repeated so often. The Communist Party had been severe in its unceasing attack. A resolution was moved in the Rajya Sabha on December 7, 1956 urging India's withdrawal from the Commonwealth. The Election Manifesto of the Hindu Mahasabha declared in 1957, that "there was no other alternative for a self-respecting nation but to sever its incongruous connection with the Commonwealth."

The Commonwealth Agreement of April 1949, was really an instrument of compromises. It was a kind of improvised political device intended to reconcile two apparently inconsistent factors, namely, India's decision to adopt a republican form of government and, at the same time, her desire to continue her membership of the Commonwealth. Whatever be the advantages which flow from India's remaining in the Commonwealth and accepting the King or Queen as a symbol of free association, it cannot be denied that it is a constitutional anomaly. The position of the King or Queen as the Head of the Commonwealth of which India is a member and the Republican status of India appear irreconcilable and even contradictory. One may agree with M. Ramaswamy that the King's Headship of the Commonwealth of Nations "is only courtesy arrangement devoid of any constitutional significance, yet the constitutional pinch is there. Robert G. Menzies, Leader of the Opposition in Australia, remarked on April 28, 1949, "how a nation can become a Republic by abolishing allegiance to the Crown and at the same time retain membership of a united Commonwealth which is and must be basically a Crown Commonwealth is a complete mystery."

Menzies' appraisal of the Commonwealth Agreement is, however, not correct. India cannot be accepted in status at par with the Dominion

countries, as Canada and Australia. India does not bear allegiance to the Crown. The King or Queen is recognised as the symbol of the free association of the members of the Commonwealth. The status of India differs *de jure* from the status of the Dominion members of the Commonwealth both from the point of view of the **allegiance**, as well as **subordination** to the Government and Parliament of the United Kingdom. Gledhill elaborates<sup>26</sup> this point and says, "Though the Statute of Westminster generally releases Dominion Legislatures from subordination to the Parliament of the United Kingdom, and though the possibility of the United Kingdom Parliament deliberately passing an Act affecting a Dominion is too remote for serious consideration, the question might arise as to the validity of an Act, passed by the United Kingdom Parliament, which inadvertently conflicted with the Statute of Westminster; it would seem that a court in the United Kingdom would be obliged to hold that, as the United Kingdom Parliament was omniscient, the later Act must prevail. Such a situation could not arise with regard to India, her legislatures are subordinate only to the Constitution."

The Commonwealth Agreement has no legal significance. It is extra-constitutional. "It is an agreement by free will", as Nehru said, "to be terminated by free will." It has not even the formality which normally accompanies treaties, he further added. By remaining within the Commonwealth, India has the right to be represented at the Commonwealth Conferences, and the right to be consulted and kept informed on Commonwealth matters. Decisions at Commonwealth Conferences are not binding on her against her will. No treaty with a foreign power, and no declaration of war by a member of the Commonwealth is binding on India without her express consent. In the course of a broadcast talk from New Delhi, on May 10, 1949, the Prime Minister emphasised this point and declared, "We took pledge long ago to achieve **Purna Swaraj** (complete independence). We have achieved it. Does a nation lose its independence by an alliance with another country? Alliance normally means mutual commitments. The free association of sovereign Commonwealth nations does not involve such commitments. Its very strength lies in its flexibility and its complete freedom. It is well known that it is open to any member nation to go out of the Commonwealth if it so chooses." Continuing the Prime Minister declared, "I wish to say that nothing has been done in secret and that no commitments of any kind limiting our sovereignty or our external or internal policy have been made, whether in the political or economic or military spheres. Our foreign policy has often been declared by me to be one of working for peace and friendship with all countries and of avoiding alignments with power blocs. That remains the keystone of our policy still.... I am convinced that the Sovereign Indian Republic, freely associating herself with other countries of the Commonwealth, will be completely free to follow this policy, perhaps in an even greater measure and with greater influence than before." The same opinion was reiterated by the Prime Minister at a Press Conference held at Ottawa on October 24, 1949.

26. *The British Commonwealth: The Development of its Laws and Constitution; The Republic of India*, Vol. VI, pp. 14-15.



With regard to India's acceptance of the King or Queen as Head of the Commonwealth, it may be emphasised that the King is only accepted as the **symbol** of the free association of the independent nations of the Commonwealth and it is only in this capacity as such a symbol that he is accepted as Head of the Commonwealth. The King is not the King of India, as he was the King of India when she became a Dominion in 1947, and had not declared herself a Sovereign Republic. The growth of republicanism within the Commonwealth has obvious implications for the Crown. Although the Queen is the acknowledged Head of the Commonwealth but she no longer has any function within a republic, such as she has within one of her Dominions. When the Queen is in Canada, she leaves, as Mr. Mackenzie King said, "one home for another"; it is her own territory. But when she is in a republic, even one within her Commonwealth, she would, in law, be in a foreign territory. The Prime Minister of India unequivocally clarified the position of the monarch in relation to India in his broadcast talk to the nation on May 10, 1949. "It must be remarked," he said, "that the Commonwealth is not Super-State in any sense of the term. We have agreed to consider the King as the symbolic head of this free association. But the King has no function attached to that status in the Commonwealth. So far as the Constitution of India is concerned, the King has no place and we shall owe no allegiance to him." This is precisely what the Prime Minister said in the Constituent Assembly on May 16, 1949.

Sardar Patel, too, expressed exactly the same opinion in the course of his address to a Press Conference, held at New Delhi on April 28, 1949. Sardar Patel maintained, "India's status of a sovereign, independent Republic is, by no means, affected, because there is no question of allegiance to His Majesty the King who will merely remain a symbol of our free association as he would be of other members...." When he was asked by one of the correspondents what the functions of the King would be as the Head of the Commonwealth, Sardar Patel replied, "So far as his functions are concerned, they are hardly any. But he gets a status." It is, therefore, wrong to assume that by accepting the Commonwealth Agreement India continues to be a part of the British Empire or that she still retains the status of a Dominion. To be a member of the Commonwealth of Nations and to accept the King as the symbol of free association of the independent nations and as such the Head of Commonwealth is not derogatory to India's independence and sovereignty. India's membership of the Commonwealth, therefore, is not independence **minus** something, but actually independence, **plus** something." It is in the words of Queen Elizabeth co-operation between the Commonwealth countries. Intervening in the debate on the Communist resolution in the Rajya Sabha urging India's withdrawal from the Commonwealth, Prime Minister Nehru said that it had been the privilege and policy of India "to be a bridge between countries and not to break bridges that already exist." India, he added, did not want to break her links, nor does she desire now, with the outside world. In fact, she wanted and still wants to strengthen and develop them.

Really, the Commonwealth is not a relationship between India and Britain. It is a relationship between India and 27 other countries of the



world, of which Britain is only one. Britain is no longer the leader of the Commonwealth, though it is true she remains important because of her size and historical role. Nehru saw the great possibilities of a multi-racial Commonwealth, the value of a meeting place of nations. It is an international organization of States, complimentary to the United Nations, in which Britain has no more say than any other member country. President Nyerere of Tanzania has recently demonstrated the new nature of the Commonwealth. In 1965 he broke off diplomatic relations with Britain because he disagreed with her Rhodesia policy. But he did not take Tanzania out of the Commonwealth. That country continued to play her role in the Commonwealth affairs and indeed useful suggestions about the way the Commonwealth should develop were made by Tanzania while she was out of relations with Britain. The fact that Tanzania had quarrel with Britain did not in President Nyerere's eyes provide a reason for cutting the Commonwealth relationship with 26 other countries. There is, therefore, no justification for India to withdraw from the Commonwealth solely because of the poor state of relations between India and Britain. An Indian withdrawal would tear the heart out of the Commonwealth. India commands a unique position, the largest nation of the Commonwealth widely respected in East and West and in the non-aligned countries.

**"We the people of India."** The Preamble to the Constitution begins with the words, "we the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic" and ends with the words, "In our Constituent Assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution." The Constitution originates from the people of India and is promulgated in the name of the people. Though, there is, in the Constitution, no independent Article, as it is in the Constitution of Eire,<sup>27</sup> declaring that all powers are derived from the people, or vesting the sovereignty of the reserved powers in the people, as in the United States,<sup>28</sup> yet the Preamble emphasises the ultimate sovereignty of the people and that the Constitution itself is founded on the authority of the people. The people, are, thus, the source of all authority and all power lies with them. In *Gopalan v. State of Madras* Mr. Justice Sastri observed, "There can be no doubt that the people of India in exercise of their sovereign will as expressed in the Preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other cherished human values as a means to the full evolution and expression of his personality, and in delegating to the Legislature, the Executive and the Judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights...."

As the Constitution is given by the people of India in their aggregate capacity, and not created by the States forming parts of the Union or by the people of several States, no State or group of States can either put an end to the Constitution or secede from the Union created by it. The Supreme Court of the United States in the famous case *McCulloch v. Maryland* held the same view, although the American Constitution was

27. Article 6.

28. Tenth Amendment.

actually born out of the agreement between several independent States; and as it emerged out of the Philadelphia convention it was subject to the ratification of nine States. The Constitution of India was not subject to the ratification of the States; the States themselves being the creation of the Constitution. The sovereignty of the people is, therefore, complete in all respects.

**A Welfare State.** The Constitution of India seeks to establish a Welfare State where there should be justice, social, economic and political; liberty of thought, expression, belief, faith and worship, equality of status and opportunity. It strives to promote fraternity among all citizens assuring the dignity of the individual and unity of the nation.

Democracy requires not only equality, but also justice. The essence of justice is the attainment of happiness and good of all as distinguished from the happiness and good of individuals or even of the majority of them. But justice in this sense cannot be secured unless there is equality of status and opportunity. Equality of status and opportunity cannot be obtained unless all sections of the people are equally in a position and circumstances to benefit therefrom. Indian Constitution not only prohibits discrimination on grounds of birth, religion, caste or creed, but also adequately provides for the promotion of the interests of the backward classes.<sup>29</sup> It seeks to remove all inequities created by inequalities in the possession of wealth and opportunity, race, caste and religion by providing just and human conditions of work,<sup>30</sup> maternity relief, leisure and cultural opportunity to every individual,<sup>31</sup> prevention of exploitation in labour and industry, free education for all,<sup>32</sup> etc. The ideal of economic justice, the Constitution promises to secure by directing the State policy towards equality of reward for equal work,<sup>33</sup> by the distribution of ownership and control of the material resources of the community so as to subserve the common good,<sup>34</sup> and operation of the economic system in such a way that it does not result in the concentration of wealth and means of production to the common detriment.<sup>35</sup>

But all these ideals can be realised only when there prevails fraternity. Fraternity here means that "All human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood."<sup>36</sup> It is this spirit of brotherhood which the Constitution aims to inculcate among the citizens of India by removing untouchability and thereby restoring the dignity of the individual, and by abolishing all communal, sectional or local or provincial feelings in order to achieve the unity of the nation.

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29. Article 16 (2), (4).

30. Article 42.

31. Article 43.

32. Article 45.

33. Article 39 (d).

34. Article 39 (b).

35. Article 39 (d).

36. Article 1 of the Declaration of Human Rights as passed by the United Nations.

Indian Constitution, in brief, aims to establish the Welfare or the Social Service State. It gives to the individual citizen various rights and liberties all directed towards his welfare. At the same time, the Constitution gives to the State powers to impose restraints on the exercise and enjoyment of individual rights and liberties, if they are to the common detriment. But it does not mean that in the name of the common interest, the State may impose restraints and curtail liberties which may dwarf the individual's personality or hamper his development. The element of the "dignity of the individual" which the Preamble introduces implies, as K.M. Munshi observed, "that the Constitution was an instrument not only of ensuring material betterment and maintaining a democratic set-up but that it recognised that the personality of every individual is sacred." Once the spirit of the dignity of the individual becomes dominant amongst the citizens of the State the unity of the nation is achieved. It is the way to national integration and at the same time the repudiation of the Hegelian theory that the State is a metaphysical entity, "independent of and overshadowing the individual, whose only end was to secure its own existence."

**Single Citizenship.** The Constitution of India, unlike the Constitution of the United States<sup>37</sup> but like the Canadian and Burmese Constitutions,<sup>38</sup> introduces single citizenship, that is, there is no dual or double citizenship, one of the whole country and the other of a particular State in which the individual is inhabitant. Accordingly, the Constitution confers on all citizens similar rights and they are subject to identical obligations. Article 14 declares that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Article 15 (1) provides that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 guarantees the equality of opportunity for citizens in matters relating to employment or appointment to any office under the State and further lays down that no citizen only on the grounds of religion, race, caste, descent, place of birth, residence, or any of them, be ineligible for, or discriminate against in respect of any employment or office under the State.

But the domicile rules in existence in different States<sup>40</sup> defeat the advantages of single citizenships. They not only discriminate between citizen and citizen, but "also engender provincialism and parochialism which tend to disrupt the unity of the nation."<sup>41</sup> The States Reorganiza-

37. *Aspects of Indian Constitution*, op. citd., p. 71.

38. In the United States there is double citizenship, one as a citizen of the United States and the other as citizen of a particular State. Dual citizenship in the United States was the result of reconciling national unity with "State rights."

39. Section 10 of the Burmese Constitution says, "There shall be but one citizenship throughout the Union, that is to say, there shall be no citizenship of the Unit as distinct from the citizenship of the Union."

40. Domicile requirements vary from State to State and require three to fifteen years' continuous residence as also fulfilment of other conditions as well, which are often very cumbersome.

41. Pylee, M.V., *Constitutional Government in India* (sec. ed.), p. 183.

tion Commission reported that a number of States confined entry to their services to permanent residents of their States and there were variety of definitions of "permanent residence." The Commission, accordingly, recommended that Parliament should pass an early legislation removing all such restrictions. Now States have done with domicile tests in the matter of recruitment to services. But domicile rules are not confined to recruitment to public services alone. They also regulate the awards of contracts and rights in respect of fisheries, ferries, toll-bridges, forests, excise shops, and even govern the admission of students to professional colleges, engineering and medical particularly. The Bombay High Court in *The State vs. N.M. Dayme*,<sup>42</sup> has declared the domicile rules unconstitutional. It is, however, of urgent importance that Parliament should enact legislation under Article 35 of the Constitution removing all barriers imposed by the existing rules of domicile, which are taking ugly shape after the General Elections of 1967.

✓ **Fundamental Rights.** Prior to the inauguration of the Constitution in 1950, no Parliamentary Act had contained a list of rights. In fact, the British statesmen had always spurned the idea of their inclusion in any constitutional enactment. Both the Simon Commission and the Joint Parliamentary Committee asserted that the declaration of such rights would impose embarrassing restrictions on the powers of the legislature and as such render many laws liable to be declared invalid. The Government of India Act of 1935, in spite of its democratic pretensions, did not contain any affirmation of fundamental rights.

The Indian National Congress throughout its struggle for independence had strived for the inclusion of the Rights of Man in India's Constitution as such rights were the *sine qua non* of a democratic system of government. When India won her freedom and became independent, it was the foremost concern of the Constitution-makers to enshrine them in the Constitution. There was another important reason too. A declaration of rights was deemed essential for assuring the minorities that their rights would be constitutionally guaranteed and that they should not entertain any apprehension of the alleged despotism and arbitrariness of, what Jinnah used to describe, "the brute majority." The inclusion of a Chapter on Fundamental Rights in the Constitution was, therefore, in accordance with the trend of political thought,<sup>43</sup> and in fulfilment of the pledges the Indian National Congress had given to the people as a whole,

42. 1958, A.I.R., Bombay 68.

43. In *Moti Lal v. Uttar Pradesh Government*, Mr. Justice Sapru observed, "The history of the evolution of thought on the rights of man takes us back into the seventeenth century or even earlier. From the time of Tom Paine's Rights of man, Jefferson's declaration of rights, Rousseau and the French Revolution, schools of thoughts had existed down to H.G. Wells and the U.N.O. discussions on human rights, which assert that man has certain natural and inalienable rights and that it is the function of the State in order that human liberty might be preserved, and human personality developed, to give recognition and free play to those rights. Fundamental Rights were practically to be found in every Constitution that came into existence after World War No. I. After World War No. II, as a result of the discussions on the proposed United Nations Charter of Human Rights, they have become even more visibly important in most Constitutions framed after the war."



and assurances to the minorities in particular. A resolution passed at the Madras session of the Indian National Congress in 1927 categorically laid down that the basis of the future Constitution of India must be a declaration of Fundamental Rights.

The Fundamental Rights guaranteed in the Constitution are comprehensive, although they do not exhaust the list of rights. There are some rights which do not find place in the Constitution, but are upheld by various existing laws and regulations. The rights are justiciable and constitutional remedies are provided for their enforcement.<sup>44</sup> The Constitution, thus, makes judiciary the guardian of rights and liberties of the people. But none of the Fundamental Rights is absolute. The Constitution itself provides necessary limitations,<sup>45</sup> and rights can be suspended under conditions of grave emergency threatening security of the State.<sup>46</sup>

**Directive Principles of State Policy.** A distinctive feature of the Constitution is that it contains Directive Principles of State Policy. The Fundamental Rights aim to protect the individual's life, liberty and property. They are negative in character and prohibit the State not to do various things. The Directive Principles of State Policy, on the other hand, are positive in character and direct the State to apply these principles in making laws. They are not enforceable by any court. All the same, these principles have been declared to be "fundamental in the governance of the country."<sup>47</sup>

The idea of incorporating Directive Principles of State Policy has been taken from the Constitution of Eire, 1937,<sup>48</sup> and the provisions in Part IV of the Indian Constitution are intended to lay down in general terms the social and economic order which the Fathers of the Constitution desired to be established in India. The Preamble to the Constitution sets forth the ideals which the Constitution intends to secure for the people of India and the Directive Principles of State Policy form a detailed exposition of those ideals. According to the Directive Principles, the Welfare State should be promoted; ownership and control of the material resources of the community should be so distributed as to subserve best the common good; wealth and means of production should not be concentrated to the common detriment; the right to equal pay for equal work, to a decent standard of life, to education as well as to public assistance should be secured; the interests of backward classes should be promoted; and the uniform civil code should be enacted. The Fundamental Rights and the Directive Principles of State Policy are the rock foundations on which the social structure rests.

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44. Article 32.

45. Part III.

46. Article 358.

47. 37.

48. Article 45 of the Constitution of Eire read: "The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this Constitution." Also refer to similar provisions in Article 32 of the Constitution of Burma, 1948.



**Parliamentary System of Government.** There are three characteristics of Parliamentary Government understood in the British Constitution. First, the King is the Constitutional Head of the State. The real functionaries are the ministers who belong to the majority party in Parliament and depend upon its pleasure for their tenure in office. Secondly, the popular Chamber has a democratic basis and it is the hub of parliamentary democracy. Finally, the ultimate legislative and financial control is vested in the popular House. The President of India, like the British King, is a constitutional Head. The Constitution provides that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions; the Prime Minister shall be appointed by the President and other ministers shall be appointed by the President on the advice of the Prime Minister; the salaries and allowances of ministers shall be such as Parliament may from time to time by law determine, and the Council of Ministers shall be collectively responsible to the Lok Sabha (House of the People). The real executive is, thus, the Council of Ministers, chosen from Parliament and which can remain in office so long as it retains the confidence of the Lok Sabha (House of the People). The President, like the British King, takes no part in politics and, accordingly, he does not participate in the confidential discussions in which his Ministers decide the advice they shall give him. In other words, the President does not preside over cabinet meetings. Though all executive action is taken in the name of the President, orders and regulations so made and executed are required to be authenticated in such manner as may be specified in rules made by the President, yet the President does nothing by doing everything, because there is a Council of Ministers to aid and advise him and this body is collectively responsible to the Lok Sabha (House of the People). The President performs no official act on his own initiative and owns responsibility for none.

Parliament of India consists of two Houses, the Lok Sabha (House of the People) and the Rajya Sabha (Council of States). The Lok Sabha is a popular chamber directly elected by voters in the States. The election is on the basis of adult franchise. The Rajya Sabha is also popular in composition, but it is indirectly elected. Twelve of its members are nominated by the President to represent letters, art, science and social services.

A bill other than a money bill normally requires approval of both the Houses separately. In case of deadlock, the President may summon a joint sitting of both the Houses for the purpose of deliberating and voting on the bill. A money bill originates in the Lok Sabha and is finally approved by it. The Rajya Sabha simply makes recommendations for its amendments and if the Lok Sabha does not accept them, the bill is deemed to have been passed by Parliament in the form in which it is approved by the Lok Sabha. The budget is laid before both the Houses, but it is the exclusive right of the Lok Sabha to grant demands. The Rajya Sabha simply discusses them.

All the three characteristics, which constitute the *sine qua non* of a parliamentary democracy, the Indian Constitution establishes. It was deliberately chosen by the framers of the Constitution, for the people were familiar with its working, and being simple in its operation it was intel-

ligible to them and, accordingly, suited to Indian condition." Parliamentary system of Government is both responsive and responsible. "There is," as Dr. Ambedkar put it in his speech in the Constituent Assembly, "both a daily and periodic assessment of the responsibility of government."<sup>49</sup> The daily assessment is done by members of Parliament through questions thereby eliciting information from the Government on issues of public importance, resolutions are moved to impress upon the Government the need for pursuing a particular programme, and by criticising the policy of the Government through debates on addresses and adjournment motions. The Government can be ousted from office through a vote of no confidence if the majority of members support such a motion. Periodic assessment is done by the electorate at the general elections. The Government, is, thus, always under scrutiny and it cannot act arbitrarily.

**A Federal Polity.** The Indian Constitution is federal in form, although Article I of the Constitution describes it as a Union of States. In fact, nowhere in the Constitution the word federation has been used and the omission seems to be deliberate. In his introductory note to the President of the Constituent Assembly while submitting the Draft Constitution, Dr. Ambedkar wrote, "It will be noticed that the Committee has used the term Union instead of Federation. Nothing much turns on the name, but the Committee has preferred to follow the language of the preamble to the British North America Act, 1867, and considered that there are advantages in describing India as a Union although its Constitution may be federal in character."<sup>50</sup> But it may be noted that Canada has been described as a Dominion and not as a Union in the Preamble to the British North America Act. It reads, "whereas the Provinces of Canada, Novo Scotia and New Brunswick have expressed their desire to be federally united into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." There is no Article in the British North America Act containing the word 'union', except that it has been used in one of the chapter-heading of the Act. It would have been more correct if the Drafting Committee had said that it had followed to some extent the language of the Union of the South Africa Act, 1909 for describing India as a Union of States, and the Union of South Africa makes no pretence of being a federation.

The expression Union of States is, according to Dr. Ambedkar, deliberate. Moving the Draft Constitution for the consideration of the Constituent Assembly on November 4, 1938, he explained the significance of the use of the expression "union" instead of the expression "Federation". Ambedkar said, "It is true that South Africa which is a unitary state is described as a Union. But Canada which is a Federation is also called a Union. Thus the description of India as Union, though its Constitution is federal,

49. Refer to the speeches of Sir Alladi Krishnaswami Ayyar, Dr. Ambedkar and Mr. K.M. Munshi, all members of the Drafting Committee in the Constituent Assembly. *Constituent Assembly Debates*, Vol. VII, p. 985 and Vol. XI, pp. 836, 967-68, 974 and 984.

50. Dated November 4, 1948, *Constituent Assembly Debates*, Vol. VII, p. 33.

51. Draft Constitution, p. iv.

does no violence to usage. But what is important is that the use of the word 'Union' is deliberate. I do not know why the word 'Union' was used in the Canadian Constitution. But I can tell you why the Drafting Committee has used it. The Drafting Committee wanted to make it clear that though India was to be a federation, the federation was not the result of an agreement by the States to join in a federation, and that the federation not being the result of an agreement, no state has the right to secede from it. The federation is a Union because it is indestructible. Though the country and the people may be divided into different states for convenience of administration, the country is one integral whole, its people a single people living under a single *imperium* derived from a single source. The Americans had to wage a civil war to establish that the States have no right of secession and that their federation was indestructible. The Drafting Committee thought that it was better to make it clear at the outset rather than to leave it to speculation or to dispute."<sup>52</sup> Both these points, that the Indian federation is not the result of agreement by its units, and that the component units have no freedom to secede from it, need clarification as they have a bearing on the nature of the Indian federation.

There are two principal methods of forming a federation and the way in which it comes about depends upon the pre-existing conditions of the federating units. The first is the result of voluntary agreement between the hitherto sovereign and independent States. The States desiring to federate agree to transfer certain subjects of common concern and interest to the newly created national government and retain the rest for themselves. In this way, the federating units, while forming a union, preserve their independent existence. The distribution of subjects between the Central Government and the federating units has a constitutional guarantee and neither of them can encroach upon or destroy the other. All alterations desired to be made must be made by the consent and free participation of both the parts. No unilateral action is valid.<sup>53</sup>

Before the Government of India Act, 1935, came into operation, India was a unitary form of government. The Provincial Governments were virtually the agents of the Government at Delhi, deriving authority from the latter. By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of Canada. The Provinces were created compulsory units of the federation and their powers were defined by the Act. But it was a matter of choice for the Indian States to join the federation or not, and the scope of the federal jurisdiction in the States was to depend solely upon the transfer of subjects made by their respective Rulers through their Instruments of Accession. Thus, the Provinces and the States were to differ regarding the ex-

52. *Constituent Assembly Debates*, Vol. VII, p. 43.

53. In *Attorney General for Commonwealth v. Colonial Sugar Refining Company* (1914), the Privy Council observed: "Their Lordships are called upon to interpret the legislative compact between the Commonwealth and States, and they have to determine on the language of the Statute (the Commonwealth of the Australia Constitution Act) what rights of legislation the federating colonies declared to be reserved to themselves. It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that...the Commonwealth Parliament could not legislate so as to alter that distribution on its own motion."

tent of their powers in the federation, although once having acceded to the federation no State could secede therefrom or diminish the subjects. They could, of course, be enlarged.

The federal part of the Government of India Act, 1935 had to be suspended, and it was only the Provincial Part which came into force. The Provinces derived their authority from the Crown and they were autonomous within the sphere assigned to them. But there was really no autonomy for the Provinces and the Central Government continued to exercise its control and direction through various devices like the Governor's special responsibilities and his obligations to exercise the individual judgment and direction in many matters. When India became independent, the Government of India Act, 1935 provided a working machine in the Provinces, and as Dr. Jennings remarks, "It was not possible to start afresh when Provinces became States."<sup>54</sup>

The Constitution-makers of Independent India were in no doubt that the country could not be efficiently and satisfactorily governed as a unitary State. With the integration of the Indian States the formation of federation had become a **fait accompli**. It also helped the removal of the anomalies of the Government of India Act, 1935, and consequently the original idea of a variety of Constitutions was abandoned, and entries in the legislative lists which differentiated between States and Provinces were dropped. Sardar Patel could rightly claim that unlike the Government of India Act, 1935, the Indian Constitution did not form "an alliance between democracies and dynasties, but a ready union of the Indian people built upon the basic concept of the sovereign people." He further maintained that the Constitution "removes all barriers between the people of the States and the people of the Provinces and achieves for the first time the objective of a strong democratic India built on the true foundation of a co-operative enterprise on the part of the people of the Provinces and States alike."<sup>55</sup> The Butler Committee in 1929 had said that "politically there are....two Indias....The problem of statesmanship is to hold the two together."<sup>56</sup> The makers of new India firmly believed that India was politically one and their "holding together" was simply not sufficient. They strove to weld them together and integration of the States in the Indian Union was accomplished without any major pain.

The Union of India is not the result of a compact between the component units. It is the creation of the people of India assembled in the Constituent Assembly and the Constitution so framed by them determines the distribution of powers between the Union Government and the Governments of the States. The States have no rights and powers anterior to or apart from powers given by the Constitution. The Union is irrevocable, except when the people themselves determine otherwise. The States have no right to secede therefrom and put an end to the Union. Dr. Ambedkar gave a matter of fact analysis when he said that the Constitution of the Union and the States is "a single frame from which neither can get out and within which they must work."<sup>57</sup>

54. *Some Characteristics of the Indian Constitution*, p. 56.

55. *Constituent Assembly Debates*, Vol. V, p. 161.

56. As quoted in the White Paper on Indian States, p. 123.

57. *Constituent Assembly Debates*, Vol. VII, p. 34.



According to Dr. Jennings the Government of India Act, 1935, was "a bad precedent for the Constitution of an independent country,"<sup>58</sup> for the scheme of federation under the new Constitution is fundamentally the same as under the Act of 1935. With minor differences, as Prof. Srinivasan says, "the distribution of the legislative authority between the Union and the States and the status accorded to the latter in the two Constitutions are identically the same."<sup>59</sup> The Act of 1935 enumerated the legislative powers in three Lists: The Federal List, the Provincial List, and the Concurrent List. In the Concurrent List both the Federal and Provincial Legislatures could legislate with the proviso that in case of a conflict between the federal law and the provincial law the former would prevail over the latter. The residuary power was vested in the Governor-General who could authorise in his discretion the Federal or the Provincial Legislatures to legislate on a subject not enumerated in any of the three Lists. The 1950 Constitution of India closely followed the scheme of the Government of India Act, 1935, except that under the new Constitution subjects not mentioned in any List, including taxes, fall within the exclusive competence of the Union Legislature. Thus, an elaborate scheme of federalism was there, "and hence it was quite natural and also tempting for the makers of the Indian Constitution to accept the essentials of the 1935 Act in their plan of allocation of powers."<sup>60</sup> Moreover, the problems confronting India had not substantially changed with the independence of the country from the alien rule.

The question whether the Indian Constitution could be classified as federal exercised the minds of its framers. Many members of the Constituent Assembly, who had faith in the inherent rights of the constituent units of the federation, expressed their disappointment with the scheme of federal polity the Constitution would set up in India. The Constitution, they contended, actually provided for a formidable unitary Constitution and reduced the States to the position of "glorified district boards." For instance, P.T. Chacko said, that what the Constitution would establish was "in form a federation...in substance a unitary Constitution."<sup>61</sup> B.M. Gupta expressed the opinion that India would be "not a federal State but a decentralised unitary State."<sup>62</sup> Shymanandan Sahay maintained that the Constitution had created "a kind of fedro-unitary system leaning heavily towards a unitary system" and the units would be "perpetual wards of the Centre."<sup>63</sup> Mahboob Ali Beg and N.G. Ranga apprehended that the emphasis on centralization and the easy means with which the Central Government could convert the federal system into a unitary one might lead to totalitarianism and to the absolute negation of democracy.<sup>64</sup>

Since then the controversy on the nature of the Indian Constitution has remained unabated. After the Fourth General Elections in 1967,

58. *Some Characteristics of the Indian Constitution*, op. cit., p. 56.

59. Srinivasan, N., *Democratic Government in India*, p. 145.

60. Amal Ray, *Inter-Governmental Relations in India*, p. 24.

61. *Constituent Assembly Debates*, Vol. XI, p. 745.

62. *Ibid.*, p. 844.

63. *Ibid.*, p. 788.

64. *Ibid.*, Vol. VII, pp. 296 and 350.



with some nine Non-Congress Governments in the States and a depleted Congress majority in Parliament, the controversy has assumed an added importance, especially when a member of the Drafting Committee of the Constituent Assembly spells out an opinion against what he himself had drafted. K.M. Munshi observed in 1953, "India is not a federation but a Union", and that "The Centre is not a federal Government but a Government of plenary powers and social purpose."<sup>65</sup> Those in office also do not lag behind. H.V. Pataskar, till recently the Governor of Madhya Pradesh, in the course of his address to the State unit of the Indian Council of World Affairs, said, "To my mind our Constitution is not a federal one."<sup>66</sup> Dr. Wheare, the renowned authority on Federalism, says, "on the whole it seems evident that the Constituent Assembly intends the Union to be more centralised than was proposed by the Act of 1935, although in that case also there were methods of intervention permitted to the Centre in the affairs of the provinces which reminded one more of the Canadian conception of federation than of the United States one. The new Constitution goes further still. It establishes, indeed, a system of government which is at most quasi-federal, almost devolutionary in character, a unitary state with subsidiary federal features rather than a federal State with subsidiary unitary features."<sup>67</sup> Sir Ivor Jennings and Allan Gledhill generally agree with K.C. Wheare. In his Paper, submitted to the All-India Political Science Conference, entitled: **Is India a Federation?**, Dr. Krishna P. Mukherjee maintains, "I have come to take the view that whatever might have been the position at the drafting stage or previous to that stage, the Constitution that emerged out of the august deliberations of the Constituent Assembly of India in January 1950, is a definitely unfederal or unitary Constitution." Professor Morris-Jones, in an article in the *Sunday Times*, wrote that as a result of the Fourth General Elections "India comes of age as a federal State in the full sense of the term and with all the difficulties that it entails. As the United States has learnt many times, this makes problems but also marks a step towards a pattern of politics that really fits her diversity."<sup>68</sup> The Chief Minister of Madras, C.N. Annadurai said that under the present Constitution, powers which strictly came under the States' sphere were being slowly taken over by the Centre. "We must correct this and leave those powers to the States." Annadurai maintained that an ideal centre in a federation was one which left sufficient powers to the States and kept just enough power to itself to protect the integrity and sovereignty of the country. On the other hand, M.C. Setalvad would give to the Centre yet more powers "to legislate in matters of education, food production and distribution which are vital needs."<sup>69</sup>

65. *The Statesman*, New Delhi, August 14, 1953, p. 6.

66. *The Hindustan Times*, New Delhi, December 24, 1964, p. 5.

67. *Aspects of Indian Constitution*, op. cit., p. 80.

68. *The Indian Journal of Political Science*, July-September 1954, p. 177.

69. As reported in the *Hindustan Times*, New Delhi, March 25, 1967.

70. *The Sunday Standard*, New Delhi, April 10, 1967.

71. *The Times of India*, New Delhi, April 23, 1967, "Wanted, a yet more powerful Centre at Delhi."

What does federalism really mean? Federalism, in its traditional analysis, is a system of government in which powers are divided and distributed between a central government and governments of the units which make the State. It postulates dual polity, national and regional governments, within the framework of the same State. Both sets of government exercise powers granted by the Constitution and both are supreme within the spheres assigned to them by the Constitution. The central or national government is given jurisdiction over matters which are of common concern and interest of the people as a whole, and affairs of local and particular interest to people of different regions are left to the regional governments. The national government which presides over the general interests concerning the nation as a whole does not carry any precedence or superiority in status over the regional governments. Federalism, thus, presupposes equality of status between two sets of government, the one is not simply the creation of the other. Both enjoy a juridical status and corporate personality.

But equality of status does not mean absolute equality of powers. This is an impossible task and not within the reach of practical politics. The distribution of powers between the centre and the units depends upon various factors and every country has its own peculiar problems. Federalism is, after all, a device for securing the unity of the newly created State and a good government to effectively ensure its integrity. The distribution of powers is made with that end in view. The balance of powers is, accordingly, differently tilted in different federations. In some, it is in favour of the centre and in others it is in favour of the units. It does not deprive the Constitution of its federal character "so long as the one is not rendered thereby helplessly dependent on the other for its existence or proper functioning."<sup>72</sup> By the federal principle, observes Prof. Wheare, "I mean the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent."<sup>73</sup> The mode of distribution of powers between the central and regional governments is, therefore, not the essential characteristic of federalism.

An important implication of the co-ordinate and independent character of both sets of government is the dual citizenship with separate privileges and immunities. In the United States of America it is so.<sup>74</sup> It also implies a double set of officials and a double system of courts manned by separate personnel.

Another very important characteristic of federalism is the supremacy of the Constitution. It has three implications: (1) the Constitution must necessarily be written and all causes of disputes arising between one set of government or the other or between the regional governments themselves must be settled with reference to its provisions; (2) the Constitution must be rigid and it should not be alterable either by the central legislature or by regional legislatures under the ordinary law-making procedure; and (3) sovereignty rests with the State and it is exercised by the

<sup>72</sup>. Ghosal, A.K., 'Federation in the Indian Constitution,' *Indian Journal of Political Science*, October-December, 1953, p. 318.

<sup>73</sup>. Wheare, K.C., *Federal Government*, op. cit., p. 11.

<sup>74</sup>. Burdick, *Law of the American Constitution*, p. 329.

Constitution amending authority. Every legislative body, central or regional, is a subordinate law-making body.

Lastly, it is the pre-requisite of a federal polity that there should be an independent judicial tribunal to finally interpret the Constitution and to maintain its sanctity. This court should act as a guardian of the Constitution and see that it is not violated by either set of the government or any authority thereof. The successful working of the federal principle depends upon the vigilance of the federal judiciary, independent of both central and regional governments, so that none of the governments disturbs the balance between the centrifugal and centripetal forces. Happy balancing between these two forces is the essence of federalism. Prof. Dicey described this aspect of federalism in his own characteristic way, a desire for union rather than unity, that is, the desire for national unity and the determination of each individual unit to maintain its identity and independence. Oneness of the State with separateness of the units is, therefore, the formula of federalism and there can be no other authority than an independent and impartial judiciary to protect it.

No federal Constitution can claim to completely fulfil all the requirements of the federal principle. Not even the Constitution of the United States which sets the model for others. Prof. Wheare is, accordingly, constrained to remark that "It seems essential to define the federal principle rigidly, but to apply the term 'federal Constitution' more widely."<sup>75</sup> If a Constitution predominantly fulfils the federal principle so as to overshadow the unitary features, it may still be regarded as a federal Constitution. Accepting this basis of classifying the Constitutions, Dr. A.K. Ghosal concludes that "Federal Constitutions may be arranged in an ascending scale of conformity to the rigid federal principle beginning with Australia at the one end of the pole where the degree of conformity is the highest, to Canada at the other where it is the lowest. India's place in the scale would be by the side of Canada rather than Australia."<sup>76</sup>

But a simple classification of the Constitution is not sufficient for our purposes. There can be a good deal of difference in the law and practice of the Constitution, thus, signifying the difference between a federal Constitution and a federal government. Prof. Wheare places particular emphasis on this difference and says, "A country may have a federal Constitution, but in practice it may work that Constitution in such a way that its government is not federal. Or a country with a non-federal Constitution may work it in such a way that it provides the example of a federal government."<sup>77</sup> Take the example of the Canadian Constitution. Lord Haldane held that the North America Act, 1867, was not federal.<sup>78</sup> The Fathers of the Canadian Constitution were not wedded to the narrow ideas of federalism and the Act of 1867, contains many exceptions to the

75. *Federal Government*, op. cit., p. 17.

76. 'Federalism in the Indian Constitution,' *The Indian Journal of Political Science*, op. cit., p. 321.

77. *Federal Government*, op. cit., p. 22.

78. Attorney-General for Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.

federal principle. Prof. Wheare characterises it as "a quasi-federal Constitution." But in actual practice the unitary elements in Canada have either now become obsolete or are being so worked as not to compromise with the federal principle. If Canada, therefore, as Prof. Wheare concludes, "has not a federal Constitution, it has a federal government." United States, Switzerland and Australia, on the other hand, have federal Constitutions as well as federal governments though the process of centralization in all these countries is assuming alarming proportions.

What has been said above is a lengthy description of the theory and practice of federalism. But such a description is necessary to decide the controversy at issue, viz., the nature of the Indian Constitution.

The Union of India, according to Dr. Krishna Mukherjee, does not satisfy any one of the conditions enshrined in the federal principle. "On the contrary," he observes, "our Constitution in the four opening articles makes it amply clear that it is a unitary Constitution, and whatever **categorisation** of the units of the Union and distribution of powers between the union and the units are there, they are for the sake of administrative convenience, and whenever they create administrative inconvenience they may be constitutionally withdrawn, abolished or changed."<sup>79</sup> Article 3 of the Constitution provides: Parliament may by law:

- “(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
- (b) increase the area of any State;
- (c) diminish the area of any State;
- (d) alter the boundaries of any State;
- (e) alter the name of any State.”

The same Article provides that no bill proposing such a legislation can be introduced in Parliament, except on the recommendation of the President. Further, where the name<sup>80</sup> or boundaries of any State are proposed to be altered the views of the Legislature of the State or each of the State “both with respect to the proposal to introduce the Bill and with respect to the provision thereof have been ascertained by the President.” It means that the views of the State Legislature are to be ascertained on two points: (i) as regards the proposal to introduce the Bill; and (ii) as regards the provisions of the Bill. But the President only **ascertains** the views of the States involved and it is for him to accept those views or not. He is not required to obtain the **consent** of the States concerned or their Legislatures.<sup>81</sup>

79. ‘Is India a Federation?’ *The Indian Journal of Political Science*, July-September 1954, p. 179.

80. Madras State has become Tamil Nadu.

81. According to the Constitution of the United States, Article IV, section 3(1): “But no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of the two or more States, or parts of States, without the consent of the Legislatures of

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Article 4 further provides that laws made under Article 2 of the Constitution, regarding Parliament's right to admit into the Union, or establish new States, on such terms and conditions as it thinks fit, and Article 3, as referred to above, shall not "be deemed to be an amendment of this Constitution for the purposes of Article 368." It means that Parliament can be means of an ordinary process of legislation, subject to ascertaining the views of the Legislatures of the States concerned, can redraw the map of India; amendment of the Constitution is not required.

All this means that by a unilateral action, Parliament can make or unmake the territories of the States of the Union of India, change the shape of the existing States or abolish some and substitute other units for them. The Andhra State Act, 1953, created the new State of Andhra by the partition of Madras, and the States Reorganization Act, 1956 really changed the map of India. The bifurcation of the State of Bombay into Maharashtra and Gujarat States on May 1, 1960, meant again redrawing the map of India. It has been followed by the creation of the State of Nagaland and division of the Punjab into two States, Punjab and Haryana with parts of the territory going to Himachal, and Chandigarh formed into a Union Territory. The Constitution (Twenty-second Amendment) Act, 1969 paves the way for the creation of an autonomous Hill State within the State of Assam. In the United States alterations in the boundaries of the States cannot be made against their consent. In Australia alterations in the boundaries of a State can only be made with the consent of the Legislatures of the State concerned, and approval of the majority of the electors of the State voting upon the question at a referendum. Equal participation of the States in matters relating to the alterations in their boundaries is the essence of the federal principle. Leaving aside all political considerations and exigencies and speaking strictly in terms of law, Articles 3 and 4 of the Indian Constitution are not only the negation of the federal principle, but the very definition of a unitary Constitution.

The Constitution of India conforms to the traditional criteria of a federal Constitution in so far as it is written; provides for the distribution of powers between the two sets of government within the framework of the same State; their sphere of jurisdiction is clearly demarcated and if a change is desired to be made in the division of powers, it needs a constitutional amendment at least one half of the States agreeing thereto.<sup>82</sup> Thus, neither the central government nor the regional governments have the power of altering unilaterally the provisions of the Constitution relating to the scheme of distribution of powers between the two thereby upsetting the balance of power. Then, there is the Supreme Court, the guardian of the Constitution, with powers to interpret it and preserve its

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the States concerned as well as of the Congress." According to Articles 123, 124, of the Constitution of Australia, the Commonwealth Parliament is empowered to create new States from an existing State or from parts of existing States with the consent of the Legislatures of States concerned. But the boundaries of the States can be altered only by the consent of the Legislature of the State concerned and approval of the majority of the electors of the State voting upon the question.



sanctity and supremacy. The right of judicial review vested in the Supreme Court empowers it to intervene in case any of the two governments oversteps its jurisdiction or increases its powers upsetting the federal principle. Refuting the criticism of over-centralization in the Constituent Assembly, Dr. Ambedkar said, "A serious complaint is made on the ground that there is too much centralization and that the States have been reduced to municipalities. It is clear that this view is not only an exaggeration but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relations between the Centre and the States it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law made by the Centre but by the Constitution itself. This is what the Constitution does. The States in our Constitution are in no way dependent upon the Centre for their legislative and executive authority. The Centre and the states are co-equal in this matter.... The chief mark of federalism lies in the partition of the legislative and executive authority between the Centre and Units by the Constitution. This is the principle embodied in the Constitution. There can be no mistake about it. It is therefore wrong to say that the States have been placed under the Centre...."<sup>83</sup>

Ambedkar gave a matter of fact analysis of a federal polity, but he did not present a true picture of the Indian Constitution. He did not state clearly the Centre's constitutional powers to abridge the autonomy of the States in normal times and to abrogate it, if it so desired, during emergencies. The fact of the matter is that the Constitution sets up a highly centralised structure of government and some of its provisions are reminiscent of a unitary system. And the Constitution-makers deliberately did it. "All Constitutions," as Ivor Jennings remarks, "are the heirs of the past as well as testators of the future." The Founding Fathers were fully conscious of the centrifugal forces which have worked in India since the dawn of her history. The partition of the country was a rude shock to India's solidarity, and the partition did not mean the complete disappearance of separatist trends so systematically encouraged and nursed by the foreign rulers for cementing their stronghold in the country. It left behind a trail of sinister forces of communalism, casteism and regionalism. At the time of Constitution-making the disruptive forces were already revealing symptoms of revival.<sup>84</sup> It was, therefore, the anxiety of the Constitution framers to give to the centre enough powers to meet effectively the menace of disruptive forces. While defending the emergency powers vested in the President, T.T. Krishnamachari observed, "...these emergency provisions have got to be tolerated as a necessary evil, and without these provisions it is well nigh possible that all our efforts to frame a Constitution may ultimately be jeopardized...."<sup>85</sup>

83. *Constituent Assembly Debates*, Vol. VII, p. 33.

84. The war in Kashmir, the Communist insurrection in Telengana and Razakar trouble in Hyderabad. Nasiruddin Ahmed, a member of the Constituent Assembly, declared, "There are forces of disintegration and disorder already visible everywhere." *Constituent Assembly Debates*, Vol IX, p. 116.

85. *Constituent Assembly Debates*, Vol. IX, p. 125.

The emphasis of the Constitution-makers on unity rather than union can thus well be appreciated. The Constitution-makers in no country can divorce their Constitution from the realities of the past and anxieties of the future. They make a Constitution which can serve the best interests of the people and forges them into a strong and unified nation. They would not, accordingly, hesitate even if they have to deviate from the principles of Political Science or Constitutional Law. Dr. Mukherjee, however, does not agree with this point of view. Adhering to the traditional principles which distinguish a federal from a unitary system of government, he says that "there can be no leniency on the part of the Constitution classifier who is a scientist. For him either the difference between federal and unitary Constitutions does or does not exist. If it does not exist, no time need be wasted on idle discussions. If, however, it does exist it is necessary for him to find out the principle of distinction, in this case the **federal principle** and if that principle has been violated in any Constitution (no matter for what political, social and economic reasons) that Constitution is not federal." The main provisions of the Constitution which violate the traditional principles of federalism are:

(1) The Constitution of India, like that of Canada, prescribes the Constitutions of the Union as well as those of the States, except that of Jammu and Kashmir. It means that the principle of equality of status between the States is destroyed, no matter with what considerations. Even the original division of States in Part A and Part B was incongruous in a federal polity. Part B States did not enjoy the same status as Part A States. Now defunct Article 371 placed Part B States under the general control of the Union Government and they were required to comply with such particular instructions as were issued to them from time to time. It is matter of common knowledge that the control and direction of the Union Government over Part B States was reminiscent of the proverbial control and direction of the Political Department of the Government of India before Independence.

(2) The States in India, unlike the Provinces of Canada, have no independent power of constitutional amendment. Even a decision to abolish the Legislative Council (upper chamber) in a State requires an Act of Parliament.<sup>86</sup> Most other changes can be effected only by constitutional amendment and in the process of constitutional amendment there is unequal association of the central and regional governments. Except for a few specified matters,<sup>87</sup> when ratification of at least one half of the State Legislatures is required, the Constitution can be amended by Parliament, when the Bill has passed in either House by a majority of the total membership of the House, and by a majority of not less than two-thirds of the members of that House present and voting.

(3) One of the essential principles of federalism on which the Constitution of the United States is based is the equality of the component States irrespective of their size or population. In fact, it was a great compromise which smoothened the way to union and it was reflected in equal representation of the States in the Senate. Article V of the Ameri-

86. Article 169. Also refer to Articles 2-4.

87. Article 368, clauses (a), (b), (c), (d), and (f).

can Constitution provides "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." This principle of equal representation in the Upper House of the Federal Legislature is followed in the Constitutions of Switzerland and Australia as well. In Canada while the original Provinces of Canada, Nova Scotia, and Brunswick, have 24 members each in the Senate, the number of members from other Provinces, subsequently added to the Union, varies down to a minimum of four. Under the Indian Constitution there is no equality of representation of the States in the Rajya Sabha (Council of States). The number of members from several States varies from 1 to 34.<sup>88</sup> Then, the Rajya Sabha, unlike the Senates of the United States, Australia and even Canada, is not exclusively representative of the States. It consists of 12 members nominated by the President, apart from the representatives of the States.<sup>89</sup> This is a glaring exception to the federal principle.

(4) The concept of dual polity as obtainable in India is also a departure from the federal principle. As a recognition of the 'Sovereignty' of the States or what Prof. Wheare calls "co-ordinate and independent" character of the original governments, the American Constitution made a logical provision for double citizenship, a double set of officials and a double system of courts. The Indian Constitution, like the Canadian Constitution, creates only single citizenship.<sup>90</sup> Though there are two sets of services, State Services and All-India Services, but there is, like the United States of America, no clear-cut demarcation of administration of State laws and Union laws. The State Services administer the State laws as well as the Union laws, and the Union Services while serving in a State likewise administer State laws. Article 258 provides delegation of functions "in relation to any matter to which the executive power of the Union extends." There are also Articles 256 and 257. Article 256 specially makes it the duty of the State "to ensure compliance with the laws made by Parliament." Article 257 provides that "the executive power of every State shall be so exercised as not to impede or prejudice the executive power of the Union." The Union Government would give the State Governments such directions as may appear to the Government of India necessary for that purpose. It is further provided that the power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared to be of national or military importance, the declaring authority being the Union Government. Finally, there is no separate system of federal courts for the administration of federal laws. As in Canada, the same system of courts in the State administer both the Union and the State laws. The President appoints not only Judges of the Supreme Court, but also Judges of the High Courts. The President can also, under Article 222, transfer a Judge from one High Court to another after consultation with the Chief Justice of India. At the top of the judicial hierarchy is the Supreme Court.

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88. Fourth Schedule.

89. Article 80.

90. Article 5.

(5) The Union Government is not simply empowered to give directions to the States. Failure to comply with, or give effect to, any directions given by the Government of India in the exercise of its executive powers under any of the provisions of the Constitution would entitle the President to declare "that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution," and, thus, supersede the State government for the time being. It means bringing the State under the unitary rule of the Union.

(6) The State government is superseded on a report from the Governor of the State. The Governor is appointed by the President by warrant under his hand and seal.<sup>91</sup> He is, accordingly, the nominee of the party in power at the Centre. The tenure of office of the Governor is five years and he holds office during the pleasure of the President.<sup>92</sup> The implication clearly is that the Governor can be recalled even during his normal term if the Union Government so desires and the President is advised accordingly. It means that the Governor will act primarily as an agent of the Central Government, and as such, he may come into conflict with his duly constituted Ministers. So long as the same Party reigns supreme at the Centre and in the States, the possibilities of a conflict of authority between the Governor and the Ministry are remote. But when the Party or Parties in power in a State is different from the one in power at the Centre, the Governor and the Ministry are sure to pull in opposite directions if the interests of the Centre and the State conflict. The Central Government may use the Governor as their agent for influencing or controlling the policy and measures of the State Government and if the Governor fails to impress the State Ministry with his directions, the Central Government may on his report take over the State Government. No appeal can be made to the electorate before the suspension of the constitutional machinery of the State. The suspension of the constitutional machinery in a State, under Article 356, on the report of the Governor is a violation of the most cherished federal principle of equality of status between the national and regional governments.

(7) Article 365 gives a general power to the Union Government: "where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution." This provision is a paradise for the Union Government, because the Centre may consider non-compliance of a State with any of its directives, given in the exercise of its executive power under any of the provisions of the Constitution, as a breakdown of the constitutional machinery of the State and proclaim an emergency according to Article 356. <sup>93</sup>

91. Article 365.

92. Article 356.

93. Article 155.

94. Article 156.



(8) That the Governor of a State is not a mere constitutional head can be appreciated from the provisions of Articles 200 and 201, which empower the Governor to withhold assent to a Bill passed by the State Legislature, or reserve it for the consideration of the President. When a Bill is reserved for the consideration of the President, the President shall declare either that he assents to the Bill or that he withholds assent therefrom. Under a Parliamentary system of Government, it is inconceivable that the Ministry, initiating the legislation and anxious to see that it passes through the legislature, itself will advise the Governor to withhold his assent to the Bill or reserve it for the consideration of the President. Prof. Kogekar pertinently asks, "On what ground then except that of the Union Government's discretion, can the Governor stultify the legislature's power."<sup>95</sup> It should be noted, he further adds, "that the Governor is not confined in his negative action to those matters only which under the constitution require the President's approval, as, for instance, under Article 31(3)."<sup>96</sup>

(9) The scheme of distribution of subjects between the Centre and the Units follows essentially the pattern of the Government of India Act, 1935, which broke away from the traditional system. There are three Lists of subjects, the Union List, the State List and the Concurrent List. The residuary powers rest in Parliament. The total number of subjects given to the Central Government are 97 as compared with 66 given to the States. Concurrent List contains 47 subjects.<sup>97</sup> Both the Centre and the States have concurrent powers of legislation with regard to matters in the Concurrent List. But if both legislate and if the law made by the State Legislature is repugnant to any provision of law made by Parliament on the same subject, the Union law supersedes the State law. Parliament has also been empowered to legislate on any matter in the State List, if the Rajya Sabha (Council of States) passes a resolution by a two-thirds majority declaring a particular subject or subjects of national importance or interest.<sup>98</sup> When a Proclamation of Emergency is in operation, Parliament is empowered to make laws for the whole or any part of the territory of India with respect to any subject enumerated in the State List.<sup>99</sup> When the Legislature of one or more States determine by a resolution that Parliament should legislate on a particular matter on the State List, Parliament can make laws with respect to that particular matter.<sup>100</sup> The State Legislatures of Bombay, Madhya Pradesh, Orissa, Punjab, Uttar Pradesh, Rajasthan, etc., allowed Parliament to levy estate duty on agricultural land situated in those States. Parliament, accordingly, passed the Estate Duty Act, 1953 and it applied to agricultural land situated in those States. Surrender of such powers to Parliament is unconditional and irrevocable. Any Act so passed by Parliament can be amended or repealed by Parliament

95. 'Some Observations on the Constitution of India', *The Indian Journal of Political Science*, April-June, 1950, p. 62.

96. *Ibid.*

97. In the Government of India Act, 1935, the Federal List contained 59 subjects, the Provincial List 54 and the Concurrent List 36 subjects.

98. Article 249.

99. Article 250.

100. Article 252 (1).



alone and not by the States to which it is applicable.<sup>101</sup> Finally, Article 253 empowers the Union Parliament to pass legislation implementing any treaty, agreement or convention with another country "or any decision made at any international conference, association or other body." This last phrase is remarkably vague, as Jennings remarks, and the Union Parliament can acquire jurisdiction of any subject, as for example, even over university education, "by the simple process of a decision of the inter-university Board of India, which is an international body because it contains representatives of universities in Burma and Ceylon."<sup>102</sup>

(10) The rest is achieved under the emergency powers.<sup>103</sup> Dr. Ambedkar frankly admitted in the Constituent Assembly that "the Constitution has not been set in a tight mould of federalism." It has been so designed that it should work as a federal system in normal times and as a unitary system in war and other emergencies without the slightest pretence of being a federation. While a Proclamation of emergency is in operation Parliament gets the power to legislate for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List and the Executive power of the Union extends to the giving of directions to any State as to the manner in which the executive authority thereof is to be exercised. In case of financial emergency the directions of the Central Government may include: (a) a provision regarding the reduction of salaries and allowances of all or any class of persons serving in a State, and (b) a provision that Money Bills or other Bills involving financial implications be reserved for the consideration of the President after they are passed by the Legislature of the State.

(11) Then, there is the Election Commission established under Article 324. It is a centralised electoral machinery which is required to superintend, direct and control elections not only to Parliament but also to the State Legislatures. The members of the Commission are appointed by the President. There is also the Comptroller and Auditor-General appointed by the President,<sup>104</sup> who keeps careful vigilance not only over the finances of the Union but also of the States. As Comptroller, he controls the issue of public money, his duty being to satisfy himself that no money is paid out of the exchequer without proper legal authority. As Auditor he audits the accounts and reports annually thereupon.

It will, thus, be clear that the Indian Constitution makes a wide departure from the traditional theory of federalism. Since the Constitution became operative in 1950, the bias has increasingly been towards centralization. Even Ministers of the Central Government have time to time given expression to their feelings decrying the tendency towards the increasing concentration of power, authority and functions and urged the need for decentralization of power to make the democratic process and concept of federalism more concrete and tangible to the common man. M.M. Shah, Union Minister of Industries, in his address to the Harold Laski Institute of Political Science, Ahmedabad, analysed the

101. Article 252 (2).

102. Jennings, *Some Characteristics of the Indian Constitution*, p. 66.

103. Article 250, 356, 365.

104. Article 148.

causes contributing to the process of centralization and maintained that the Centre in India was becoming a steamroller and the States appeared to be in a pitiable position. Shah's conclusion was that in a federal polity "the Centre should only be felt and the States should be seen."<sup>105</sup>

T.T. Krishnamachari, one of the architects of the Constitution, and a Minister without Portfolio in 1962, suggested re-examination of the relationship between the Centre and the States and their respective spheres of power. He asserted that, no doubt, the strength and prosperity of the nation depended upon and was derived from the strength of the Federal Government, but "in the achievement of this great result, it cannot be denied that a certain political imbalance creeps in the relationship between the Centre and the States."<sup>106</sup> That imbalance, Krishnamachari added, had occasionally given rise to frictions. If the conflicts did not come to surface it might have been because the same ruling Party functioned at the Centre and in the States, the Governments at both levels pursuing common policy.

The charge of over-centralization making inroads on State authority is the logical consequence of a Single Party Government both at the Centre and in the States for an interrupted period of seventeen years. The Party in power was the Indian National Congress which, according to Morris-Jones, "inherits the traditions of a national movement and reflects these in its rather centralised structure."<sup>107</sup> When one single Party rules the nation, without any electoral shock, for such a long time, it regards itself the custodian of the nation more especially when the Party had strived and won freedom for India from the alien rule. With its centralised structure and command policies it ignored the barriers which a federal polity creates and it treated the State Governments as subordinates. This was precisely the condition before the 1967 General Elections. It is a matter of common knowledge that the Central organization of the Indian National Congress Party determined the policy and its decisions were unquestionably accepted by the Central and State Governments. The Central Parliamentary Board, which consisted of the top leaders of the Congress, including Central Ministers high in the rank of the Party, was the maker and unmaker of State Governments. It even imposed the man of its own choice to assume the leadership of the State Legislature to become the Chief Minister. The Chief Minister did not select his own team to constitute the Council of Ministers. All initiative, thus, flowed from the Central Party organization and the State Governments looked to the Centre for direction. While reviewing the working of the Constitution, the Council of Public Affairs at a symposium at Madras, held that the domination of a single Party had resulted in centralization of policy-direction which negated the feeble principles of federation on which the Constitution was based.<sup>108</sup>

105. "Concept of Federalism and Unitary Government in Indian Politics." *Hindustan Times*, New Delhi, October 13, 1959.

106. Feroze Memorial Lecture, *Hindustan Times*, New Delhi, September 9, 1962.

107. Morris-Jones, *Parliament in India*, p. 13.

108. As reported in the *Hindustan Times*, New Delhi, November 21, 1959.

And not all Indians had put their impact teeth in federalism. Since the inception of the Union of India some politicians, including those belonging to the Congress Party, Politicians, Scientists and citizens are in favour of scrapping the federal system altogether and replacing it by a unitary government because federalism encourages centralised tendencies and generally weakens the country. Unitary government, however, will effectively prevent the numerous sectarian, communal and other, disruptive tendencies which plague the country today. N. V. Gopal in his capacity as Governor of Mysore, deplored the formation of States on linguistic basis and pleaded for a unitary government. His preference for the unitary government still remains unabated, although he is the occupant of the exalted office of the President of India, and, despite the government of India has strongly rejected such a demand.

All discussions of establishing a unitary government have only academic value and India shall remain a federation with a strong Centre. But the existence of a strong Centre is not inconsistent with the theory and practice of federalism. Each country evolves its own pattern of Union-State relations in the light of its historical background and its political, economic and social conditions. In India the balance of power, as said earlier, was deliberately tilted in favour of the Centre to meet the realities of the partition of the country, to reconcile with the scheme of government the legacy of the Provincial Autonomy and the regional loyalties, and to fulfil the hopes for the future. After having enunciated the basic ideals of a Welfare State in the Preamble and the Directive Principles of State Policy, the makers of the Constitution had to arm the Centre with adequate and effective powers in order to realize the cherished ideal.

A.H. Birch has aptly said that a federal government is not limited

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109. There was an individual opposition in the Constituent Assembly to the establishment of a federation. Prominent among such members were Brijeshwar Prasad, P.S. Deshmukh and Frank Anthony.

110. In their Election Manifesto the Bharatiya Jana Sangh declared, "The present Constitution which, by calling the Centre 'Union' and the States as 'States', has recognised a separate and somewhat sovereign status of the constituents, is also a hindrance to National unity. The Bharatiya Jana Sangh will amend the Constitution and declare India a Unitary State, with provision for decentralization of power to the lowest levels." Speaking with reference to the Chinese aggression against India, Home Minister of Orissa, Naramani Ronray said, "the people are now prepared to have a unitary form of Government." He demanded the immediate amendment of the Constitution to curb "narrow, parochial interests of state, language, religion and caste" and "if necessary the powers of the states should be curtailed by reducing them to the status of local units." *The Hindustan Times*, New Delhi, January 20, 1963, p. 4.

111. *The Statesman*, New Delhi, December 31, 1966.

112. *Indian Express*, New Delhi, December 22, 1967. Address to the Rotary Club, Delhi North.

113. Prakash Vir Shastri introduced a Private Member's Bill in Parliament seeking to amend the Constitution to establish a Unitary Government. It was withdrawn in the face of strong Government opposition. *The Hindustan Times*, New Delhi, November 7, 1965.

to its own sphere when it passes a good deal of legislation in relation to welfare, and State Governments are not in practice independent of the federal government when they derive a considerable proportion of their revenues from federal payments.<sup>114</sup> This is precisely the position in America, Canada and Switzerland and it is equally applicable in India too. The execution of welfare projects cannot succeed in isolated moulds, particularly when a State is constitutionally committed to a welfare ideal. The welfare content of the State can only be achieved through the joint Co-operative efforts of the National and State Governments. In India the co-operation is sought in different ways and the best example in this respect is the Zonal Councils. According to Morris-Jones, Zonal Councils have proved "a most useful device in the development of co-operative federalism." These Councils help to facilitate co-operation between the Centre and the States, and between the States themselves. Economic planning on a unified basis has the effect of centralizing power and direction, no doubt. But the preparation of the plan, defining the stages in the execution of the plan, allocation of resources and fulfilment of targets are decided by mutual consultation and understanding. "The plan," according to V.T. Krishnamachari, "is a joint national enterprise in which the Centre and the States are partners, united in a common purpose and working with agreed policies in different fields of national development."<sup>115</sup> Then, there is the technique of conferences evolved to ensure harmony in Union-State relations and inter-level co-operation. These conferences are numerous and for different purposes for the solution of important problems confronting the life of the nation. Some of the conferences are regularly held as the Governors' Conference, the Chief Ministers' Conference, and so many other meetings of the State Ministers. All these Conferences and meetings "seek to provide a forum for discussion of mutual problems and set the stages for the co-operative solution of these problems."<sup>116</sup>

The dominant spirit of federalism is not competitive, but co-operative exercise of authority by different governments. The traditional theory of federalism is a political anachronism now. Centralization is a universally accepted phenomenon and the concept of 'dual sovereignty' is untenable. David Fallman has correctly observed that the American Supreme Court "has snuffed out the heresy of dual federalism. The Court, by invoking the doctrine of implied powers, has assigned a vast sweep of authority to the Centre. In fact, the centralization is the most significant aspect of the operative machinery not only of American Federalism but also of the Australian, Canadian and Swiss Federalism." What Courts, conventions, practices and usages have achieved in America, Canada, Australia and Switzerland, these have been enshrined in the express constitutional provisions in India.<sup>117</sup> Intervening in the debate in the Constituent Assembly on November 8, 1948, Alladi Krishnaswami Ayyer observed that all that the Draft Constitution had done was to take note of the inevitable tendency

114. Birch, A.H., *Federalism, Finance and Social Legislation* in Canada, Australia, and the United States, p. 290.

115. *Five Year Plan* (Progress Report), 1953, p. 1.

116. Schoenfeld, Benjamin N., *Federalism in India*, p. 20.

117. *Constituent Assembly Debates*, Vol. VII, pp. 335-36.



in every modern federation in the direction of strengthening the federal government and to make suitable provisions for the purpose, instead of leaving it to the Supreme Court, as in the United States, to extend the powers of the Central Government by a process of judicial interpretation.<sup>118</sup> Ambedkar maintained that the Draft Constitution had struck a fair balance between the claims of the Centre and the States and the Centre had not been given more powers than were strictly necessary in the context of conditions in the modern world which rendered centralization of power inevitable.<sup>119</sup> Perhaps he forgot to say that the makers of the Constitution had to arm the Centre with sufficient power to defend and maintain the Constitution rather than to allow certain forces to wreck it from within. Two Politburo members of the Indian Communist Party (Marxists), Kerala Chief Minister E.M.S. Namboodripad and A.K. Gopalan, declared in a statement that the avowed objective of the Marxists was to promote discontent among the people and prepare them for a class-war. "Our objective", they said, "is to capture power by making the fullest of the constitutional machinery so that we can break the Constitution from within."<sup>120</sup>

What really matters in a federation is whether the Centre and States ordinarily enjoy autonomy within the spheres assigned to them in the Constitution. The Seventh Schedule of the Indian Constitution clearly demarcates the spheres of the Centre and the States and within those spheres both are ordinarily autonomous. The Centre, no doubt, possesses the power to act decisively and expeditiously in the national interests, but this power is used as a medicine and not a daily diet. Constitutional remedies apart, "self-consciousness and self-assertiveness" of the State Governments deter even a strong Centre to intervene without a convincing cause which it may be able to plead at the bar of public opinion. In a democratic set up, with a Parliamentary system of Government, the actions of Government are ever under scrutiny. No government can forget that tomorrow is the day of election. If the Central Government ventures to trespass the limits ordinarily assigned to it, it shall have to pay the penalty at the next elections.

It is often maintained that the sense of "self-consciousness and self-assertiveness" of the State Governments was curbed during the last seventeen years of a single Party rule. This is not entirely correct, although this sense of awareness has considerably increased with the coming into power of the non-Congress Governments in various States. The Congress Chief Ministers had also differed with the Centre, but their differences were confined, by and large, to the inner councils of the Party and were not aired publicly. Sometimes, however, the din of controversy was heard outside, as for instance, when during Lal Bahadur Shastri's tenure of Prime Ministership the Madhya Pradesh Chief Minister, D.P. Mishra, got a decision on a food policy reversed within twenty-four hours. The non-Congress Governments are today more articulate and vocal. The interplay of non-Congress points of view on the Centre's policies and measures can be extremely beneficial if they express their views with restraint.

118. *Ibid.*, pp. 33-37.

119. *The Indian Express*, New Delhi, July 9, 1969.

120. *Ibid.*



responsibility and spirit of co-operation in the larger interest of the country as a whole. It is in this sense that Morris-Jones expressed the view that after the General Elections of 1967, India had come of age as a federal State in the full sense of the term. It is important to remember that the Centre's authority should not be weakened, for herein lie seeds of disintegration and danger to the unity of the country. Benjamin Schoenfeld has aptly said, "The problems which Indian federalism forces stem from the need of the people to have a government armed with sufficient powers, needed to solve modern economic problems on the one hand, and to combat the strong sentiments of regionalism found throughout the land."<sup>121</sup>

Doubts about the nature of Indian Constitution arise because of our rigid adherence to the traditional theory of federalism which divides authority into two sets of government, central and regional, each within the spheres assigned to them, co-ordinate and independent. But this is irrelevant in the context of modern times and not one of the federal unions, as Gopalaswami Ayyanger pointed out in the Constituent Assembly. "will be found to conform to the actual terms."<sup>122</sup> A.H. Birch rejects the classical theory of dualistic federalism. He defines federalism as a system of government "in which there is a division of powers between one general, and several regional authorities, each of which, in its own sphere, is co-ordinate with others, and each of which acts directly on the people through its own administrative agencies."<sup>123</sup> He eliminates from his definition the term "independent" within its own sphere, although he retains their co-ordinate character. But Vile says that the equality of federal and State Governments "may be defensible in legal terms, but it is very difficult to interpret in terms of power and influence."<sup>124</sup> The leadership of the Central Government in a federation is unchallengeable and all federal unions have moved alike in this direction. According to Vile federalism is "a system of government in which neither level of government is wholly dependent on the other nor wholly independent of the other."<sup>125</sup> Their functions cannot be divided into water-tight compartments. Independence and interdependence is, thus, the hall-mark of the federal State. The Central and regional governments act independently within the spheres assigned to them, but when vital interests of the State intervene the decisions of the former prevail, though they concern matters outside its jurisdiction. It does not, however, mean that the Central Government should become so dominant that it should always dictate its decisions. Dictation is not the essence of interdependence. Since Central and regional authorities, in a federal system of government, "are linked in a mutually interdependent political relationship; in this system a balance is maintained such that neither level of government becomes dominant to the extent that it can dictate the decision of the other, but each can influence, bargain with and persuade the other." The Constitution of India fulfils all these elements of

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121. As quoted in Norman D. Palmer, *The Indian Political System*, p. 97.

122. *Constituent Assembly Debates*, Vol. III, p. 36.

123. Birch, A.H., *Federalism, Finance and Social Legislation*, p. 206.

124. Vile, M.J.C., *The Structure of American Federalism*, p. 196.

125. *Ibid.*, p. 197.

federalism which is co-operative.<sup>126</sup> The present distribution of powers does not reduce the States to the level of municipalities. Sri Ram Sharma has aptly said, "India is a shining example of co-operative federalism."<sup>127</sup>

**Amendment of the Constitution and its Rigidity.** Supremacy of the Constitution, *inter alia*, involves its rigidity. The rigidity of the Constitution depends upon two factors. First, it depends on the degree of difficulty in the amending process, that is, a procedure other than the one required in the ordinary legislation is needed for a constitution amendment. Secondly, it depends upon the content of the Constitution. "What makes the Indian Constitution so rigid," says Jennings, "is that in addition to a somewhat complicated process of amendment, it is so detailed and covers so vast a field of law that the problem of constitutional validity must often arise."<sup>128</sup> Really speaking the method of amendment is not so complicated. It is simple, though far from easy. All the same, it has sought to avoid the difficult processes laid down by the American and Australian Constitutions. The Indian Constitution may be characterised as partly flexible and partly rigid. Prof. Whearè says that the Indian Constitution strikes a good balance between extreme rigidity and too much flexibility. The reason for introducing the element of flexibility in the Constitution was explained by Jawaharlal Nehru. He said, "While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people.... In any event, we could not make this Constitution so rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through a very swift period of transitions, what we may do today may not be wholly applicable tomorrow." Jennings, too, expresses the same opinion. He says that a Constitution has to work not only in the environment in which it was drafted but also centuries later. "It must therefore, be capable of adaptation to new Constitutions as they arise." He, accordingly, suggests that "The golden rule for Constitution-makers, therefore, is never to put in anything that can safely be left out."<sup>129</sup> Referring to the Indian Constitution, he says, "What the Constituent Assembly has done is to produce a long and complicated document which cannot easily be amended. It is quite obvious that there are clauses which do not need to be constitutionally protected. An example taken at random is Article 224, which empowers a retired judge to sit in a High Court. Is that a provision of such constitutional importance that it needs to be constitutionally protected, and be incapable of amendment except with the approval of two-thirds of the members of each House sitting and voting in Union Parliament?" But Sir Ivor Jennings completely missed two important points. He completely ignored, as Sardar D.K. Sen observes, "The political and social circumstances prevailing in India as well as the ethos of the Indian people."<sup>130</sup> Secondly, the mere fact that a Constitution

126. *Ibid.*, p. 199.

127. Haqqi, S.A.H. (Ed.), *Union-State Relations in India*, p. 49.

128. *Some Characteristics of the Indian Constitution*, op. cit., pp. 9-10.

129. *Ibid.*, p. 16.

130. *A Comparative Study of the Indian Constitution*, p. 302.

has long and detailed provisions does not necessarily mean that it is a rigid Constitution. Detailed provisions, in fact, render it unnecessary to introduce any constitutional amendment, and also save a great deal of litigation. It is true that Article 224 of the Indian Constitution, to which Sir Ivor Jennings refers, and some other, too, add to the bulk of the Constitution but they do not make it any more rigid. Wyne correctly observed, "The tendency in recent times has been to extend the number and variety of matters which are deemed sufficiently important to warrant provisions which shall be rendered more or less immutable by inclusion in the Constitution."<sup>131</sup> What appears to Sir Ivor Jennings as unnecessary may have been considered extremely important by the Indian Constituent Assembly. There is no such thing as the "golden rule."

But the majority decision rendered by the Supreme Court in **Golak Nath and others v. the State of Punjab** has certainly introduced rigidity in the Constitution. The Supreme Court declared that in future Parliament cannot abridge Fundamental Rights through the normal procedures of constitutional amendment.

The Indian Constitution prescribes three different methods for amendment of the different provisions of the Constitution:

(1) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament. It must, however, be pointed out that there are very few provisions which allow alterations by simple majority. By this process new States may be created and the existing States reconstituted,<sup>132</sup> the qualifications of Indian citizenship may be changed,<sup>133</sup> Upper Chambers may be created and abolished in the States,<sup>134</sup> the provisions for the Administration of Scheduled Areas and Scheduled Tribes may be altered.<sup>135</sup>

But these matters will not be treated as amendments to the Constitution, although they deal with some of the essential provisions of the Constitution.

(2) The amending clause is Article 368. Certain specified subjects, as amendments affecting the method of electing the President, the extent of the executive and legislative powers of the Union or the States, the provisions regarding the Supreme Court and the High Courts, the representation of the States in Parliament, and the method of amending the Constitution<sup>136</sup> require: (a) a majority of the total membership in each House of Parliament; (b) a majority of not less than two-thirds of the members present and voting in each House of Parliament; and (c) ratification by the Legislatures of one half of the States. It is to be noted that in the United States two-thirds majority in Congress of the members present and ratification by three-fourths of the States is required.

131. As cited in above, p. 304.

132. Article 4.

133. Article 11.

134. Article 169.

135. Schedule V. Part D.

136. Proviso to Article 368.

(3) The remaining provisions of the Constitution require: (a) a majority of the total membership in each House of Parliament; and (b) a majority of not less than two-thirds of the members present and voting in each House of Parliament. The Supreme Court has now decided in **Golak Nath and others v. The State of Punjab** that Parliament could not amend the Constitution so as to take away or to abridge the Fundamental Rights. It does not, however, mean that the Supreme Court prohibits the amendment of Fundamental Rights. But the Court reserves to itself the power of determining in each specific case whether the amendment in question takes away or abridges the rights.

A few observations may be made regarding the procedure adopted for passing the amendment Bill. The President of the provisional Parliament ruled that a Bill amending the Constitution must be passed by the House, clause by clause, with the required majority for every clause. This view was confirmed by the Supreme Court in **Shankar Prasad v. Union of India**. The Supreme Court held that the procedure required for amending the Constitution is a legislative procedure and that the rules framed by Parliament under Article 118 relating to its ordinary legislative business shall be followed, so far as applicable, in the matter of an amendment Bill under the provisions of Article 368.

The Indian Constitution, like the Constitution of the United States, does not prescribe any time limit within which State Legislatures<sup>137</sup> should ratify or reject the amendment referred to them. Closely connected with it is another question. Is it necessary that Bills required to ascertain the will of the States must be submitted to all the States, or is it enough if a Bill is submitted to some of them? A situation did arise in the case of the Third (Amendment) Act. The Constitution was amended before some of the States could consider the provision on the ground that half of the States had signified their approval thereto. The Mysore Legislative Assembly strongly protested against this procedure.

When the procedure adopted in the amendments is similar to ordinary legislation, can the President withhold his assent therefrom? Article 368 does not make any reference to the President's power to do as such. It simply says that, "...it shall be presented to President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the Bill." Article 111 refers to the assent of the President with regard to ordinary Bills. It says, "when a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom." When Article 368 does not specifically say anything about his power to withhold assent to an amendment Bill, the President's assent to a Bill duly passed by Parliament as an amendment is only a formality. The question of his withholding assent only arises when the procedure prescribed in Article 368 has not been duly followed.<sup>138</sup> In the United States constitutional amendments are not presented

137. In the United States ratification is by the States and not by the Legislatures of the States.

138. There are authorities in India who hold that as the constitutional amendment has to be in the form of a Bill subject to rules and regulations  
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to the President and hence the question of vetoing a constitutional amendment in any form does not arise.

Another important fact to be noted in this connection is that the power of initiating an amendment to the Constitution is vested exclusively in the Union Parliament. The States have absolutely no right to propose constitutional amendment, except under Article 169 when the Legislative Assembly of a State may propose for the creation or abolition of the Legislative Council (Vidhan Parishad) of a State. Nor is the right to initiate constitutional amendment conceded to the people. The exclusion of the States in the process of amending the Constitution is the negation of the federal principle and contrary to the practices followed in other federations. The Drafting Committee claimed to have largely followed the model set by the Canadian federation. But even in Canada the Provincial Legislatures have the untettered power to amend the Provincial Constitution in the ordinary process of legislation, "excepting on one point only, viz., the office of the Lieutenant-Governor."<sup>139</sup>

To sum up, the process of amendment is not easy as it apparently appears to be. To secure a double majority, a majority of the total membership and a majority of not less than two-thirds of the members present and voting of each House of Parliament, is not easy to obtain. So long as one single party commanded a comfortable majority both in the States and in Parliament, it was possible to secure the double majority. But now when the Congress majority has been sufficiently reduced in Parliament and in the States and quite a good number of States are being governed by non-Congress Governments consisting of in very many cases seven or eight heterogeneous parliamentary groups, the requisite majorities cannot be obtained and the amending process can hardly be used for altering the Constitution under Article 368. This is the practical outcome of Indian politics. So far as the letter of the law is concerned Indian Constitution is no more rigid than any other federal Constitution; on the contrary it is more flexible than many existing federal Constitutions such as those of the United States, Switzerland and Australia.

**Judicial Review.** The Constitution establishes a Supreme Court and the doctrine of judicial review is implicit in the Constitution. In a federation, apart from the doctrine of separation of powers, there is a distribution of powers between the two sets of government and this distribution is as binding on the federal authorities as it is on the member States. The federal government cannot ordinarily enter the sphere of jurisdiction

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relating to the ordinary legislative procedure, the President can withhold assent. Contesting the argument of the Additional Solicitor General, in the writ petitions of I.C. Golak Nath and others challenging the constitutional validity of the Constitution (17th Amendment) Act, 1964, Mr. R.V.S. Mani submitted to the Full Bench of eleven Judges of the Supreme Court, that it was not correct that Article 368 is a code by itself and that the assent of the President was only a formality. The word "assent" in Article 368, he said, must have the same meaning as it has in Article 111 and other Articles. Therefore the President should be assumed to have in Article 368 the power to withhold his assent or to return the Bill amending the Constitution as he can do so in the case of ordinary legislation.



exclusively assigned to the States; nor can the States entrench upon the exclusive competence of the federal Government. In a federation, therefore, it is imperatively necessary that there should be a duly constituted authority to enforce the observance of the constitutional limitations. Moreover, in a federation Constitution is the supreme constitutional law and any executive or legislative act, whether federal or State cannot be operative if it infringes the provisions of the Constitution. It is, accordingly, necessary that there should be an impartial umpire to annul such acts and protect the Constitution. Lastly, all federal Constitutions, except for the Constitutions of Canada and Australia, contain a declaration of rights which protect the liberties and freedoms of the citizens from the encroachments of the governments, both federal and State. An independent judiciary is necessary to enforce the due observance and fulfilment of the fundamental rights.

In the Indian Republic all questions arising under the Constitution or involving its interpretation fall within the jurisdiction of the ordinary courts, subject, however, to the final authority of the Supreme Court. In *Nar Singh v. State of U.P.* the Supreme Court declared, "This Court has general powers of judicial superintendence over all courts in India and is the ultimate interpreter and custodian of the Constitution. It has a duty to see that its provisions are faithfully observed and, where necessary to expound them." Under Article 131 of the Constitution the Supreme Court has jurisdiction in all disputes in respect of justiciable issues between any two governments. Article 246 which deals with the nature of the division of powers involves the power of judicial review. But Article 13 clearly enacts that every law in force or every future law inconsistent with or in derogation of the Fundamental Rights shall be void. Speaking about the significance of Article 13, Chief Justice Kania observed in *Gopalan v. The State of Madras* that "The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights was abridged by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid..." The right of judicial review is implicit in Article 32 which guarantees the right to constitutional remedies to all persons in the enjoyment of rights and empowers the Supreme Court and other Courts authorised by Parliament to issue any of the writs known as prerogative writs in Britain.

**A Secular State.** A secular State is primarily devoted to political order and freedom and pursues all its activities in promoting economic stability and welfare of the people. By a secular State is, thus, meant a system of government which is conducted in "conformity with the needs of the world and on the basis of the fundamentals and methods provided for modern civilization by science or technique." It is not to be guided in the discharge of its functions by the teachings of any particular religious faith or creed practised within the territories of the State, no matter what may be the numerical strength of its followers. A secular State does not allow its resources and prestige to be utilised for the propagation of any particular religion. It allows freedom of religion to all, provided such freedom is exercised subject to law and morality. According to P.B. Gajendragadkar, the former Chief Justice of India, secularism was the

pragmatic approach to the problems of society. It was not anti-God or anti-religion. "So long as religions keep themselves within their bounds, it does not seek to interfere with them."<sup>140</sup> The basis of secularism is ethics and dedication to its promotion would be the striving to bring about a society of equality and justice.

The Indian Constitution establishes a purely secular State wherein there would be complete freedom from religious or communal bias. It guarantees to all citizens freedom of faith, worship and conscience, consistent with the security of the State and ethical standards of the society. All citizens are guaranteed enjoyment of equal rights without any distinction of religious belief, caste, creed or sex.

The secular basis of India is a revolutionary departure from the traditional Indian approach to the problem of political obligation. But the facts of history, the circumstances attending the birth of India's national independence, and aspirations of the people to make India strong and united all combined together to make a secular approach to the problems of the State as an indispensable condition.

There is no specific provision in the Constitution which provides against communalism or prohibits political activities by religious groups as such. Presumably the framers of the Constitution did not envisage the emergence of these ugly forces in view of the marked strength of national feeling after the achievement of independence and the bitter experience of partition. Prof. Damle points out that in the Indian context the content of secularism stemmed from the country's concern to bury the two-nation theory that had caused immeasurable communal strife in the sub-continent.<sup>141</sup> But communalism and separatism are again the grim realities and both offer a serious challenge to the integrity of the State. The now abandoned secessionist movement of the Dravida Munnetra Kazhagam, the constant cry of Sikh "homeland" by a group of Akalis now headed by Kapur Singh, and the communal poison emitted by the Jamate-i-Islami and some other parties of their like in the North shake the indissolubility of the Union and secularism which constitute two of the four fundamentals of the Indian Constitution. If the makers of the Constitution had envisaged the emergence of these ugly forces, they would probably have had made specific and explicit provisions to deal with them vigorously and effectively. It cannot, however, be denied that any challenge to the integrity of the Union and importation of religion into politics are against the spirit of the Constitution.

**Adult Suffrage.** As a step towards secularism, the Constitution abolishes communal representation and communal electorates. This ensures national solidarity. Another radical feature of the Constitution is the

140. Address on "Secularism and the Indian Constitution" delivered at a meeting held in connection with the Lajpat Rai centenary celebrations. *Times of India*, New Delhi, November 23, 1965. Also refer to the proceedings of the seminar on "Secularism" organized by the Indian Law Institute in collaboration with the Education Commission appointed by the Government of India. As reported in the *Hindustan Times*, New Delhi, November 3, 1965.

141. Seminar on "Secularism", as reported in the *Hindustan Times*, New Delhi, November 3, 1965.

introduction of adult suffrage. "The introduction of adult suffrage", writes Prof. Srinivasan, "without any qualifications of any kind is the boldest step taken by the Constituent Assembly and is an act of faith". Under the Government of India Act, 1935, only 14 per cent of the total population secured franchise, and women constituted just a negligible proportion of the total franchise. Under the new Constitution both men and women enjoy the equal right to vote.

## CHAPTER II

# FUNDAMENTAL RIGHTS AND THE DIRECTIVE PRINCIPLES OF STATE POLICY

**The importance of Fundamental Rights.** "Rights are the groundwork of the State. They are the quality which gives to the exercise of its authority a moral character. And they are natural rights in the sense that they are essential for the good life"; as essential as light and air, food and clothing are necessary for the existence of life. They are rights for which man struggled from the dawn of history against autocrats and tyrants and he still continues to struggle not only for their due recognition, but to make them inviolable under all conditions so as to bring to a citizen the full enjoyment of his liberty. The problem of democracy is really the problem of liberty and the success and failure of a democratic government depends largely on the extent in which civil liberties are enjoyed by the citizens in general. If democracy has put to an end the personal rule of the despots, it has, undoubtedly, brought in its wake "the tyranny of the majority". The tyranny of the majority, as John Stuart Mill has rightly said, is "among the evils against which society requires to be on its guard", because of the ease with which it can be exercised and the severity with which it operates. Willoughby, a distinguished American publicist, has emphasised that "there can be no tyranny of a monarch so intolerable as that of the multitude, for it has the power behind it that no king can sway."

Fundamental Rights are a declaration of the fact that certain elementary rights of the individual are not subject to the vagaries of the shifting legislative majorities. Mr. Justice Jackson of the United States Supreme Court, in **West Virginia State Board of Education v. Barnette**, declared, "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other Fundamental Rights may not be submitted to vote; they depend on the outcome of no elections".

The Theory of Fundamental Rights implies limited and free government. To put it in the words of the Constitution of the German Republic, the function of the Fundamental Rights is "to supply standards and prescribe limits for legislature, the executive and the administration of justice". The incorporation of a Bill of Rights in a Constitution acts as a great safeguard, not only against any "misconstruction or abuse of" power on the part of a department of a government, but also against the tyranny of the majority. It aims at preventing the government and the

legislature from becoming despotic and it is the duty of the courts to ensure the observance of Fundamental Rights. Fundamental rights are, accordingly, justiciable. In *Hurtado v. People of California* Mr. Justice Mathews of the United States Supreme Court observed, "The limitations imposed by our constitutional law upon the actions of the Governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of the self-governing communities to protect the rights of individuals and minorities, as well as against the power of numbers, as against the violence of public agents transcending the limits of public authority, even when acting in the name and wielding the force of the government." In the *State of Madras v. V.G. Row*, Chief Justice Sastri observed, "our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution..... If then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the Fundamental Rights as to which this Court has been assigned in the role of sentinel on the *qui vive*....." A mere declaration of Fundamental Rights does not serve the desired purpose. Nor does it contribute to the enjoyment of liberty unless an infringement of any of such rights can be prevented by providing adequate safeguards and guaranteeing ample remedies by resort to the highest courts in the land for asserting such Fundamental Rights. The Constitution makes the independent judiciary of a country the guardian of Fundamental Rights. When the essential human rights are enshrined in the Constitution, they are cherished as sacred and any trifling with them by any agency of the State is viewed with horror and deemed as a violation of the Constitution. Herein lies the importance of Fundamental Rights.

But Fundamental Rights are not absolute. They are subject to limitations in order to secure or promote the greater interests of the community. Freedom does not mean anarchy. "There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights.....are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace, general order and morals of the community.....What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control." Restrictions are a necessary part of the rights and many Constitutions provide for such restrictions, as the Constitution of India does. When the Constitutions state the rights broadly and leave their interpretation to the courts, reasonable restrictions have been imposed in public interest. For example, the Australian Constitution provides that trade, commerce and intercourse between the States shall be "absolutely" free, but the Australian Courts and the Judicial Committee of the Privy Council have held

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1. *A.K. Gopalan v. State of Madras*, (1950).



that this freedom must be qualified, that is, freedom to trade, like other freedoms, must be subject to reasonable restrictions in the public interest.

**Fundamental Rights in the American Constitution.** The Constitution of the United States is perhaps the best example of a democratic Constitution in which the idea of fundamental rights is developed. As originally drafted, the Constitution contained no Bill of Rights, although it did contain some provisions relating to individual liberty. The absence of the Bill of Rights from the Constitution created apprehensions and Jefferson and others expressed the desire for its early incorporation. Hence the first ten Amendments were adopted which became a part of the Constitution in 1791. These ten Amendments are generally referred to as the American Bill of Rights.

The most important feature of Fundamental Rights, as developed in the United States, is the doctrine of "due process of law." Amendment V of the Constitution, which is directed against the Federal Government, *inter alia*, provides that "no person shall be deprived of his life, liberty or property without due process of law." A similar provision is contained in Amendment XIV which relates to the powers of the States. It provides, "nor shall any State deprive any person of life, liberty or property without due process of law." It means that any law or action of the Federal or State Government can be challenged, under the due process of law clause, in a court of law if it amounts to depriving a man of his life, liberty or property. Due process of law means 'reasonable law or reasonable procedure', that is to say, what the court finds to be reasonable. There is no doctrine of the 'security of the State' in the United States and the legislature cannot suspend or abridge any individual right on the ground of the safety of the State. It is for the judiciary to decide and determine whether there is "a clear and present danger" to the existence of the social order so as to justify a curtailment of the rights of the individual. The courts have, of course, been responsive to the needs of the time and determined accordingly. In 1937, the Supreme Court held that interception of telephonic messages by government agents to collect information was unconstitutional as it contravened the Fourth Amendment.<sup>2</sup> In 1942, the same Court reversed its own previous order and held interception of telephonic messages valid under the stress of war conditions.<sup>3</sup> The same Court, which had upheld the Espionage Act during the World War I,<sup>4</sup> refused in time of peace "to prohibit by injunction a regular vilification of public officers by a newspaper."<sup>5</sup>

The Supreme Court, however, has conceded that the Legislature has the power of making laws and regulating individual rights for the advancement of public warfare. This power is known as the "Police Power" of the State and may be defined "as the legal capacity of the Government to control the personal liberty of individuals for the protection of social interests, or common good of the people." Chief Justice Hughes writes, "Both Congress and the State Legislatures must have a wide field of legis-

2. *Nardone v. United States*.

3. *Godman v. United States* (1941).

4. *Schenck v. United States* (1918).

5. *Mear v. Minnesota* (1930).

lative direction that is essential to the exercise of legislative power. The due process clause does not substitute the judgment of the Court for this discretion of the legislature. . . . Changing social conditions require new remedies, the moral exercise of the Police Power, to care for both social and individual interests. Our Federal Constitution has vested in the Supreme Court, and the inferior Federal Courts, the judicial, not the legislative power. Those who find fault with the multiplicity of laws, and with vexatious interference, normally must address themselves to the Legislature, and not to the Court: they have their remedy at the ballot box." But there is a limit to legislative direction and the courts reserve to themselves the last word by declaring whether the legislative action was arbitrary or without reasonable relation to some purpose within the competence of the State. The Supreme Court, no doubt, takes into account changes in the social and economic conditions of the country while determining the validity or otherwise of the legislation. Mr. Justice Sutherland, while delivering the opinion of the Supreme Court in *Euclid v. Ambler Realty Co.*, observed, " . . . for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to meaning, but to the application of constitutional principles, statutes and ordinance, which after giving due weight to the new conditions, are found clearly not conform to the Constitution, of course, must fall. . . ."

In the United States, therefore, it is the Supreme Court which has the final and conclusive say in determining whether curtailment of individual rights justify the changing requirements of society or not. The judiciary, as guardian of the Fundamental Rights, is competent to override the wishes of the legislature and, as such, the wishes of the representatives of the people. It is a safeguard against the despotism of the majority and legislative omnipotence. But judiciary is neither responsive nor responsible and being proverbially conservative it cannot adequately appreciate the changing demands of the people consistent with the needs of the time. Moreover, when the judiciary considers the justification or otherwise of the legislation with reference to the changing social and economic conditions, it directly enters into the arena of political controversies. The Supreme Court in the United States has, thus, not only assumed the position of a super-legislature, without being responsive and responsible to any one, but its virtue of impartiality also becomes questionable.

## FUNDAMENTAL RIGHTS IN INDIA

**Demand for Declaration.** Before the enactment of the Constitution of 1950, there was no charter of fundamental rights of a justiciable nature, although the demand for such rights and their constitutional guarantee

6. Hughes, C.E., *The Supreme Court of the United States*, p. 135.

7. *Meyer v. Nebraska*.

goes back to 1895. The Constitution of India Bill, described by Mrs. Annie Besant as the Home Rule Bill, had envisaged for India a Constitution guaranteeing to all citizens freedom of speech and expression, right to personal liberty, inviolability of one's house, right to property, equality before the law, equality to admission to public offices, and right to petition for redress of grievances. Immediately after the publication of the Montague-Chelmsford Report, the Indian National Congress at its Bombay session in August 1918, demanded the new Constitution of India should contain a "declaration of the rights of the people of India as British citizens" guaranteeing equality before the law, freedom of speech and press, and protection in respect of liberty, life and property.

The Constitution of the Irish Free State in 1921, which contained a Bill of Rights, had a profound effect on the political thought in India. The Commonwealth of India Bill drafted by the National Convention in 1925, embodied a "declaration of rights" more or less similar to the provisions of the Irish Constitution. A resolution passed at the Madras session of the Indian National Congress emphasised that the future constitution of India must guarantee fundamental rights. The Nehru Committee appointed by the All-Parties Conference, in its report included an enumeration of such rights and in recommending their declaration the Committee urged that "Ireland is the only country where conditions obtaining before the Treaty were the nearest approach to those we have in India. The first concern of the people of Ireland was, as it is indeed of the people of India today, to secure fundamental rights that have been denied to them. The other Dominions had their rise from earliest British settlements which were supposed to have carried the law of England with them. Ireland was taken and kept under the rule of England against her own will, and the acquisition of Dominion Status became a matter of Treaty with the two nations...." Another reason why India attached great importance to a declaration of the rights was, in the opinion of the Nehru Committee, the unfortunate existence of communal differences in the country. "Certain safeguards and guarantees," the Committee urged, "are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution. The Committee added, "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."

In 1931, the Indian National Congress passed a Resolution on Fundamental Rights. In order to end the exploitation of the masses, the Resolution emphasised, political freedom must include real economic freedom of the starving millions. It was further declared that any Constitution which might be agreed to on behalf of the Indian National Congress should provide, or enable the Swaraj Government to provide, for certain fundamental rights and duties. But the British Government was in no mood to reconcile to this primary demand of the Indians. In fact, such a demand was unsuited to the British genius. The Simon Commission had ridiculed the idea of fundamental rights. "Abstract declarations", the

Commission observed, "are useless unless there exists the will and the means to make them effective."<sup>8</sup>

All the same, the matter came for consideration during the Round Table Conferences. At the second Round Table Conference, M K Gandhi, the sole representative of the Indian National Congress, circulated a memorandum, *inter alia*, demanding that the new Constitution should "include a guarantee to the communities concerned for the protection of their cultures, languages, scripts, education, profession and practice of religion and religious endowments." Another memorandum on the subject was put forward jointly by the representatives of the minorities. Ramsay MacDonald, the then Labour Prime Minister, announced that he felt the need of incorporating fundamental rights in the proposed Constitution of India for safeguarding the interests of the minorities. Immediately after came the National Government into power with Ramsay MacDonald as Prime Minister, but with an avowed majority of the Conservatives in the Government. This made a sharp swing in the official policy. Lord Reading and Sir John Simon were vehement in opposing the inclusion of fundamental rights in the new Constitution for India. The Indian representatives at the conference could not agree amongst themselves on the basic problems of constitutional reforms and, accordingly, the issue of fundamental rights also lapsed.

The Joint Parliamentary Committee on the Government of India Bill 1934, endorsed the observations of the Simon Commission on the demand for a constitutional guarantee of fundamental rights to subjects of British India. The Committee said, "A cynic might indeed find plausible arguments... for asserting that the most effective method of ensuring the protection of a fundamental right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restrictions on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts as being inconsistent with one or other of the rights so declared. There is this further objection, that the States have made it abundantly clear that no declaration of fundamental rights is to apply in State territories: and it would be altogether anomalous if such a declaration had legal force in part only of the area of the Federation...." The Committee, however, conceded that there were some legally recognised principles which could be included in the New Constitution and, accordingly, the Government of India Act, 1935 conferred certain rights and forms of protection on British subjects in India.<sup>10</sup>

8. *Report of the Indian Statutory Commission*, Vol. II, para 36.

9. J.P.C. Report, para 366.

10. Refer to Sections 275 and 297 to 300 of the Government of India Act, 1935. These sections, *inter alia*, provided:

(1) No person shall be disqualified by sex for being appointed to any civil service of, or civil post under, the Crown in India except a ser-

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The subject of fundamental rights came for active consideration in the deliberations of the Conciliation Committee, also known as the Sapru Committee, appointed by the All-Parties Conference (1944-45). The Committee was of the opinion that fundamental rights were not only "assurances and guarantees to the minorities but also prescribing a standard of conduct for the legislatures, governments and the courts."<sup>11</sup> The Committee further said that it was for the Constitution-making body to settle the list of fundamental rights and, then, to decide about their division into justiciable and non-justiciable rights and to provide in the case of the former, suitable machinery for their enforcement.

**Constituent Assembly and the Fundamental Rights.** The Cabinet Mission Plan conceded the demand for the Constituent Assembly as well as the need for a written guarantee of fundamental rights in the Constitution of India. It recommended the appointment of an Advisory Committee on the Rights of Citizens, Minorities and Tribal and Excluded Areas, containing the interests affected, which would prepare a list of fundamental rights and also to recommend their inclusion in the State or the Union List. By the Objectives Resolution introduced by Jawaharlal Nehru and adopted on January 22, 1947, the Constituent Assembly solemnly pledged to draw up for India's future governance a Constitution wherein "shall be guaranteed and secured to all the people of India, justice, social, economic and political, equality of status, of opportunity and before the law: freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality."

Two days after adopting the Objectives Resolution, the Constituent Assembly elected an Advisory Committee for reporting on minorities, fundamental rights and on the tribal and excluded areas. The Advisory Committee consisted of 54 members with Sardar Vallabhbhai Patel as its Chairman. The Advisory Committee constituted on February 12, 1947, five sub-committees one of which was to deal with fundamental rights.<sup>12</sup> The draft report of the sub-committee was circulated to its members with the explanatory notes on various clauses prepared by B.N. Rau. These were thereafter discussed in the Sub-Committee in the light of the comments offered by the members and the final report was submitted to the Chairman of the Advisory Committee on April 16, 1947. The Advisory Commit-

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vice or post specified by order made by the Governor-General, or Governor or Secretary of State,

- (2) No British subject domiciled in India shall be ineligible for office under the Crown in India or be prohibited from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India on grounds only on religion, place of birth, descent, colour or any of them, and
- (3) No person shall be deprived of his property in British India save by the authority of law.

11. *Constitutional Proposals of the Sapru Committee* (1945), pp. 256-57.

12. The Sub-Committee on Fundamental Rights consisted of J.B. Kripalani, M.R. Masani, K.T. Shah, Rajkumari Amrit Kaur, Alladi Krishnaswami Ayyar, Harnam Singh, Maulana Abul Kalam Azad, B.R. Ambedkar, Jairam das Daulatram and K.M. Munshi. The President of the Committee was authorised to nominate additional members.



tee accepted the recommendations of the Sub-Committee. (1) for division of rights into justiciable and non-justiciable rights, that is, rights enforceable by appropriate legal process and rights consisting of directive principles of state policy, which though not enforceable in courts, were nevertheless to be regarded as fundamental in the governance of the country, (2) certain rights being guaranteed to all persons and certain others to citizens only, and (3) all such rights being made uniformly applicable to the Union and the units. The Constituent Assembly adopted all these recommendations and the Constitution of 1950, contains two Chapters, Chapter III enumerating the Fundamental Rights and Chapter IV dealing with the Directive Principles of State Policy.

**Some Features of Fundamental Rights in India.** The Indian Constitution sets out a most elaborate declaration of human rights as compared with the Bill of Rights contained in any other existing Constitution of importance. The provisions are detailed covering a variety of topics and some are purely the outcome of the peculiar social conditions prevailing in India.<sup>13</sup> Whereas some of the rights granted by the Constitution are limited to citizens, such as freedom of speech, assembly and cultural and educational rights, while in the case of others, as equality before the law, religious freedom, etc., such a limitation does not exist; these are applicable to citizens and aliens alike. The relevant Articles of the Constitution make use of the two terms 'citizens' and 'persons' and they are indicative of the distinction between citizens and aliens. Even in the absence of such a distinction all the rights would not have been available to citizens and aliens alike, but the matter would have remained undecided until the Supreme Court would have determined so.

Some of the provisions of the Fundamental Rights are of the nature of prohibitions and place constitutional limitations on the authority of the State, e.g., no authority of the State can deny to any person equality before the law or the equal protection of the laws, discrimination against any citizen; and no titles other than a military or academic distinction can be conferred. From the point of view of an individual, such rights may be termed as negative rights. The remaining provisions of the Chapter on Fundamental Rights, as such, can be said to contain positive rights of the individuals. In spite of this distinction no clear-cut line of division can be drawn between the two. There is, however, one important distinction between them. The provisions which impose constitutional limitations on the authority of the State are binding for all intents and purposes and any action, legislative or executive, which contravenes any of these provisions would be void altogether. The provisions relating to individual rights, on the other hand, are subject to the regulation of the State within certain prescribed limits and restrictions so imposed cannot be held to be void unless they travel beyond the prescribed limits.

The Fundamental Rights as contained in the Constitution of India place limitations on all kinds of authority that has either the power to make laws or the power to have discretion vested in it. The Fundamental Rights are, accordingly, binding on the Union Government, the State Governments as also the local bodies including the village Panchayats.

13. Articles 15(2), 15(4), and 17.

Dr. Ambedkar explained to the Constituent Assembly the word "State" as used in the Chapter on Fundamental Rights. "The object of the Fundamental Rights", he said, "is two-fold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority... upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the Fundamental Rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government,... they must also be binding upon District Local Boards, Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make by-laws."<sup>14</sup>

Absolute or unrestrained rights, as said before, are not possible. This is the position in Britain, although there are no constitutional guarantees of fundamental rights in that country.<sup>15</sup> In the United States there are no direct restrictions imposed by the First Ten Amendments which determine the American Bill of Rights. But under the doctrine of Police Power the Supreme Court has recognised the inherent power of the State to impose such restrictions on Fundamental Rights as may be deemed reasonable to protect the common good.<sup>16</sup> The final say, however, rests with the Supreme Court to determine whether such restrictions justify the common good or not. There is no doctrine of the "security of the State" in the United States and no legislation can override any individual right on the ground that the safety of the State is in danger. The Constitution of India, on the other hand, imposes direct limitations on Fundamental Rights. Dr. Ambedkar, while introducing the Draft Constitution and supporting the restriction clauses, maintained, "what the Draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the State directly to impose limitations upon the fundamental rights."<sup>17</sup> Courts in India cannot, therefore, question the propriety of legislation once it has been established that it is within the competency of the legislature to make such a law or in any way to modify its effect on the ground that it seeks to "unduly restrict personal liberty."<sup>18</sup>

The Constitution of India, thus, does not recognise the supremacy of the judiciary against the Legislature, although the Constitution gives to the Judiciary the power to review legislation repugnant to the Fundamental Rights. The position before February 1967 was that Parliament would abrogate or abridge Fundamental Rights by amending the Constitution by the provisions of Article 368 and thereby override the unwholesome deci-

14. *Constituent Assembly Debates*, Vol. III, p. 610.

15. *Liversidge v. Anderson* (1942).

16. See *ante*, under the heading: Fundamental Rights in the American Constitution.

17. *Constituent Assembly Debates*, Vol. VII, p. 41.

18. *Lakhinarayan v. Prov. of Bihar* (1949). Also refer to *Gopalan v. The State of Madras*.

sions of the Judiciary simply by securing the requisite special majority, which the Congress Party had commanded in Parliament all those years. The first Amendment of the Constitution in 1951, was necessitated with a view to override a series of decisions rendered by the Supreme Court. It was intended to save the Zamindari Abolition Acts from judicial scrutiny. The Fourth Amendment was enacted with a view to render the question of reasonable compensation for acquisition of estates non-justiciable. In 1961 and 1963, the Supreme Court declared that the Kerala and Madras Land Reform Acts, which provided for a ceiling on land holdings, were bad. In the wake of these declarations the Seventeenth Amendment was enacted in 1964 where 44 laws passed by both the States were included in the Ninth Schedule in order to maintain them valid. A good number of writ petitions challenging the competence of Parliament to enact the Seventeenth Amendment were moved in the Supreme Court. The Supreme Court by a historic 6-5 ruling on February 27, 1967 reversed its earlier decisions and declared that Parliament has no power to abridge or take away Fundamental Rights guaranteed under the Constitution. Chief Justice K. Suba Rao observed, "I have...no hesitation in holding that the Fundamental Rights created by the Constitution are transcendental in nature, conceived and enacted in the national interest and therefore cannot be waived." The Court rejected the Government argument that if the power to amend the Constitution was not all-comprehensive no way would be left to change the structure of the Constitution or to abridge the Fundamental Rights in the event demanding such a change and declared that it "was too extravagant a demand". If such a contingency arises the residuary power of Parliament may be relied upon to call the Constituent Assembly to make a new Constitution or to change it radically.

The resultant position is that the amendment of Fundamental Rights is not forbidden, but the Supreme Court reserves to itself the powers of determining in each specific case whether the amendment in question takes away or abridges the rights. The precariously balanced six to five decision establishes the supremacy of the judiciary so far as Fundamental Rights are involved. The decision affirms what Chief Justice Hughes of the United States once said that "we are under a Constitution, but the Constitution is what the Judges say it is." The Supreme Court of India, like its counterpart in the United States, has become a super-legislature because what is taken away by Justices from Parliament is taken away from the people.

K. Suba Rao reiterated his stand on the Fundamental Rights which he had taken in the **Golak Nath** case.<sup>19</sup> The former Chief Justice of India further maintained that the two instruments provided in the Constitution to preserve the Fundamental Rights of the people, namely,

19. The majority view was expressed by two separate judgments, one by the Chief Justice Mr. K. Suba Rao, for himself and Justices J.C. Shah, S.M. Sikri, J.M. Shefat and C.A. Vaidyalingam and the other by Mr. Justice M. Hidayatullah. The dissenting Justices were Wanchoo, Bhargava, Mitter, Bachawat and Ramaswami.

20. Address delivered to the Students' Representative Council of the University Law College, Nagpur, September 23, 1967. *Hindustan Times*, New Delhi, September 26, 1967.

the provision for proclamation of emergency and the power to amend the Constitution had turned out to be "instruments of destruction." Justice K.N. Wanchoo, who succeeded K. Suba Rao as Chief Justice and was with minority on the Supreme Court's historic decision, on the other hand, said that the Constitution should in order to endure, subserve the needs of generations which came into being after its adoption. Delivering Feroze Memorial Lecture in New Delhi, Mr. Justice Wanchoo said the decision taken by the Supreme Court by a majority of one showed "how the problem of interpretation of the Constitution by the Court may have far-reaching consequences". He affirmed that the contents of the Constitution may change from time to time as new ideas gain force in the body politic of the country and new concepts of law and justice emerge. He added that it was inevitable that the view of life of individual Judges would have an impact when considering the question of Fundamental Rights, but "at the same time it must not be forgotten that the view of the elected legislatures should not be overridden lightly."<sup>21</sup>

The Supreme Court's judgment in the **Golak Nath** case that the Chapter on Fundamental Rights is beyond Parliament's jurisdiction to alter has given rise to a sharp controversy, both in Parliament and outside. Nath Pai, the PSP Member of Parliament, said, "The destiny of India depends on one Judge—that's my quarrel."<sup>22</sup> He, accordingly, introduced the Constitution (Amendment) Bill, 1967, in Parliament for the restoration of what he described the supremacy of Parliament. It is not the Fundamental Rights, he said, which are at stake but the sovereignty of the people of India. He added, "The power to amend the Constitution is an inalienable part of the sovereignty of people. It is this sovereignty that is being challenged by the Supreme Court. My Bill merely seeks to assert that the sovereignty of the people cannot be abridged by a group of judges."<sup>23</sup> The Supreme Court should not sit as a super-legislature, he concluded.

Nath Pai's Constitution (Amendment) Bill was referred by the Lok Sabha to a Joint Select Committee of Parliament on August 4, 1967. Among other amendments in the Bill, the Joint Select Committee recommended that the State Legislatures should also be associated with the amendments of the provisions contained in Chapter III and henceforth all constitutional amendments be ratified by the Legislatures of not less than one-half of the States. The Government is committed to support Nath Pai's Bill. But when the Lok Sabha took up for consideration the Joint Select Committee's Report on November 29, 1968, the Congress and the Opposition both were divided and divergent views were expressed. Nath Pai's Bill is, therefore, as controversial as the Supreme Court's decision in the **Golak Nath** case. The sharp differences in the Congress Party do not augur well for the Bill. S.N. Mishra, a Congress Member of Parliament, declared that he objected to Nath Pai's Bill on three counts: it is a self-defeating measure, and void *ab initio*; it will be nearly impossible to have the Bill passed; and it is absolutely unnecessary.<sup>24</sup>

21. Feroze Memorial Lecture, New Delhi, September 12, 1967. *The Hindustan Times*, New Delhi, September 14, 1967.

22. *The Indian Express*, New Delhi, December 12, 1968.

23. *Ibid.*

24. *Ibid.*



Another important feature of Fundamental Rights in India is that there is a special constitutional provision for their enforcement. The right to move the Supreme Court for the enforcement of Fundamental Rights is itself a guaranteed right as provided for in Article 32. The Supreme Court is, accordingly, the protector and guarantor of Fundamental Rights.<sup>25</sup> The citizen whose rights have been infringed by any public authority in India can move the Supreme Court by appropriate proceedings for the enforcement of his rights and the Court is empowered to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto*, *certiorari*, whichever may be appropriate.<sup>26</sup> The State High Courts have also the power of issuing writs under Article 226 and enforce rights in the same manner within the limits of their respective jurisdictions. Thus, the constitutional remedies for the enforcement of rights are made available to every citizen and within his easy reach.

Fundamental Rights in India can also be restricted or suspended. According to Article 33 the provisions relating to Fundamental Rights may be restricted or abrogated in their application "to the members of the Armed Forces or the Forces charged with the maintenance of public order. The special feature of the Indian Constitution is that the provisions of Article 33 apply not only to the armed forces but also to the ordinary police force who are charged with maintenance of public order. Article 34 further empowers Parliament to pass a law of indemnity, legalising acts done during the operation of martial law which would otherwise have been wrong under the ordinary law. Finally, rights may be suspended during the Proclamation of Emergency as provided in Articles 358 and 359. The Constitution also empowers the President to suspend, under an emergency, the right to move any court of law for the enforcement of any of the Fundamental Rights.

There are no natural or unenumerated rights under the Indian Constitution. This is in sharp contrast to the Constitution of the United States. Amendment IX to the American Constitution provides that "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Supreme Court, accordingly, held that an Act of the Legislature which is contrary to the first principles of social compact will be *ultra vires*.<sup>27</sup> What these principles of social compact are, it is for the courts to determine. In this respect the Supreme Court in the United States assumes the role of a super-legislature. The Constitution of India does not permit so. The Supreme Court in India has definitely held that unless there is an express provision in the Constitution with which the Act of a Legislature conflicts, it cannot be held to be void merely on the ground of its being inconsistent with what the court considers to be the spirit of the Constitution.<sup>28</sup> In other words, a right which has not been enumerated and expressly declared to be a Fundamental Right in Part III of the Constitution is not a

25. *Bomesh Thapar v. The State of Madras*.

26. Article 32(2).

27. *Calder v. Bull*, as per Chief Justice Chase.

28. *A.K. Gopalan v. State of Madras*.



Fundamental Right. It does not, however, mean that there are no rights apart from those included in the Fundamental Rights. But all such rights are ordinary legal rights and not Fundamental Rights and they cannot be enforced in the Supreme Court under Article 32 or in the State High Courts. The legal remedies provided under Article 32 are only applicable to Fundamental Rights. Take, for example, Article 265. It provides that no tax shall be levied or collected except by authority of law. Although this right is a constitutional right, yet it is not a Fundamental Right and it cannot be enforced by the Supreme Court under Article 32,<sup>29</sup> as remedies provided for under Article 32 are only applicable to Fundamental Rights.

Finally, there are the Directive Principles of State Policy as contained in Chapter IV. In considering the question of fixing the Fundamental Rights and incorporating them into the Constitution, the Advisory Committee, appointed by the Constituent Assembly,<sup>30</sup> came to the conclusion that the Fundamental Rights should be divided into two parts—the first justiciable and the other non-justiciable. The non-justiciable rights are put under the heading Directive Principles of State Policy and according to Article 37 they are not enforceable by any Court, “but the principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.” To put it in a more matter of fact language, whereas the Fundamental Rights “are in effect, injunctions prohibiting Government from doing certain things, the directive principles are affirmative instructions to Government to do certain things.”<sup>31</sup>

### SOME SPECIFIC FUNDAMENTAL RIGHTS

**The Right to Equality.** The right to equality guaranteed in Part III of the Constitution has no socialist implication. It is essentially negative in character and is intended to remove the social and civic disabilities from which the masses of India had suffered all through these ages. Democracy can only exist and flourish amongst a society of equals and the Indian Constitution makes social and civic equality as the bedrock of Indian polity. It guarantees equality of all persons before the law,<sup>32</sup> prohibits discrimination on grounds of religion, race, caste, sex or place of birth as between citizens,<sup>33</sup> grants to all equality of opportunity in the matter of public employment,<sup>34</sup> and abolishes untouchability<sup>35</sup> on the one side and titles<sup>36</sup> on the other. Citizens may not be denied admission to educational institutions maintained by the State or receiving aid out of State funds on the grounds only of religion, race, caste, or language.<sup>37</sup> Minorities may

29. *Ramjilal v. Income Tax Officer*.

30. Vide resolution of the Constituent Assembly of January 24, 1947.

31. Gledhill A., *The Republic of India*, op. citd., p. 161.

32. Article 14.

33. Article 15.

34. Article 16.

35. Article 17.

36. Article 18.

37. Article 29.

establish their own schools and government may not discriminate against them in making grants on the grounds of religion, race or language."

Some exceptions are, however, inevitable and the Constitution sets out these exceptions. A legislature may make laws with special provisions for women and children." The Constitution (First Amendment) Act, 1951 further provided that "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." Another exception made is with regard to the equality of opportunity in public employment. Parliament may confine employment under a State or local authority to residents." The States may also provide for the reservation of appointments or posts for members of backward classes which in the opinion of the State are not adequately represented in the services under the State." Offices connected with the religious denominations may be reserved for the adherent of that denomination."

The right to equality, therefore, aims to protect citizens against discriminatory treatment by the State in the fields of administration and legislation, to advance the uplift of the socially backward classes even to the exception of granting them special privileges, and removing other cruder forms of social inequality. It uplifts about 50 million untouchables of India from their age-old degraded social status. Such social customs and disabilities as enforced segregation of the so-called untouchables at wells, in streets, schools and places of worship are declared illegal." In fact, the Constitution bans all kinds of untouchability specified and unspecified.

**The Right to Freedom.** The Right to Freedom is covered by Articles 19 to 22 and embraces the classical liberties of the individual. Of these, Article 19 is the most important as it guarantees seven fundamental rights, which may be described as the seven freedoms, viz., (a) freedom of speech and expression; (b) freedom of assembly; (c) freedom of association; (d) freedom of movement; (e) freedom of residence and settlement; (f) freedom of property; and (g) freedom of profession, occupation, trade or business. All these seven categories of freedom are the most important ingredients of human happiness and progress as without them no individual can rise to the full stature of his personality. The Preamble of almost every Constitution epitomises these freedoms and declares as its objectives. For instance, the Preamble to the Constitution of the United States, *inter alia*, declares "to secure the blessings of liberty to ourselves and to our posterity." The Preamble to the Indian Constitution declares that one of its objectives is to secure "Liberty of thought, expression, belief, faith and worship."

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38. Article 30.

39. Article 15 (3).

40. Amendment to Article 15.

41. Article 16 (3).

42. Article 16 (4).

43. Article 16 (5).

44. Article 15 (2).

Article 19 may be divided into two parts. The first is the declaration of rights and, as said above, contains seven freedoms. The second part contains limitations [clauses (2) to (6)] each governing one or more clauses of the first part. Consistent with the theory that rights can never be absolute, the Constitution imposes specific limitations on their exercise and enjoyment. This is an improvement on the American Constitution which leaves the determination of restrictions and adjustment of conflicting interests of the individual and society to the Courts. The Constitution of India defines the scope of limitations and authorises the State to restrict the exercise of freedoms guaranteed by Article 19 within the restricting clauses of the same Article. It has been maintained that these limitations are, in fact, the partial codification of the American doctrine of Police Power.

The limitations imposed on the freedom to speech and the right to property were substantially modified by the Constitution (First Amendment) Act, 1951. On May 12, 1951, about 16 months after the Constitution had been working, a Bill to amend the Constitution was introduced in Parliament. On May 16, the Prime Minister moved for reference of the Bill to a Select Committee and the Committee reported back on May 25. Parliament started discussion on the Select Committee's Report on May 29 and finally passed the Bill on June 2, 1951. The President assented to the Bill on June 18, 1951 and it became the First Amendment of the Constitution. The main objects for amending the Constitution can best be explained from the Statement of Objects and Reasons attached to the Amending Bill.<sup>45</sup> The Statement read, "During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements especially in regard to the Chapter on Fundamental Rights. The citizen's right to freedom of speech and expression guaranteed by Article 19(a) has been held by some Courts to be so comprehensive as not to render a person culpable even if he advocates murder and other crimes of violence. In other countries with written Constitutions, freedom of the speech and press is not regarded as debarring the State from punishing or preventing abuse of his freedom. The citizen's right to practise any profession or to carry on any occupation, trade or business conferred by Article 19(1)(g) is subject to reasonable restrictions which the laws of the State may impose "in the interests of the general public." While the words cited are comprehensive enough to cover any scheme of nationalisation which the State may undertake, it is desirable to place the matter beyond doubt by a clarificatory addition to Article 19(6)."

The scope of the freedom of speech under the original provisions was, indeed, exceptionally wide. There were only four reservations restricting this right, viz., laws relating to libel, slander and defamation; contempt of court; decency or morality; and security of the State. Thus, "public order" was not one of the purposes for which the freedom of speech could be restricted. Similarly, incitement to an offence was not made one of the objects to restrict the freedom of speech. The Supreme Court held in a series of cases that a law restricting the freedom of speech and not

45. Gazette of India, 1951, Part II—Sec. 2, p. 357.

relating to defamation or contempt of court and not involving offences against decency or morality would be *ultra vires* unless it related to any matter which undermined the security of, or tended to overthrow the State. In *Romesh Thapar v. The State of Madras* it was held that the Constitution "has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it and made their prevention the sole justification of legislative abridgment of the freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify the curtailment of the freedom of speech and expression."<sup>46</sup>

The Amendment of 1951 added three more reservations to the existing list contained in Article 19(2). The new reservations were: friendly relations with foreign States, public order, and incitement to an offence. Article 19(2) now reads: "Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." With the inclusion of the three additional reservations the right to freedom of speech has been considerably curtailed and the scope of interference appreciably widened, provided the Courts could be satisfied about the reasonableness of such restrictions. By reasonable restrictions the Supreme Court has meant such restrictions which are not excessive in nature and beyond what is required in the interests of the public. The Supreme Court has also held that "the determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to supervision by this Court. In the matter of Fundamental Rights the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its functions it has the power to set aside the Act of the Legislature if it is in violation of the freedoms guaranteed by the Constitution."<sup>47</sup>

The Constitution (Sixteenth Amendment) Act, 1963, added the Sovereignty and integrity of India" as one of the grounds in the interests of which Legislatures could impose reasonable restrictions on freedom of speech and expression. Asoke Sen, the Law Minister, while moving a motion to refer the Constitution (Sixteenth Amendment) Bill to a Joint Committee of Parliament, said in the Lok Sabha on January 22, 1963, that powers were also being taken to impose restrictions on those individuals or organisations who wanted to make secession from India as political issues for the purposes of fighting elections. This, he maintained, had become necessary as some decisions of the Supreme Court had made it clear that Article 19 of the Constitution in its present form was not enough to ban secessionist activity. He also said that it was also being provided that any person who wanted to stand as candidate for a seat in the Assembly in a State or in the Lok Sabha or a State Council or the

46. Refer to *Romesh Thapar v. The State of Madras*; and *Brij Bhushan v. The State of Delhi*.

47. *Chintamanras v. The State of Madhya Pradesh*.



Rajya Sabha should take an oath pledging himself to uphold the sovereignty and integrity of India. This would ensure that no candidate would make secession a political issue in the elections. Further, after elections, every member would have to take another oath pledging himself to the same thing, namely, upholding the sovereignty and integrity of India.<sup>48</sup>

Other rights guaranteed by Article 19 may be briefly stated. Freedom of assembly is subject to reasonable restrictions in the interests of public order.<sup>49</sup> The right to form associations or unions is subject to reasonable restrictions in the interests of public order or morality.<sup>50</sup> The restrictions, thus, imposed on the freedom of assembly and to form associations must, in the first place, be reasonable, and secondly, be in the interests of public order or morality. In the State of Madras v. V.G. Row, Chief Justice Patanjali Sastri observed, "The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic field that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed. . . . The formula of subjective satisfaction of the Government or of its officers with an Advisory Board thrown in to review the material on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions of Fundamental Rights." It was, accordingly, held that Section 15(2) of the Criminal Law Amendment Act, 1908 as amended by the Criminal Law Amendment (Madras) Act, 1950, was *ultra vires* as the impugned provision imposed unreasonable restrictions on the freedom of association. The Constitution (Sixteenth Amendment) Act, 1963, amended clauses 3 and 4 of Article 19, precisely providing that the State could pass laws imposing reasonable restrictions on the exercise of the right to assemble peaceably and without arms and on the right to form associations or unions, if such restrictions were in the interests of the sovereignty and integrity of India.

The right to move freely is the right of movement unchecked and unrestricted anywhere within the territories of the Indian Union, subject to such restrictions as are imposed by any existing law or such as the State may in future impose in the public interest or to safeguard the interests of any scheduled tribe. In times of emergency, such as war, every citizen cannot claim as a matter of right access to places considered of military or strategic importance. Similarly, when an epidemic spreads in one part of the country, people may be prohibited by law from entering or leaving such affected area in the interest of public health. The freedom of movement also does not take away the right which law gave to the

48. *The Indian Express*, New Delhi, January 24, 1963, p. 4.

49. Article 19 (3).

50. Article 19 (4).



government to exclude any person from any part of the country for a particular period in the interests of maintenance of law and order, as also the right to detain any person for sufficient grounds if the public interest demands it.<sup>50</sup>

Allied to the right of free movement is the right to reside or settle in any part of the territory of India, and to acquire, hold or dispose of property, limited, of course, by reasonable restrictions in the interests of general public or for the protection of the interest of the scheduled tribes. These rights are characteristic of every free nation.

Finally, the right to practise any trade or profession is subject to the right of the State to prescribe professional or technical qualifications to enable a citizen to become a lawyer or an engineer. This restriction is natural and necessary. The Constitution (First Amendment) Act, 1951, further empowered the State to reserve to itself the right to carry on any trade, business, industry or service either directly or through State controlled corporations to the complete or partial exclusion of private citizens. This amendment was necessitated because of the judgment of the Allahabad High Court in *Motilal v. The Government of Uttar Pradesh*. The U.P. Motor Vehicles Act, 1939 was challenged in the Court as it conflicted with Article 14 of the Constitution. The Allahabad High Court decided that it could not allow the exemption of transport vehicles owned by the State Government from Section 43(3)(a) of the Motor Vehicles Act which required that all vehicles should be used in accordance with the conditions of permits granted by the Regional or Provincial Authority. The purpose of the amendment was explained by the Union Law Minister during the course of debate on the Amendment Bill. He said that the State Governments would gradually take the nationalization hence it was necessary that the Constitution should be amended to provide authority for the same.\*

It shall, therefore, be obvious that under the amended Clause (6) the restrictions on the right of carrying on any trade or profession, etc., fall into three classes: (a) reasonable restrictions imposed under the general power in the interests of the general public; (b) restrictions in the form of professional or technical qualifications; and (c) any law relating to carrying on of trade or business, industry or service, by the State or by a corporation owned or controlled by the State. It must be noted that restrictions imposed in the interests of general public give a very wide scope for interference and can include all matters affecting public welfare, such as public safety, public health, public morals, etc.

**Personal Liberty.** The rights guaranteed in Articles 20—22 relate to the individual's personal liberty and collectively come under the sub-heading "Right to Freedom." These rights strengthen the liberties conferred on citizens under Article 19. Article 20 deals with certain Fundamental Rights of a person accused of a crime and embodies certain important principles of criminal jurisprudence. Clause (1) of the Article embodies the principle that no one should be made to suffer any punish-

51. *N.B. Khare v. State of Delhi*, 1950.

52. *A. K. Gopalan v. State of Madras*, 1952.

ment for an offence under any law not in force at the time of the commission of an offence. Similarly, no person shall be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The second clause embodies the fundamental principle that no one should be placed in jeopardy twice for the same offence. The principle underlying this clause is the same as it underlies the "double jeopardy" clause of the American Constitution, though the words used are different. The third clause gives effect to the principle that no one should be compelled to give evidence against himself in a criminal case. This clause follows the language of the Fifth Amendment of the Constitution of the United States, though the rule laid down in the Indian Constitution is "narrow than the American rule as expanded by interpretation."<sup>53</sup>

Article 21 guarantees to every person the most essential of all rights, the right to life and personal liberty, which the Article says cannot be taken away except according to procedure established by law. The Constitution permits the continuance of preventive detention, but only in accordance with the laws providing for it. The Article is not intended to be a constitutional limitation upon the power of the Legislatures. "Its object is simply to serve as a restraint upon the Executive so that it may not proceed against the life or personal liberty of the individual save under the authority of some law and in conformity with the procedure laid therein." The procedure so laid down must be in conformity with Article 22 of the Constitution.

The provisions of Article 21 are analogous to the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States. Under the Fifth Amendment no person shall be deprived of life, liberty or property without due process of law and under the Fourteenth Amendment no State shall deprive any person of life, liberty or property without due process of law. The Indian Constitution gives the right to property a separate treatment and substitutes for "due process of law" "procedure established by law." The words "procedure established by law" have been borrowed from Article 31 of the Japanese Constitution of 1946.<sup>54</sup>

Article 22 of the Constitution gives certain constitutional rights to arrested persons and also lays down certain fundamental rules with regard to preventive detention. It should be noted here that provisions relating to preventive detention are peculiar inasmuch as that the Constitution of India permits resort to preventive detention even in peace time. In other democratic countries preventive detention is usually a method resorted to in emergencies like war.<sup>55</sup>

Preventive detention for reasons connected with the security of the State, or the maintenance of public order, or of supplies and services, is

53. Basu, Durga Das, *Commentary on the Constitution of India*, op. cit., p. 149.

54. Article XXXI of the Japanese Constitution says, "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed except according to procedure established by law."

55. *A.K. Gopalan v. The State of Madras*.

on the Concurrent List," but preventive detention for reasons connected with defence, foreign affairs, or the security of the Union, is within the exclusive competence of Parliament."

Ordinarily an Act may not authorise detention for longer than three months unless within that period an Advisory Board, composed of persons qualified for appointment to a High Court, holds that there is a sufficient cause for further detention up to a limit set by Parliament which may, in specified circumstances, or in respect of certain specified classes of cases, authorise detention without resort to the Advisory Board for periods exceeding three months.<sup>56</sup>

Every detenu has a constitutional right to be informed of the grounds of detention, and to the earliest opportunity of making representations against the order of detention,<sup>57</sup> but the authority issuing the order may withhold such facts if he considers it contrary to the public interest to disclose.<sup>58</sup> Replying to the criticism Dr. Ambedkar agreed that Article 22 excepted certain cases from the purview of the Advisory Board, but he felt that it was necessary to make such a distinction because there might be particular cases of detention in which the circumstances were so severe and the consequences so dangerous to the very existence of the state that it would not even be desirable to permit the members of the Board to know the facts. Even in cases so excepted from the purview of the Board, Ambedkar added, there were two mitigating circumstances: (i) such cases were to be defined by Parliament and not by the Executive arbitrarily; and (ii) in every case the maximum period of detention would have to be prescribed by law.<sup>59</sup>

**Right Against Exploitation.** Article 23 and 24 come under the sub-heading right against exploitation. Article 23 categorically prohibits all traffic in human beings and **begar** and other similar forms of forced labour. "Traffic in human beings" is evidently a very wide expression and would embrace not only the prohibition of slavery but also traffic in women for immoral or other purposes. Contravention of this prohibition has been made an offence punishable in accordance with law. Clause (2) of Article 23, however, provides for the power of the State to impose compulsory service for public purposes. The word public service has nowhere been defined, but it must include an object or aim in which the general interest of the community, as opposed to particular interests of individuals, is directly and vitally concerned.<sup>60</sup> It will be instructive to note that in America it has been held that the State has inherent power to require any able-bodied man within its jurisdiction to labour for a reasonable time on public roads near his residence without direct compensation.<sup>61</sup> In the United States, military service is a public service. The Supreme Court

56. Concurrent List, Item 3.

57. Union List, Item 9.

58. Article 22 (iv).

59. Article 22 (v).

60. Article 22 (vi).

61. *Constituent Assembly Debates*, Vol. XI, pp. 575-76 and 600.

62. *State of Bihar v. Kameshwar Singh*.

63. *Butler v. Perry*.

observed in *Arver v. United States* that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." In India "compulsory service for public purposes" must likewise include military service as it is clearly a service for a public purpose to maintain the integrity and sovereignty of the State.

Article 24 ordains that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Here the Indian Constitution goes ahead of the American Constitution as there is no express prohibition against the employment of children in any factory or mine or in other hazardous occupations.

**Right to Freedom of Religion.** The particular religious rights contained in Articles 25—28 have a wide scope, and they cover both the personal and social aspects of religion. These rights are equally enjoyed by all persons living in India, citizens and aliens. The Constitution guarantees to all persons the right of freedom of conscience, and to profess, practise and propagate any religion subject to the prescribed limitations. Religious institutions being on the Concurrent List, the right to freedom of religion does not, accordingly, prevent the State Legislatures from making any law regulating or restricting any economic, financial, political or other secular activity of a religious body, nor render invalid Acts throwing open public religious institutions formerly reserved for a section of the adherents of any one of the Hindu, Sikh, Jain or Buddhist religions to all adherents of that religion. All religious denominations are 'guaranteed autonomy, the right to establish institutions, and the right to acquire and deal with property, but only subject to public order, health and morality.'<sup>64</sup> No one can be compelled to pay taxes for the propagation or maintenance of any religion,<sup>65</sup> and religious instruction is not to be given in schools and colleges wholly maintained out of government revenues. But religious instruction may be imparted in private institutions receiving a grant from public funds or recognised by the State provided no pupil is given religious instruction or to attend religious worship in a building attached to the institution without his consent, or, if he is a minor, his guardian's consent.<sup>66</sup>

**Cultural and Educational Rights.** Article 29 guarantees to every minority or section of the people to preserve its language, script and culture notwithstanding the provisions of Article 343 under which the official language of the Union shall be Hindi in Devnagari script. Clause (2) of the same Article provides that no citizen may be denied admission to State and State-aided educational institutions on the grounds only of religion, race, caste, or language.<sup>67</sup> All minorities whether based on religion or language have the right to establish their own schools and Government

64. Article 26.

65. Article 27.

66. Article 28.

67. In *State of Madras v. Champakam Dorairajan* the Supreme Court held that a State Government has no power to fix the number of seats available for admission into Government educational institutions according to the caste or religion of the applicants for admission.

shall not discriminate against them in making grants on the grounds of religion, race or language."

**Right to Property.** Article 31 recognise as a matter of Fundamental Right the sanctity of private property. Under Article 19 every citizen is assured the right to acquire, hold and dispose of property. Under Clause (1) of Article 31 every person is guaranteed the right not to be deprived of his property except by authority of law. No one can, accordingly, be deprived of his property merely by an Executive action and even the Executive acts under the authority of law its action is repugnant to Article 31 of the Constitution and hence void. Clause (2) of Article 31 further provides that no property should be acquired by the State or requisitioned by the State except for public purposes and on payment of compensation. Clauses (3) to (6) and Articles 31A and 31B are concerned with the exceptions to the general provisions of acquisition and requisition of property by the State for public purposes and compensations to be paid thereto. Articles 31A and 31B were incorporated by the Constitution (First Amendment) Act, 1951. The effects of these Articles are very wide and were intended to validate the acquisition of **Zamindaries** on the abolition of Permanent Settlement without interference from Courts. Article 31A provides that no law, past or future, affecting rights of any proprietor or intermediate holder in any estate shall be void on the ground that it is inconsistent with any of the Fundamental Rights contained in Part III of the Constitution. That is to say, no law shall be liable to challenge in a Court on the ground that no compensation has been provided for or that there is no public purpose or that it violates some other provisions of Part III of the Constitution. The Article, accordingly, overrides the decision of the Patna High Court in **Kameshwar Singh v. State of Bihar** wherein it was held that whether a particular piece of land is for a public purpose is a matter which is not beyond the scrutiny by the Courts, and since the Bihar State Management of Estate and Tenures Act 21 of 1949 was not for a public purpose, it was not valid. Article 31B was inserted by way of "abundant caution" to save the Acts in the Ninth Schedule of the Constitution notwithstanding any decision of a Court or tribunal that any of these Acts is void for contravention of any of the Fundamental Rights. The Article, however, reserves the power of a competent legislature to repeal or amend any of the Acts included in the Ninth Schedule.

With regard to compensation, the Constitution of United States and Australia<sup>68</sup> provide for payment of just compensation and Courts in both the countries have held that the determination of "just" compensation is a matter for the Courts and not for the Legislature or the Executive.<sup>69</sup> The

68. Article 30.

69. A similar opinion was held by the Pepsu High Court in *Prillo Singh v. The State*. On the other hand it was held in *Asrar Ahmad v. State of Ameer* that where a House is requisitioned under Section 3 of the U.P. (Temporary) Accommodation Requisition Act 25 of 1947, as extended to Ameer, the decision of the District Magistrate that the House in question was required for a public purpose was final and the High Court could not go beyond the finding.

70. Fifth Amendment.

71. Section 51 (31).

72. See *Board Air Line Co. v. U.S.* (1923), *Australian Marketing Board v. Tonking* (1942).



Constitution of India, on the other hand, gives final authority to the Legislature "subject only to the scrutiny of the Courts in cases of frauds on the Constitution, e.g., where the provision was merely a cloak for a confiscatory legislation, or where the legislature seizes property without referring to compensation at all."<sup>73</sup>

The Patna and Calcutta High Courts, however, held otherwise. In *Kameshwar Singh v. The State of Bihar* the Patna High Court held that the omission of the word "just" or "fair" does not make the question of amount of compensation non-justiciable. A similar opinion was held by the Calcutta High Court.<sup>74</sup> If the amount which a law gives by way of compensation be not just or reasonable then it cannot be regarded as compensation within Clause (2) of Article 31 and the law is, accordingly, *ultra vires*.

These decisions were endorsed by the Supreme Court. In December 1953 the Supreme Court reversed the opinion of the Bombay High Court in *Dwarkanadas Shrinivas v. Sholapur S. & W. Co.* and held that the *Sholapur Mills Ordinance and Act* were *ultra vires* under Article 31. The need for amending Article 31, thus, became obvious and the Constitution (Fourth Amendment) Bill was passed on April 12, 1955 by an overwhelming majority of 302 votes against 5.<sup>75</sup> Before the final voting, Prime Minister Nehru declared that the Bill would remove certain difficulties in their way and would make it easier for them to bring about the desired changes in "their social structure without injuring any interest. The object of the amendment can best be explained in the words of the Prime Minister. "We are not suggesting", observed Nehru, "any arbitrary, confiscatory or expropriatory action. In fact the law provides that acquisition of property be by law, and compensation should be paid. But the quantum of compensation will be determined by the legislature. I cannot say off hand, what the legislature might do in a particular case, but by and large, if you think of governing this country democratically, you should trust the legislature."<sup>76</sup> The Prime Minister further maintained that the Amendment did not completely abolish the jurisdiction of the Supreme Court in the matter of compensation but only limited it. Nehru, however, expressed the hope that while interpreting the laws, the Supreme Court will take full cognisance of the "new atmosphere" in the House and the country about "this business of compensation"<sup>77</sup> and should not attempt to act as a "third House of Parliament." The effect of the Constitution (Fourth Amendment) Act was: (i) provision was made for acquisition and requisitioning; and (ii) it was expressly stated that no law would be called in question in any court on the ground that the compensation was unjust. A new clause (2-A) laid down that the obligation to pay compensation would not arise unless either the ownership or right to pos-

73. Basu, Durga Das, *Commentary on the Constitution of India*, p. 215.

74. *West Bengal Settlement Kamungo's Co-operative Credit Society Ltd. v. Bella Banerjee* (1951).

75. The Bill was referred to the Select Committee on March 15, 1955 by 322 votes against 9 in the Lok Sabha.

76. Speech in the Lok Sabha on April 11, 1955, moving the Bill for consideration as reported by the Select Committee. *The Tribune*, Ambala Cantt., April 12, 1955, p. 1, col. 7.

77. Speech in the Lok Sabha, March 15, 1955. *The Tribune*, Ambala Cantt., March 16, 1955.

session of the individual was transferred to the State or to a corporation owned or controlled by the State.

The Supreme Court in 1964 again struck at the validity of the Kerala and Madras Land Reforms Acts which fixed ceiling on land holdings. This led to the passing of the Seventeenth Amendment by virtue of which 44 Acts of the States were included in the Ninth Schedule in order to maintain them valid in spite of the Judgment of the Supreme Court. The competence of Parliament to enact the Seventeenth Amendment was challenged and the Supreme Court in **Golak Nath** case decided by a majority Judgment that Fundamental Rights were beyond the reach of Parliament and none of the Fundamental Rights enshrined in Part III of the Constitution can be taken away or abridged by Parliament by amending the Constitution under Article 368. The Court also held that the First, Fourth and Seventeenth Amendments which validated laws violating the Fundamental Rights had infringed the injunctions contained in Article 13(2) and therefore void and unenforceable.

But the Justices representing the majority opinion felt that by disturbing the previous Amendments a chaotic situation of law and legal authorities might result in the country. Therefore Chief Justice Suba Rao by applying the American doctrine of "Prospective Overruling" preserved the past but protected the future so that similar onslaughts on the freedoms of the individuals might not be made. Mr. Justice Hidayatullah, who concurred with the majority opinion and reached the same conclusion to preserve the existing arrangements, did not rely on the doctrine of "Prospective Overruling." He relied upon the doctrine of "acquiescence" which implied that whatever Amendments with regard to Fundamental Rights had been made were valid but in future Parliament could not abridge or change them.

**Right to Constitutional Remedies.** Article 32 of the Constitution guarantees to every citizen to move the Supreme Court for the enforcement of all the Fundamental Rights. And for that purpose the Supreme Court is given general power to safeguard the Fundamental Rights as well as the power to issue directions or orders or writs, including writs in the nature of **habeas corpus**,<sup>78</sup> **mandamus**,<sup>79</sup> **prohibition**,<sup>80</sup> **quo warranto**<sup>81</sup>

78. Denning Prospective Overruling, in the majority opinion, the Chief Justice observed, "It is a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of *Stare decisis*, but confines it to the past transactions...."

79. **Habeas Corpus** is intended to protect the citizen from unlawful arrest and detention, particularly at the order of the executive. Detention is permitted vide Article 22 of the Constitution and for an application under **habeas corpus** to succeed, it is necessary to show that there is no constitutionally valid law authorising the detention, or that the detention is not a bona fide exercise of the powers given by the law invoked to justify it.

80. **Mandamus** is used to enforce the performance of a public duty by an official. It is not available if there is any other adequate legal remedy.

81. **Writ of Prohibition.** Prohibition and certiorari are appropriate to complaints of excess of jurisdiction. Prohibition is intended to prevent a inferior court or tribunal dealing with a matter over which it has no jurisdiction.

82. **Quo Warranto** is issued for the purpose of determining the right of a person in office to hold on to that office. Quo Warranto will be issued only at the instance of the Union or a State Government.

and *certiorari*<sup>83</sup> whichever may be appropriate for the enforcement of any of the rights conferred by Part III of the Constitution.

The provision relating to the Constitutional remedies was described by Dr. Ambedkar as the "heart and soul of the Constitution." In fact, a declaration of Fundamental Rights is meaningless unless there are effective judicial remedies for their enforcement. In Britain, individual rights are safeguarded, although there is no declaration of Fundamental Rights in that country, by means of the "prerogative writs" which have been called by Dicey "the bulwark of English Constitution." In the Constitution of the United States there is no specific provision for the issue of these writs. The Fathers of the Constitution had assumed that these Common Law writs would be available in the United States and, as such, they specifically prohibited against the suspension of *habeas corpus*.<sup>84</sup>

But in India while a Proclamation of Emergency is in operation, Fundamental Rights relating to the seven freedoms stand automatically suspended.<sup>85</sup> The President may also suspend the right to move Courts to enforce any other Fundamental Right but such an order must be laid before Parliament according to the requirements of the Constitution.<sup>86</sup>

### DIRECTIVE PRINCIPLES OF STATE POLICY

✓ The Directive Principles. Part IV of the Constitution contains certain Directive Principles of State Policy which are declared fundamental in the governance of the country.<sup>87</sup> These Directive Principles are intended to lay down in general terms the objects which the framers of the Constitution desired that the Governments, at the Centre and in the States, should pursue in guiding the destinies of the nation. They are in the nature of affirmative instructions to Governments to direct their activities to do certain things and thereby promote the realization of the high ideals set forth in the Preamble of the Constitution. The Preamble declares the resolve to secure to all citizens social, economic, and political justice, liberty of thought, expression and belief, equality of status and opportunity, and fraternity, assuring the dignity of the individual and unity of the nation. Speaking about the purpose of the Chapter on the Directive Principles of State Policy, Dr. Ambedkar said in the Constituent Assembly, "In enacting this part of the Constitution, the Assembly is giving certain directions to the future legislature and the future executive to show in what manner they are to exercise the legislative and the executive power they will have. Surely it is not the intention to introduce in this

83. *Certiorari* is available when a tribunal acts without jurisdiction as well as when it exceeds jurisdiction. It, thus, enables proceedings before an inferior Court to be quashed or transferred to a competent court. Both Prohibition and *Certiorari* govern, accordingly, judicial as opposed to ministerial acts.

84. Article I, Sec. 9(2). It can, of course, be suspended while the public safety is endangered by rebellion or invasion.

85. Article 358.

86. Article 359.

87. Article 37.

part these principles as mere pious declarations. It is the intention of this Assembly that in future both the legislature and the executive should not merely pay lip-service to these principles but that they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the country."<sup>88</sup>

The idea of making constitutional declaration of social and economic policy is the recognition of the ideal of service State in place of the regulatory State. It originated with the Weimar Constitution. Since then most of the democratic countries have included such declarations of policy in their Constitutions.<sup>89</sup> But all these Constitutions, except that of the Eire, did not distinguish between justiciable and other rights. The Constitution of Ireland separates the justiciable rights of the individual from the non-justiciable social policy<sup>90</sup> and the Indian Constitution follows the example of Ireland, though the Irish themselves had taken the idea from the Constitution of the Republic of Spain, which was the first ever to incorporate such principles as a part of her Constitution. The importance of the Directive Principles has since been fully realised and quite a few States, Burma, Indonesia, Nepal, Thailand and Pakistan, have incorporated them in their Constitutions.

✓ **The Directive Principles and Fundamental Rights.** The Directive Principles of State Policy are in many cases of wider import than the Fundamental Rights. Whereas the Fundamental Rights are, in effect, negative injunctions to the Government not to do certain things, the Directive Principles are positive commands to the Government to promote social welfare through corrective or constructive measures. But the Directive Principles differ in one vital respect from the **Fundamental Rights**. The former are non-justiciable whereas the latter are justiciable. That is to say, the Fundamental Rights are enforceable by the Courts as they are **mandatory**,<sup>91</sup> while the Directive Principles are declaratory and have expressly been excluded from the purview of the Courts.<sup>92</sup> If the Government does not take any positive action in promoting the objects set forth in the Directive Principles no action can be brought against it in a Court of law. But the Courts are bound to declare as void any law that is inconsistent with the provisions of any of the Fundamental Rights. The Courts cannot, on the other hand, declare any law void, which is otherwise valid, on the ground that it contravenes any of the Directives. In case of conflict between Fundamental Rights and Directive Principles the former will prevail in the Courts. The Supreme Court in the **State of Madras v. Champakan Dorairajan** held: "The Directive Principles of State policy which are expressly made unenforceable by a court cannot override the provisions in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or Directions under Article 32. The Chapter on Fundamental Rights is sac-

88. *Constituent Assembly Debates*, Vol. VII, p. 382.

89. The Constitutions of Austria (1929), Spain (1931), Eire (1937), Brazil (1942), France (1946), Italy (1947), Burma (1948), and Germany (1949).

90. Article 45.

91. Article 32.

92. Article 37.



rosanct and not liable to be abridged by any Legislative or Executive act, or order except to the extent provided in the appropriate Article in Part III. The Directive Principles of State Policy have to conform to and run subsidiary to the Chapter on Fundamental Rights. . . . That is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the Legislative and Executive powers and limitations conferred on the State under different provisions of the Constitution." In *Golak Nath* case the Supreme Court rejected the argument of the Government that if Parliament was not given the power to amend the Constitution it would be difficult to implement the Directive Principles of State Policy and there would be revolution in the country. The majority judgment declined to take decision on such hypothetical situations and held, "If it is the duty of Parliament to enforce the Directive Principles it is equally its duty to do so without infringing upon the Fundamental Rights. The Constitution-makers thought that it could be done and we also think: That the Directive Principles could reasonably be enforced within the self-regulatory machinery provided by Part III of the Constitution." But it is to be noted that the Directive Principles constitute the national policy of the country which the representatives of the nation assembled in the Constituent Assembly formulated and enshrined in the Constitution. "Far from being a proclamation or promulgation of principles, the Directives constitute a pledge by the framers of the Constitution to the people of India and a failure to implement them would constitute not only a breach of faith with the people but would also render a vital part of the Constitution practically a dead letter."<sup>93</sup>

The Directive principles of State Policy are in the nature of Instrument of Instructions, which both the Legislature and Executive authorities are expected to respect and follow, in enacting legislation to implement these "directive principles" and incorporate their spirit in the laws hereafter to be placed on the statute book. The Chairman of the Drafting Committee made this point expressly clear in the Constituent Assembly. Dr. Ambedkar observed, "The Directive Principles are like the Instrument of Instructions which were issued to the Governor-General and to the Governors of the Colonies and to those of India by the British Government under the 1935 Act. What is called 'Directive Principles' is merely another name for Instrument of Instructions. The only difference is that they are instructions to the Legislature and the Executive. Such a thing to my mind should be welcomed. Wherever there is a grant of power in general terms of peace, order and good government, it is necessary that it should be accompanied by instructions regulating its exercise."<sup>94</sup> Com-

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93. Markandan, K.C. *Directive Principles in the Indian Constitution*, pp. 147-48.

94. *Constituent Assembly Debates*, Vol. VII, p. 41. Also refer to the Full Bench decision delivered by Chief Justice Chagla in *Firm Nuserwan, of Balsara v. State of Bombay* (1951).



menting on Article 32<sup>a</sup> of the Constitution of Burma, which contains provisions similar to Article 37 of the Indian Constitution, B.N. Rau maintained that "they are in the nature of moral precepts for the State authorities and are open to the facile criticism that the Constitution is not the place for moral precepts. But they have an educative value and most modern Constitutions lay down general principles of this kind. They correspond to the Instrument of Instructions with which we are familiar in the Indian Constitution; only, instead of being addressed to the Governor-General or the Governor they are addressed to all State authorities, legislative or executive."<sup>b</sup>

**Value of the Directive Principles.** The Directive Principles of State Policy have been variously criticised. It has been asserted that their inclusion in the Constitution is out of place for want of enforceability. The Directive Principles are, accordingly, nothing more than a political manifesto, devoid of any constitutional importance. Nasiruddin, a member of the Constituent Assembly, characterised them as a set of new year resolutions. Prof. K.T. Shah likened them to a cheque on a bank payable at the convenience of the bank. Dr. Wheare, Gladstone Professor of Government and Public Administration at the University of Oxford, described them as "a little more than a manifesto of aims and aspirations." He is of the opinion that a Constitution should include only those provisions which can be capable of enforcement and are, thus, obligatory on the State. The criticism offered by Jennings seems to be unfair when he says, "The ghosts of Sidney and Beatrice Webb stalk through the pages of the text. Part IV of the Constitution expresses Fabian Socialism without the Socialism, for only the 'nationalization of the means of production, distribution and exchange' is missing: but nationalization for the Fabians was a means to an end and not the end itself, the end is quite adequately expressed in the Constitution."<sup>c</sup> At another place Dr. Jennings questions the reasonableness of inserting in a Constitution a collection of political principles which "obviously derive from English experience in the nineteenth century and are deemed to be suitable for India in the middle of the twentieth century." He remarks that the ideas expressed in Part IV will survive for a generation and some of them may even survive for a longer period. "The question whether they are suitable for the twenty-first century, when the Constitution may still be in operation, cannot be answered, but it is quite probable that they will be entirely outmoded."<sup>d</sup>

But, though the Principles enunciated in Part IV are not directly enforceable, it would be too cynical a view to take that they have no value. The aim of such constitutional declarations, as it has been said before, is to anchor the human rights of the Welfare State in the Constitution. The Directive Principles of State Policy declare the ideal of the Welfare State and emphasise that the regulatory State of the past has

95. It provides: "The principles set forth in this chapter are intended for the general guidance of the State. The application of these principles in legislation and administration shall be the care of the State but shall not be enforceable in any court of law."

96. *India Quarterly*, Vol. IV, p. 112.

97. *Some Characteristics of the Indian Constitution*, p. 31.

98. *Ibid.*, p. 33.

given place to the Service State of the present day. Article 38 clearly prescribes that "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." The State shall, in particular, direct its policy so that wealth, its source of production, and its means of distribution shall not be concentrated in the hands of a few, but shall be distributed so as to subserve the common good; there shall be adequate means of livelihood for all, and labour shall not be exploited or forced to operate in inhumane conditions; the standard of living shall be raised, and public health improved; public assistance shall be provided for the sick, disabled and aged; there shall be free and compulsory primary education; agriculture shall be improved and organised.<sup>99</sup>

The aim of the Constitution, in short, is to establish a State which shall be a democracy not only in the political field where legislative authority is based on adult franchise and the executive is parliamentary, but also to promote a Welfare State where social and economic democracy, as Dr. Ambedkar put it, shall prevail.<sup>100</sup> Article 36 lays down that "the State shall strive to promote the welfare of the people...." Dr. Ambedkar stated in the Constituent Assembly that the word "strive" had been purposely used "because their intention was that however adverse the circumstances that stand in the way for Government in giving effect to these principles and however improptitious the time might be they should always strive for the fulfilment of the principles. Otherwise it would be open to the Government to say that circumstances were not good and the finances were so bad that they could not implement them."

There is a definite advantage in not making the Directive Principles enforceable and, accordingly, rigid. The Directive Principles require positive action on the part of the State to secure justice, social, economic and political. Actions of the State are the product of time and circumstances. Time moves on, circumstances change rapidly and so does our concept of justice. If the State policy is to adequately cater to the needs of the people and be in accordance with their sense of justice, it is neither expedient nor practicable to make the Directive Principles enforceable and, therefore, rigid. At the same time, they provide an element of permanency in democracy and make it possible for the parties of the Right and the Left to strive in their own way to reach the ideals of social and economic democracy whenever they get an opportunity to form the government after having received the verdict of the people at the polls. Dr. Ambedkar said in the Constituent Assembly: "We have deliberately introduced in the language that we have used in the Directive Principles, something which is not fixed or rigid. We have left enough room for the people of different ways of thinking, with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy; the fullest opportunity to act in the way in which they want to act."<sup>101</sup>

99. Articles 39 and 41.

100. *Constituent Assembly Debates*, Vol. VII, pp. 494-95.

101. *Ibid.*

The Directive Principles, though not directly enforceable, are bound to affect decisions of Courts on constitutional matters. Being a part of the Constitutional Scheme, the Directive Principles do not, in the words of the late Chief Justice Kania, "represent a temporary will of a majority, but the deliberate wisdom of the nation expressed through the Constituent Assembly entrusted with the duty of settling the paramount and permanent law of the country." As the Directive Principles are a part of the Constitutional Scheme and the political, social and economic ideals expressed therein are fundamental in the governance of the country it, *ipso facto*, becomes the duty of the courts to safeguard them "from the vicissitudes of fortune of political parties who may come into and go out of power from time to time." The Directive Principles are intended to impart continuity to the national policies and it is for the Courts to see that this continuity does not become the plaything of party politics and retard at any stage.

Moreover, many of the Fundamental Rights are subject to reasonable restrictions in the interests of public. In interpreting these rights, which are justiciable, the Courts have the obligation to lay down the canons for determining what is *reasonable* and a *public interest* and while doing so they must take cognizance of the Directive Principles as the Constitution holds them fundamental in the governance of the country. This point has been clearly explained in *Surayopal Singh v. Government of Uttar Pradesh*: "The distinction between public purpose and public policy may be well founded if by public policy is meant no more than the policy of the political party which then holds office. But the distinction ceases if by public policy is meant State policy or the policy solemnly laid down in the Constitution, the principles of which are declared to be fundamental to the governance of the country. A law made for the purpose of securing an aim declared in the Constitution to be a matter of State policy would be a public purpose. If, therefore, the acquisition of property sought to be effected by the U.P. Zamindari Abolition and Land Reforms Act, 1 of 1951, is for the purpose of implementing one or more of the Directive Principles of State policy it will be for the public purpose within the meaning of the Constitution and it will not be necessary for the courts to consider whether for other purposes it comes within the meaning which the law has given to that expression. In seeking to answer this question the court is not concerned with the wisdom of the means embodied in the Act to carry into effect the purpose of the Legislature; that it will neither approve nor condemn. The acquisition of the property effected by the U.P. Act has for its object the implementation of one or more of the Directive Principles of State policy and is, therefore, for a public purpose."

The mere fact, therefore, that a principle is not enforceable in a court of law does not deprive it of the Constitutional sanctity. Its violation is as much unconstitutional as a violation of a principle or provision which can be enforced in a court of law. If the Government pursues a policy which conflicts with the Directive Principles, it acts unconstitutionally, that is, contrary to the Constitution. And no ministry responsible to the

people can afford light-heartedly to do so. Alan Gledhill rightly observes, "If the Indian Constitution becomes vested with the cope of sanctity essential to its durability it will be difficult for any public figure to propose any important legislative measures without making any appeal to the Fundamental Rights or the Directive Principles. Measures will be attacked by the opposition as 'unconstitutional' in so far as they conflict with the Directive Principles."<sup>103</sup>

The Government in a parliamentary system of government is ever under scrutiny. The people and their leaders jealously scrutinize the actions of the Government and they measure its success or failure in the light of its achievements as prescribed by the Constitution. If the Government pursues a policy which is in accordance with the principles enunciated in the Constitution and caters to their sense of justice they would endorse its policy and allow it to continue in office. If it does not, the Government goes out of office. Thus, the vigilant public opinion operates as the sanction behind the Directive Principles. It follows, then, that although the Principles enunciated in Part IV of the Constitution lack, in the strictly legal sense, direct enforceability through the courts, they surely carry the sanction of public opinion as expressed in elections. The sanction of public opinion is the real force behind democracy. When a member of the Constituent Assembly moved an amendment which sought to make Directive Principles justiciable, another member observed: "There is no use being carried away by sentiments. We must be practical. We cannot go on introducing various provisions here which any government, if it is indifferent to public opinion, can ignore. It is not a court that can enforce these provisions or rights. It is the public opinion that is behind a demand that can enforce these provisions. Once in four (or five) years elections will take place and then it is open to the electorate not to send the very same persons who are indifferent to public opinion. That is the real sanction and not the sanction of any court of law."<sup>104</sup>

Even if it be conceded that the Directive Principles of State Policy are in the nature of good resolutions or moral precepts still their importance cannot be denied. "The lives of countless individuals", writes Alan Gledhill, "have been shaped and re-directed by moral precepts impinging upon their minds, and it is not difficult to find instances of similar precepts directing the course of the history of nations."<sup>105</sup> The influence of Magna Carta is profound upon the development of the rights of Englishmen and various Acts of Parliament "may, without undue violence to the facts, be regarded as in direct line of descent from Magna Carta."<sup>106</sup> The Preamble to the American Declaration of Independence (1776) has considerably influenced the social and political development of that country, although it is neither a part of the American Constitution nor the ideals it enunciated are enforceable in Courts. Just as the provisions of the Magna Carta have affected the decisions of British Judges, and the Pream-

103. *The Republic of India, op. cit.*, p. 162.

104. *Constituent Assembly Debates*, Vol. VII, p. 475.

105. *The Republic of India, op. cit.*, p. 162.

106. Gooch, R.K., *The Government of England*, p. 64.



ble to the Declaration of Independence the decision of American Judges, so shall the Principles of Directive Policy guide and shape the policy of the Government in India and influence the decisions of Indian Judges while interpreting the Constitution. How the Directive Principles have influenced and guided the decision of the Judges is evident from the **State of Bihar vs. Kameshwar Singh**. Answering the question whether there was any public purpose to justify the legislation which acquired compulsorily vast lands of private owners, Mr. Justice Mahajan observed, after quoting Article 37, "Now it is obvious that the concentration of big blocks of land in the hands of a few individuals is contrary to the principles on which the Constitution of India is based. The purpose of the acquisition contemplated by the Act, therefore, is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to distribute the ownership and control of the material resources which come in the hands of the State, so as to subserve the common good as best possible."

But the effectiveness of the Directive Principles shall really depend upon the people of India and their political education. Professor Laski aptly observes, "Musty parchments will doubtless give them greater sanctity; they will not ensure their realization." It is upon the vigilance of the people and their social conscience that the real success of the Constitution depends. Even the best of the Constitution that can be conceived and framed is sure to be reduced to a mere scrap of paper if citizens of the State show apathy and indifference in public affairs. It is an old maxim of Political Science that the people get the kind of government that they deserve. Hence it is up to the people of India to make the best of their Constitution and avail themselves of the opportunities that it provides no matter whether they are justiciable or not. If they become oblivious of their duties as citizens of the State, and the party in power does not properly enforce the Directive Principles the fault will not be that of the Constitution. It is, accordingly, suggested that efforts should be made for the political education of the masses as well as of the classes and thereby create conditions for the expression of genuine public opinion. That is the real sanction behind the Directive Principles. In order to create a healthy political climate it is imperative that Fundamental Rights and the Directive Principles of State Policy are taught to every school-going boy and girl.

**Classification of the Directive Principles.** The first three Articles (36, 37 and 38) of the Chapter on Directive Principles are general in character and deal with definitions, legal effects and objectives. The remaining Articles of the Chapter may, for purposes of clarity, be grouped into three distinct categories: (i) those that aim to shape India into a Welfare State; (ii) those that aim to shape India into a Gandhian State; and (iii) those that aim to promote International peace.

(i) Article 38 provides that the State shall promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social, economic and political, shall inform all the institutions of the national life. Thus, promotion of the welfare of the



people is the objective which the Constitution sets forth and aims to secure a social order where justice—social, economic and political, shall prevail. Welfare and justice are, accordingly, the twin objects of the Constitution. Article 39, then, proceeds to particularise some of the methods by which the object of general welfare, through justice, can be obtained and the basis of the new social order established. This Article finds adequate support from the provisions of subsequent Articles for bringing about what Prime Minister Nehru stated in Parliament a "casteless and classless society" through the "peaceful and co-operative method." With this end in view the State shall direct its policy in securing—

- I. (a) adequate means of livelihood for all citizens, men and women equally;<sup>108</sup>
  - (b) distribution of wealth so as to subserve the common good;<sup>109</sup>
  - (c) the operation of the economic system which does not result in the concentration of wealth and means of production to the common detriment;<sup>110</sup>
  - (d) equal pay for equal work for both men and women;<sup>111</sup>
  - (e) protection of adult and child labour;<sup>112</sup>
  - (f) protection of child and youth against exploitation against moral and material abandonment;<sup>113</sup>
  - (g) provision for work and education for all people, relief in case of unemployment, old age, sickness and disablement and in other cases of undeserved want;<sup>114</sup>
  - (h) just and human conditions of work and maternity relief;<sup>115</sup>
  - (i) a living wage and decent conditions of work so as to ensure to the workers sufficient leisure and enjoyment of social and cultural opportunities;<sup>116</sup>
  - (j) free and compulsory education for all children until they reach the age of fourteen years;<sup>117</sup>
  - (k) raising the level of nutrition and the standard of living, and the improvement of public health.<sup>118</sup>
- II. Some of the Directive Principles are in accordance with and conform to the Gandhian way of life and fulfil the requirements of a

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108. Article 39 (a).
  109. Article 39 (b).
  110. Article 39 (c).
  111. Article 39 (d).
  112. Article 39 (e).
  113. Article 39 (f).
  114. Article 41.
  115. Article 42.
  116. Article 43.
  117. Article 45.
  118. Article 47.

predominantly non-violent State of Gandhi's conception. The Directive Principles enjoin that:

- (a) the State shall take steps to organise village panchayats and endow them with such power and authority as may be necessary to enable them to function as units of self-government;<sup>119</sup>
- (b) the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.<sup>120</sup>

Both these provisions aim at Sarvodaya. Sarvodaya or pure socialism, as Prof. S.N. Agarwal calls it,<sup>121</sup> is the Gandhian technique of decentralized economy and "composite democracy" in the form of self-dependent and self-governing village communities or panchayats. While initiating the debate in Parliament on the economic policy of India, C.D. Deshmukh, the then Finance Minister, observed that whereas the development of major industries must continue in national interest it was necessary to develop small-scale and village industries "with great opportunities for employment and more and more chances of improving the resources of the population." Prime Minister Nehru, intervening in the debate, re-affirmed his policy of bringing about casteless and classless society through the peaceful and co-operative method. He further maintained that the biggest private sector in the country was "the private sector of peasant with his small holdings."

- (c) to promote with special care the educational and economic interests of the weaker sections of the people and in particular, of the Scheduled Castes and the Scheduled Tribes in order to protect them from social injustice and all forms of exploitation;<sup>122</sup>
- (d) to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health;<sup>123</sup>
- (e) to organise agriculture and animal husbandry on modern and scientific lines;<sup>124</sup>
- (f) to take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle;<sup>125</sup>
- (g) to protect, preserve and maintain places of national and historical importance;<sup>126</sup> and

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119. Article 40.

120. Article 43.

121. Socialism and Sarvodaya, *The Hindustan Times*, New Delhi, January 1, 1955.

122. Article 46.

123. Article 47.

124. Article 48.

125. Article 48.

126. Article 49.

- (h) to take steps to separate judiciary from the executive;<sup>127</sup> and to secure for citizens a uniform civil code throughout the country.

### III. In the international field India shall strive:

- (a) to promote international peace and security;<sup>128</sup>
- (b) to maintain just and honourable relations between nations;<sup>129</sup>
- (c) to foster respect for international law and treaty obligations;<sup>130</sup>
- (d) to encourage settlement of international disputes by arbitration.<sup>131</sup>

These principles find their fullest expression in the external policy of India and Prime Minister Nehru's doctrine of dynamic neutrality. India's deep faith in co-existence, her advocacy of **Panch Sheel** and acceptance of these lofty ideals of peace and mutual tolerance by the major countries of the world is the greatest contribution which Independent India can claim. India has, indeed, saved world from disaster. Michael Foot writes, "power corrupts and the world owes Independent India an immense debt for helping to save us from the corruption of power on an international scale; which might so easily have led us to disaster."<sup>1,2</sup> The five principles<sup>1,3</sup>—(1) mutual respect for each other's territorial integrity and sovereignty; (2) non-aggression; (3) non-interference in each other's internal affairs for any reasons, either of an economic, political or ideological character (4) equality and mutual benefit; and (5) peaceful co-existence—contained in the **Panch Sheel** helped to outlaw from the minds of the Heads of the great States the possibility of war, little, of course, knowing that one of the signatories to the **Panch Sheel** would become an aggressor. "We have only one ambition", said Dr. Rajendra Prasad, addressing the Constituent Assembly at midnight on August 14, 1947, "and that is to make our contribution to the building of peace and freedom for all". India has done so and still holds steadfast to this spirit which inspires the last of the Directive Principles, though herself a victim of imperialistic designs by a country outwardly wedded to anti-imperialist policy. From ancient times India has been a land where a tradition of peace and love of tranquillity have pervaded the life of the people. Gandhi glorified this tradition through his weapons of Truth and Ahimsa, the framers enshrined it in the Constitution which they made and those noble ideals have ever

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127. Article 50.

128. Article 53 (a).

129. Article 51 (b).

130. Article 51 (c).

131. Article 51 (d).

132. *The Tribune*, Independence Number, August 15, 1955.

133. An amendment to Clause 3 was made to the **Panch Sheel** in the joint declaration signed in Moscow by the Prime Minister of India and the Soviet Union. The original Clause 3 read: "Non-interference in each other's internal affairs." The amendment added the following words: "For any reasons of an economic, political or ideological character."

since guided the statesmen who are responsible for moulding the destiny of India.

**Implementation of Directive Principles.** The Lok Sabha rejected, on August 31, 1958, by a voice vote a resolution moved by Tushar Chatterjee, Communist Member of Parliament, urging the appointment of a 15-member Parliamentary Committee to inquire into the implementation of the Directive Principles of State Policy embodied in the Constitution. While moving his resolution Chatterjee catalogued the failures of the Government and maintained that "the common people did not feel any difference from the state of affairs that existed during the British days and conditions that existed today. Several problems like food, education and health still remained unsolved while the life of the common people had become more burdensome and difficult. They could not but feel that these solemn declarations in the Constitution were not directives but only 'decoratives' in the Constitution."<sup>134</sup>

The Minister for Home Affairs, B.N. Datar, in his reply to the criticism raised by Tushar Chatterjee said that the Directive Principles were like a "manifesto of aims" and were not a matter of immediate achievement. "They are directives to which we have to go. They are trends of tendencies that have to be taken into account in laying down the policies of the Government." B.N. Datar further added that the Government in all the policies had kept uppermost the Directives laid down in these Principles. The policy of the Government had been shaped according to these Principles which was more than evident in the social, labour and economic legislation undertaken by it. This was also evident in the work of the Planning Commission. "Every decision of the Planning Commission has been guided or coloured by the Directive Principles."

The Communists and Socialists are seldom fair to the Congress Government. They deliberately minimise the achievements of the Government and paint the economic picture of the country much darker than it actually is. The problem of achieving full employment, appreciably raising the living standards, and an equitable distribution of national wealth is colossal and no Government, whatever its party complexion, can work miracles. It will take several decades to achieve the goal set in the Directive Principles and create a Welfare State in the true sense of the term. The economic development of the country depends upon hard and sustained work of all sections of the people and upon their ability to make sacrifices for a brighter and happier future. But there is a strong feeling among the people that Government is not strong enough to checkmate the designs of the anti-social elements and overcome difficulties created by the privileged classes in the way of realising a Socialist Society. Whatever be the reasons of such a feeling and whether the feeling is right or wrong, no one can deny that it is there and the Government cannot remain oblivious of this fact. A man in the street is frankly sceptical about the possibility of an equitable socio-economic order being created in the near future. It is, therefore, necessary rather imperative that the Government should periodically provide an opportunity to the people and their representatives to evaluate its policies and find out whether we are

following the right direction and whether we are moving towards our goal with resolution and courage. If welfare is to be real and a matter of substance, it is necessary that those for whom welfare is sought in the policies of the Government must be consulted. "A Government", says Prof. Laski, "which embarks on policy must offer the means of judging that policy. The opinion it has elicited by organised inquiry is fundamental to that end. The evidence it has collected, the facts at its disposal, can never be refused to its subjects if it is to build its opinion in the reasoned judgment of its citizens."<sup>135</sup> That is the way for the Directive Principles of State Policy to help India steer clear of the two extremes, the dictatorship of the proletariat which destroys the liberty of the individual and a capitalist oligarchy which cripples and frustrates the masses so far as their economic security is concerned. Malcontents of today are the revolutionaries of tomorrow and the Directive Principles of State Policy ensure the eventual emergence of an economic democracy in a bid to sustain political democracy. Political democracy without economic democracy is a sham affair.

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135. *Grammar of Politics*, p. 133.



## CHAPTER III

# GOVERNMENT AT THE CENTRE THE PRESIDENT

**Nature of the Union Executive.** One of the most important questions to engage the attention of the Constitution-makers related to the nature of the Executive. Dr. Ambedkar observed in introducing the Constitution, "A student of constitutional law, if a copy of a Constitution is placed in his hands, is sure to ask two questions. Firstly, what is the form of Government that is envisaged in the Constitution; and, secondly, what is the form of the Constitution? For these are the two crucial matters which every Constitution has to deal with." From the earliest stages of the discussions on the principles of the new Constitution there was an overwhelming opinion in favour of the Parliamentary system of Government. In the Memorandum on the Principles of the Union Constitution, submitted by Alladi Krishnaswami Ayyar and N. Gopalaswami Ayyangar, for the consideration of the Union Constitution Committee, it was specifically suggested that the Executive "power of the federation will, subject to the provisions of the Constitution, be exercised by, or on the authority of a Council of Ministers, to be called Cabinet, which will be collectively responsible to the House of Representatives." It may, however, be noted that at this stage it was contemplated to confer certain special powers on the President. In his Memorandum on the Union Constitution prepared by the Constitutional Adviser for the use of the Union Constitution Committee, it was provided that "there shall be a Council of Ministers, with the Prime Minister at the head, to aid and advise the President in the exercise of his functions, except in so far as he is required by this Constitution to act in his discretion." The President was also to be vested with specified

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1. *Constituent Assembly Debates*, Vol. VII, pp. 31-32.

2. Refer to the Questionnaire issued by the Constitutional Adviser, B.N. Rau, to the Members of the Central and Provincial Legislatures, March 17, 1947. *The Framing of India's Constitution, Select Documents*, Vol. II, pp. 434-51.

3. June, 1947.

4. *The Framing of India's Constitution, Select Documents*, op. citd., Vol. II, p. 546.

5. In a note on this clause it was stated, "Although under responsible government the head of the State acts for the most part on the advice of Ministers responsible to the Legislature, nevertheless there are certain matters in which he is entitled to exercise his own discretion: e.g., (in certain events) in the choice of a Prime Minister and in the dissolution of Parliament. In India, such matters as the appointment of Judges, the protection of minorities and the suppression of widespread disorder may properly be added to the list. Of

special responsibilities' and where any special responsibility of the President was involved, he exercised his discretion as to the action to be taken. But to safeguard against the arbitrary use of discretionary authority by the President, the Constitutional Adviser had provided for the creation of a Council of State, a kind of Privy Council, consisting of the Prime Minister, the Deputy Prime Minister, the Chief Justice of the Supreme Court, the Presiding officers of the two Houses of Parliament, the Attorney-General, such former Presidents, Prime Ministers and Chief Justices as were willing and able to serve on the Council, and not more than seven other persons of experience and eminence appointed by the President. This was really a system of checks and balances designed to prevent both the President and the Ministry from resorting to an arbitrary use of untrammelled authority.

This matter was considered by the Union Constitution Committee on June 8 and 9, 1947. The Committee generally agreed that the Union Executive should be of the Parliamentary type and that the President should have no special responsibilities as suggested by the Constitutional Adviser in his Memorandum and that he would exercise his powers, including the power to dissolve Parliament, only on the advice of his Ministers.<sup>7</sup> This recommendation of the Committee also made Constitutional Adviser's proposal for the setting up of the Council of State infructuous.

When the Report of the Union Constitution Committee came up for consideration before the Constituent Assembly, there was general agreement for establishing a Parliamentary form of Executive. The critics of such a system of government, Kazi Syed Karimuddin and Hussain Imam, however, moved an amendment proposing a non-Parliamentary Executive. Hussain Imam thought that the system of Government, as obtainable in the United States of America, was "more democratic and based on better and sounder principles" than the Parliamentary system of British type.

*(Continued from previous page)*

course, it may not always be possible for the President to use his "discretionary" powers. Thus a Ministry may threaten to resign if in the exercise of "discretionary" power he overrules them; in that case, the President can do so only if he has the support of the Legislature and can get an alternative Ministry enjoying its confidence. Failing this he can dissolve the Legislature and appeal to the electorate in an extreme case. Thus the "discretionary" powers will at least give the President a chance of appealing to the Legislature and, in the last resort, to the people." *Ibid.*, p. 476.

6. The following special responsibilities were proposed in the Memorandum:

- (a) the prevention of any grave menace to the peace or tranquillity of the Union or any part thereof;
- (b) the safeguarding of the financial stability and credit of the Union government;
- (c) the safeguarding of the legitimate interests of minorities.

In a note to this clause it was stated, "The matters referred to in this clause may be regarded as matters of national importance in the decision of which any party bias was to be avoided. The President is therefore enjoined in these matters to act in his discretion and will have available to him the advice of the Council of State." *Ibid.*, p. 477.

7. Minutes of the Meetings of the Union Constitution Committee, June 8 and 9, 1947. *Ibid.*, pp. 554-55.

The Constituent Assembly finally accepted the principle of a Parliamentary Executive collectively responsible to the representative chamber of Parliament and the Drafting Committee based the Draft Constitution on this concept.<sup>8</sup>

In the Draft Constitution of February 1948, there was a provision made for the Instrument of Instructions, as embodied in the Government of India Act, 1935, for Governors alone. The Drafting Committee decided, on further consideration, to remedy the omission and provide for one for the President too. Accordingly, in October 1948, the Committee gave notice of an amendment to Article 62 of the Draft Constitution proposing to add a new clause: "In the choice of the Ministers and the exercise of his other functions under this Constitution the President shall be generally guided by the instructions set out in Schedule III—A. . . ."

The draft of the Instrument of Instructions prepared by the Drafting Committee was much more elaborate than the corresponding instructions to the Governors. The Instrument of Instructions, *inter alia*, directed the President to set up an Advisory Board consisting of not less than 15 members of the two Houses of Parliament elected by proportional representation. This Board was to advise the President on the appointments of the Chief Justices and other Judges of the Supreme Court and High Courts, Ambassadors, the Auditor-General, the chairman and other members of the Union Public Service Commission, and the members of the Election Commission. The Instrument further required the President to consult the Advisory Board on any other appointment, other than of the Governor of a State, if required to do so by a resolution passed by both Houses of Parliament.

Ambedkar's amendment adding a clause in the Constitution for an Instrument of Instructions to guide the President in the exercise of his functions was accepted by the Constituent Assembly. On October 11, 1949, however, when the new Schedule III-A containing the Instrument of Instructions was due to be considered by the Assembly, I.T. Krishnamachari expressed the desire of the Drafting Committee that the proposal for the inclusion of the Instrument of Instructions to the President should be dropped. He also moved that a similar Instrument already included in the Draft Constitution for Governors as the Fourth Schedule, should be omitted and also the consequential clause.

The Drafting Committee appeared to have been persuaded by Jawaharlal Nehru to accept the view that the Council of Ministers should be collectively responsible to the representative Chamber of Parliament and, under the circumstances, it would be impolitic to confer on the President, through the Instrument of Instructions, powers that might give him an effective voice in the formation of the Council of Ministers or in moulding the policies of the Government. Alladi Krishnaswami Ayyar forcefully put this point in the Constituent Assembly. This view was accepted and the proposal to omit the Instrument of Instructions and the related clause was approved.

8. *Constituent Assembly Debates*, Vol. IV, p. 921.

**The President of India.** The Constitution provides for a President of India' and the executive power of the Union including the Supreme Command of Defence Forces is vested in him.<sup>9</sup> But the executive power of the union vested in the President must be exercised in accordance with the Constitution" and the Constitution prescribes that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.<sup>10</sup> When this provision is read with other provisions of the Constitution, the constitutional position of the President of India becomes abundantly clear. Under Article 75(3), the Council of Ministers is made collectively responsible to the Lok Sabha (House of the People). Under Article 78(a) the Prime Minister is required to communicate to the President all decisions of the Council of Ministers. Clause (c) of the same Article further provides that it is the duty of the Prime Minister, if the President so requires, to submit to the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

The logical implication of all these provisions is that the President of India is bound to act on the advice of his responsible ministers, although the executive power of the Union is vested in him and all executive actions of the Government of India must be expressed to be taken in his name.<sup>11</sup> There is no provision in the Constitution making the President responsible for the acts of the Government. The Council of Ministers, on the other hand, has been specifically made responsible to the Lok Sabha (House of the People). There would have been no sense in making the Council of Ministers responsible to the Lok Sabha, if the final authority of deciding matters concerning the executive actions of the Union is not conferred by the Constitution on them. Article 78, Clauses (a) and (c) make the conferment of such authority in clear terms, although dubious meanings have been given by some writers to these clauses.<sup>12</sup>

It is significant to note that the Constitution simply creates the office of the "President of India."<sup>13</sup> Nowhere does it say that the President is either the Head of the State or the Head of the Executive. The omission is deliberate. The Union Constitution Committee proposed to call the President the "Head of the Federation",<sup>14</sup> but the Drafting Committee omitted both the words 'Head' as well as 'Federation' and created the President of India. When this article of the Draft Constitution was being discussed in the Constituent Assembly Prof. K. T. Shah moved an amendment that "the Chief Executive and Head of the State in the Union shall be called the President."<sup>15</sup> Dr. Ambedkar opposed it and said, "His amend-

9. Article 52.

10. Article 53(1).

11. *Ibid.*

12. Article 74(1).

13. Article 77(1).

14. Srivastava, V.N. "The Union Executive in the Constitution of India," published in the *Indian Journal of Political Science*, Oct.-December 1950, pp. 19-20. Also refer to B.M. Sharma's Article in the same issue, p. 6.

15. Article 52.

16. Report of the Union Constitution Committee, July 4, 1947. *The Framing of India's Constitution, Select Documents*, op. cit., Vol. II, p. 578.

17. *Constituent Assembly Debates*, Vol. VII, p. 969.

ment, if I understood him correctly, is fundamentally different from the whole scheme as has been adopted in the Draft Constitution. Prof. Shah uses the words 'Chief Executive and the Head of the State'. I have no doubt about it that what he means by the introduction of these words is to introduce in the American presidential form of executive, but not the parliamentary form of executive which is contained in the Draft Constitution.<sup>18</sup>

The Constitution, therefore, establishes a Parliamentary form of Government and the Head of the State is a necessary adjunct of such a system to decide whether he is a King or a President. The real functionaries are the responsible Ministers who make and run the government. Jawaharlal Nehru told the Constituent Assembly, 'We want to emphasise the ministerial character of the Government, that power really resided in the ministry and in the legislature and not in the President as such'. There were various supporting reasons with the Father Framers to adopt such a form of Government. They were keen to devise a system of government which should combine stability with responsibility. Britain was the best example. It was argued which presented both these virtuous elements of government. K. M. Munshi emphatically said, 'The strongest Government and the most elastic executive have been found to be in England and that is because the executive powers vest in the Cabinet supported by a majority in the lower House which has financial powers under the Constitution. As a result it is the role of the majority in the legislature, for it supports its leaders in the Cabinet, which advises the head of the State, namely, the King. The King is thus placed above party. He is really made the symbol of the impartial dignity of the Constitution. The Government in England is found strong and elastic under all circumstances... We must not forget a very important fact that during the last hundred years, Indian public life has largely drawn upon the traditions of British Constitutional law. Most of us have looked up to the British model as the best. For the last thirty or forty years, some kind of responsibility has been introduced in the governance of this country. Our constitutional traditions have become parliamentary and we have now all our Provinces functioning more or less on the British model. Today, the Dominion Government of India is functioning as a full-fledged parliamentary government. After this experience, why should we go back upon the tradition that has been built over a hundred years and try a novel experiment...?'<sup>19</sup>

The Parliamentary form of Government with which the Indians were adequately familiar ensured daily assessment of policy rather than a periodic assessment upon which the American system of Government is founded. Moreover, under the Presidential system there is no cohesion between the executive and legislative departments of the government. The party ties which bind the two departments are too flimsy for an integrated policy. The incoherency and irresponsibility so often exhibited by the

18. *Ibid.*, p. 974.

19. *Constituent Assembly Debates*, Vol. IV, p. 734.

20. *Constituent Assembly Debates*, Vol. VII, p. 984.



American system has been viewed by the statesmen of that country with alarm and various plans ensuring co-ordination between the executive and the legislative departments have been suggested from time to time, though without any tangible results. India could not afford to hazard such a risk. Her imminent necessity, after one and a half century of bondage, was to devise a system of government which should be responsive and responsible so that manifold policies of national development aimed to secure for the people economic democracy, as envisaged in the Objectives Resolution, could be planned, sanctioned and executed without the least possibilities of conflict and friction between the executive and legislative departments of the Government. Alladi Krishnaswami Ayyar elaborated this point in the Constituent Assembly. He said, "There are obvious difficulties in the way of working the Presidential system. Unless there is some kind of close union between the Legislature and the Executive, it is sure to result in a spoils system. . . . Parliament may take one line of action and the Executive may take another line of action. An infant democracy cannot afford, under modern conditions, to take the risk of a perpetual cleavage, feud or conflict or threatened conflict between the Legislature and the Executive. The objective of the present constitutional structure is to prevent a conflict between the Executive and the Legislature and to promote harmony between the different parts of the governmental system. . . . After weighing the pros and cons of the Parliamentary Executive as they obtain in Great Britain, in the Dominions and in some of the continental Constitutions, and the Presidential type of government as it obtains in the United States of America, the Indian Constitution had adopted the institution of Parliamentary Executive."<sup>21</sup>

Although the Constitution establishes a Parliamentary form of Government and it is working at the Centre and in the States for the last two decades, eminent opinion in the country is now veering round the Presidential form of Government and since the 1967 General Elections its advocates have become many. K.M. Munshi, one of the few living members of the 7-man Committee which drafted the Indian Constitution, expressed an opinion that if he were to frame a Constitution for the country again he would favour the Presidential system as in the United States. He said, "Those of us who supported the British Cabinet system, to which we were accustomed, thought that it would work effectively in India, but I must confess that we have failed to evolve the two-party democratic tradition necessary to support the cabinet system. . . . The cabinet system of Government has not been a success. . . . We are heading towards a situation in which either the presidential system or military rule would become inevitable."<sup>22</sup> K.S. Hedge, Chief Justice of the Delhi High Court and now a Judge of the Supreme Court, said on April 15, 1967, that the Constitution should be reshaped to provide, among other things, for the Presidential form of Government. For multiplicity of political parties might soon lead in India to conditions similar in pre-De Gaulle France.<sup>23</sup> Madhu Limaye, a Member of Parliament, speaking on

21. *Constituent Assembly Debates*, Vol. VII, pp. 985-86.

22. As reported in *Hindustan Times*, New Delhi, January 28, 1967.

23. Seminar organised by the Bar Association of India, the *Indian Express*, New Delhi, April 17, 1967.

Future of Parliamentary Democracy in India' observed that many people in India were doubting whether democracy was successful in India. Some were thinking whether Presidential form of Government would not be better than the present Parliamentary form of Government. I have been of the opinion that adoption of Presidential form of Government involving separation of executive and legislative functions might foster national feeling during the election of the President and may also help emergence of two strong contending parties or coalition of parties.<sup>24</sup>

S.N. Mishra, Deputy Leader of the Congress Parliamentary Party, declared in New Delhi that the Congress Socialist Forum had come to the opinion that the Presidential system might prove helpful in facing the challenges which had come up after the 1967 General Elections. B.P. Sinha, former Chief Justice of India, delivering his Convocation Address of Indore University on January 13, 1968, suggested that the Constitution be amended to provide for a Presidential form of Government. The present federal system of government, he said, had only "succeeded in creating during the last twenty years of independence confusion if not chaos" in several State Governments. The Presidential form of Government with a President at the Centre and Governors in States with power to choose governing bodies could achieve a well established strong and efficient Government at all levels. The Ex-Deputy Prime Minister, Morarji Desai, on the other hand, had stated that the Presidential form of Government would mean a dictatorship. He pleaded for the retention of Parliamentary form of Government while the Constitution so wisely established. There is, however, no denying the fact that the democratic instincts of Indians have proved immature and the bane of defections after the 1967 General Elections has demoralised politics thereby threatening the future of Parliamentary democracy in India. If the Presidential system at all comes it will mean total revision of the Constitution and till it comes Parliamentary form of Government continues at the Centre and in the States.

**Qualifications and Compensation of the President.** The Constitution requires that the President should be a citizen of India, must have completed the age of thirty-five years and is qualified for election as a member of the Lok Sabha. But he must not at the time of his election hold any office of profit under any Government federal, State or local. A person, however, is not to be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor of any State or is a Minister either for the Union or for any State. The President must not be a member of either House of Parliament or

24. Meeting organised by the Progressive Group, Bombay, September 2, 1967. *The Hindustan Times*, New Delhi, September 4, 1967.

25. Article 58. The corresponding provision in the American Constitution is, "No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of the President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years and been fourteen years a resident within the United States", Art. II, sec. 1-5.

The Eire Constitution provides: "Every citizen who has reached his 35th year of age is eligible for election to the office of the President." Article 12(4)(1).

the State Legislatures and if he is, he must vacate his seat in that House before he enters upon his office as President.<sup>26</sup> In order to prevent abuse of authority by such candidates, the Constitution vests the superintendence, direction and control for the election of President in the Election Commission which, in its turn, is subject to the control of Parliament.<sup>27</sup> The decision on doubts and disputes relating to the election of President rests with the Supreme Court, and its decision is final.<sup>28</sup> The procedure according to which the Supreme Court will inquire into and decide such disputes is to be determined by the Court itself.

The salary and other emoluments, allowances and privileges to which the President is entitled are determined by Parliament.<sup>29</sup> They cannot, however, be increased or diminished during his term of office.<sup>30</sup> Parliament fixed the salary at Rs. 10,000 a month and a pension of Rs. 15,000 a year on vacating Presidency. The President is also entitled, without payment of rent, to the use of official furnished residence. He is permitted to spend a total amount of Rs. 15,26,000 a year on travel, entertainment, discretionary grants, staff, household expenses and his own allowances. When the first President relinquished office in 1962, Parliament supplemented the pension by Rs. 12,000 a year for incidental expenses, besides free medical aid. The pension of the President is income-tax free.

**Term of Office.** The President holds office for five years and is eligible for re-election.<sup>31</sup> He may resign before the expiration of his term of office and that "he might conceivably do so," writes Gledhill, "to resolve a conflict between himself and the Council of Ministers."<sup>32</sup> The Constitution provides that such resignation should be addressed to the Vice-President who is required forthwith to communicate it to the Speaker of the Lok Sabha.<sup>33</sup> But the Constitution-makers had not provided for a situation arising from the resignation of the Acting President. V.V. Giri, who acted as President after the death of Dr. Zakir Husain, expressed his desire on July 16, 1969 to resign<sup>34</sup> in order to contest the Presidential elec-

26. Article 59 (1). Article 12 (6) of the Constitution of Eire says: "(1) The President shall not be a member of either House of Oireachtas. (2) If a member of either House of the Oireachtas, be elected President, he shall be deemed to have vacated his seat in that House. (3) The President shall not hold any other office or position of emolument."

27. Article 324.

28. Article 71.

29. Article 59.

30. By the President's Pension Act, 1951, it is provided that the President who ceases to hold office either by the expiration of his term of office or resignation is to be paid a pension of Rs. 15,000 per annum for the remainder of his life. If he is re-elected, no pension shall be paid for the period during which he again holds office. The pension of the President is charged on the Consolidated Fund of India.

31. Article 57.

32. *The Republic of India, op. cit.*, p. 99.

33. Article 55 (2).

34. V.V. Giri resigned on the decision of the Congress Parliamentary Board to nominate the Lok Sabha Speaker, N. Sanjiva Reddy, as the Party candidate for the Presidency. Mr. Giri announcing his decision to contest for Presidentship stated that he did not wish to question the motives of the Par-

tion scheduled for August 16, 1969. Since the Constitution did not provide for a clear-cut direction in regard to a situation where the Vice-President was acting as President, V.V. Giri resigned from the office of the Vice-President, in accordance with the advice of the Attorney-General, and addressed his letter of resignation to the President of India. Copies of the letter sent to the President's Secretariat were forwarded to the Prime Minister and the Chief Justice of India.

The President is liable to impeachment for violating the Constitution. the expression "violation of the Constitution" has not been defined. Under the American Constitution impeachment of the President lies for treason, bribery or other high crimes and misdemeanours.<sup>35</sup> The Constitution of Eire provides for impeachment in case of stated misbehaviour.<sup>36</sup> According to the Burmese Constitution the President may be impeached for high treason, violation of the Constitution or gross misconduct.<sup>37</sup>

The manner in which impeachment proceedings take place in India is covered by Article 61. Either House of Parliament may prefer the charge for impeaching the President by moving a resolution, provided fourteen days' notice has been given to that effect by not less than one-fourth of the total membership of that House. If the resolution passes by a majority of two thirds of the total membership of the House initiating the charge of impeachment, then, the other House investigates the charge. But instead of making the investigation itself, the House may delegate the work of investigation to any court or tribunal appointed by the House for that purpose.<sup>38</sup> The President has the right to appear in person or be represented at such investigation. If the House investigating the charge passes a resolution by a two-thirds majority that the charge has been sustained, the impeachment succeeds and the President is removed from his office from the day on which such resolution is passed.

Under the American Constitution, which follows the British precedent, the power to initiate impeachment proceedings lies with the popular chamber, the House of Representatives. After the initiation of the proceedings, the House appoints a special committee out of its own members to investigate into the charges. This Committee may, then, recommend to the House that the charges be incorporated in Articles for Impeachment and transmitted to the Senate for action. When that is done, the Senate, presided over by the Chief Justice of the Supreme Court, hears the impeachment as a regular trial. A two-thirds vote of the Senators present at the impeachment is necessary for conviction.<sup>39</sup> In India either of the two Houses can initiate impeachment proceedings and if a resolu-

(Continued from previous page)

liamentary Board, "but I sincerely feel that they have neither done justice to the country nor they have been fair to the organisation to which they belong." *The Indian Express*, New Delhi, July 13, 1969.

35. Article 56 (1) (a).

36. Article II, S. 4.

37. Article 12 (10) (i).

38. Sec. 64.

39. Clause (3) of Article 61 should be read with proviso to Article 36(1).

40. So far only one President, Andrew Johnson, was impeached in 1868, but he escaped conviction by only one vote. The Senate sat for over three months as a court of impeachment.

tion to that effect is passed by a two-thirds majority of the House, then, the other House investigates the charge and decides.

**Eligibility for re-election.** On the question of eligibility for re-election the Constitution of India does not impose any express restrictions to the number of terms, consecutive or otherwise, for which a person can be elected President. It simply provides that "A person who holds, or who has held, office as President shall, subject to the other provisions of this Constitution, be eligible for re-election to the office." The Union Constitution Committee had recommended that a retiring President would not seek election beyond the second term and the Constituent Assembly accepted this suggestion.<sup>41</sup> But when the Draft Constitution came under discussion, the point was made that, if there was a capable and efficient man, there was no reason why he should not be allowed to serve the country beyond two terms and, accordingly, an amendment was moved for removing the restriction that the President would be eligible to hold office for two terms only.<sup>42</sup> Dr. Ambedkar accepted the amendment and all resolutions on the eligibility for re-election were withdrawn.

Raghunath Singh, Congress Member of Parliament, sponsored a non-official Bill in the Lok Sabha on September 6, 1957, favouring restriction to two consecutive terms. The supporters of the Bill argued that if the same individual occupied the highest office in any country too long, there was a danger of dictatorship. The opponents of the Bill contended that the real power was vested in India in the Prime Minister and not in the President and hence the danger of any President ever becoming a dictator in this country was imaginary. Raghunath Singh withdrew his Bill after the Law Minister, Ashoka Sen, expressed the view that such matters should be left to convention and not decided by statute. "Why take away the power," the Law Minister said, "to meet a particular situation when really you can achieve the very same purpose by building up conventions suited to needs which you may feel from time to time?"<sup>43</sup> The Law Minister added that it was for the party in power to show the way towards the creation of healthy conventions. "If it is felt by the party in power or the House that conventions of this sort should be built up. I have no doubt that they will be built up."<sup>44</sup>

Dr. Rajendra Prasad set a convention, as Washington did in the United States, for two terms tenure, that is, ten years in all, and thus, helped to offer a guide to the limitation and rotation of high offices of power and trust. Rajendra Prasad and George Washington were the first Presidents after the inauguration of the Constitutions of their countries. Good men are, indeed, hard to find, but they set virtuous precedents for the unworthy men who otherwise are harder to get rid of. In 1962, Dr. S. Radhakrishnan, who till then was the Vice-President of India, was elected in place of Dr. Rajendra Prasad. He did not contest for the second term and Dr. Zakir Hussain was elected President in 1967.

41. *Constituent Assembly Debates*, Vol. IV, p. 849.

42. *Constituent Assembly Debates*, Vol. VII, pp. 1023-24. Amendment by K. C. Sharma.

43. *Lok Sabha Debates*, Second Series, Vol. VII, No. 41, pp. 12429-64.

44. *Ibid.*



**Succession to Presidency.** The Constitution provides for succession to Presidency after the expiration of the term of office of the President, by reason of his death, resignation or removal. A new President must be elected before the expiration of the term of office of the incumbent for the time being. If the new President has not been elected, then, the incumbent of the office continues until his successor enters upon his office.<sup>45</sup> If the office of the President becomes vacant owing to the death of the incumbent or to any other cause before the expiry of his term of office, a new President must be elected within six months. In the meantime, the Vice-President acts as President and performs the duties and functions attached to the office. The newly elected President enjoys a full term of five years and not the remainder of the term of his predecessor.<sup>46</sup>

But the Constitution does not provide for a situation in which the offices of both the President and the Vice-President become vacant. To remedy the omission Parliament passed in May 1969, the President (Discharge of Functions) Act providing for the discharge of Presidential duties in certain contingencies and putting the Chief Justice of India, or in his absence, the senior-most Judge of the Supreme Court, in the line of succession. On the resignation of the Acting President, V V Giri, the Chief Justice of India, M. Hidayatullah succeeded Giri till the Presidential elections were held and the newly elected President assumed office. The Home Minister made it clear in Parliament that the Act in no way intended to determine succession to the Presidency. It was just to fill a vacuum if the Vice-President who can act as, or discharge the functions of, the President, is for any reason incapacitated or is not available.

**Mode of Election.** The process of election of the President is original and no other Constitution contains a similar procedure. The President is elected by the members of an Electoral College consisting of (a) the elected members of both Houses of Parliament, and (b) the elected members of the Legislative Assemblies of the States. The President is, thus, elected by the representatives of the people, and the citizens play no direct part in his election. The main reasons which influenced the deliberations of the Constituent Assembly for determining indirect Presidential elections were:

(1) The Constitution established the Parliamentary system of Government and the real authority under such a system resides in the Ministry and the Legislature whose members are chosen directly by the people. It is anomalous under such a system to have a President elected on adult franchise in as much as such a President can claim to derive his authority directly from the people and thereby come into conflict with the Ministry and Parliament. What the framers of the Constitution desired was to "emphasise the ministerial character of the government that power really resided in the Ministry and the Legislature." The best way to ensure it

45. Article 62 (1).

46. Article 62 (2).

47. Article 65 (1).

48. Article 65 (2).

was to make the election of the President indirect and thereby avoid all apprehensions of conflict and political manipulation.

(2) Popular election of the President, it was feared, would intensify party rivalry extending its influence over the whole range of politics and produce a radical change in the character of public life. The President would become the standard bearer of a party or a combination of parties. He could hardly be expected to maintain, under the circumstances, the mediating attitude as head of the nation. If the President is popular and commanded the respect of the people, he may use his position and authority to the detriment of the party in power in case of disagreement between the two and even make a bid to become a hero. Dr. Ambedkar was so much afraid of the tradition of hero-worship in India that he made a particular reference to it on the third reading of the Constitution in the Constituent Assembly.<sup>49</sup>

(3) The Electoral College, consisting of members of Parliament and State Legislatures for electing the President, it was claimed, would avoid a partisan choice and ensure really national election for the highest office in the State.

(4) India is almost a sub-continent with an electorate of more than seventeen crores. Direct Presidential elections, after every five years, by this staggering number of voters would have necessitated huge electoral machinery every time. This was considered far too much waste of time, effort and money over the election of the formal Head of the State.

**Procedure for the election of the President.** After providing in Article 54 that the President shall be elected by an Electoral College consisting of: (a) the elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the States (but not of the Union Territories), the Constitution proceeds in Article 55 to provide the procedure for election by the system of proportional representation by means of the single transferable vote.<sup>50</sup> The Constitution also provides for weighing of votes<sup>51</sup> for the purpose (a) of securing as far as possible, uniformity in the scale of representation of the different States, and (b) for securing parity between the States as a whole and the Union. For the purpose of securing such uniformity and parity the following method is laid down.<sup>52</sup> This method makes the Presidential election complicated:

1. In order to secure uniformity in the scale of representation of the

49. Dr. Ambedkar said, "The second thing we must do to preserve democracy is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not to lay their liberties at the feet of even a great man or trust him with powers which enable to subvert their institutions. This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in politics unequalled in magnitude by the part it plays in the politics of any other part of the world. Bhakti in religion may be an aid to the salvation of the soul. But in politics, Bhakti or hero-worship is sure road to degradation and to eventual dictatorship."

50. Article 55, Cl. 3.

51. Article 55 (1) and (2).

52. Article 55(2)(a), (c).

different States it is provided that every elected member of the Legislative Assembly of a State shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the State by the total number of the elected members of the Assembly. To put it in simple words, each member of the Electoral College who is a member of a State Legislature has as many votes as are obtained by the formula:

$$\left[ \frac{\text{Total population of the State (ascertained at the last census)}}{\text{Total number of elected members in the Legislative Assembly}} \right] \text{ Divided by } 1000$$

Fractions exceeding one half being counted as one

The following illustration was given in the Draft Constitution<sup>53</sup> in explanation of the method of calculation. Article 44 of the Draft Constitution corresponds to Article 55 of the Constitution of India.

"The population of Bombay is 20,849,840. Let us take the total number of elected members in the Legislative Assembly for Bombay to be 208 (i.e., one member representing one lakh of the population). To obtain the number of votes which each such elected member will be entitled to cast at the election of the President, we have first to divide 20,849,840 (which is the population) by 208 (which is the total number of elected members), and then to divide the quotient by 1000. In this case the quotient is 100,239. The number of votes which each such member will be entitled to cast would be 100,239/1,000, i.e., 100 (disregarding the remainder 239 which is less than five hundred).

(i) Again, the population of Bikaner is, 1,292,938. Let us take the total number of elected members of the Legislature of Bikaner to be 130 (i.e., one member representing roughly ten thousand of the population). Now applying the aforesaid process, if we divide 1,292,938 (i.e., the population) by 130 (i.e., the total number of elected members), the quotient is 9,945. Therefore, the number of votes which each member of the Bikaner Legislature would be entitled to cast is 9,945/1,000, that is, 10 (counting the remainder 945 which is greater than five hundred as equivalent to 1,000)."

2. For securing parity between the States as a whole and the Union, the votes of each member of Parliament will be according to this formula:

$$\frac{\text{Total number of votes assigned to elected members of the Legislative Assemblies of the States}}{\text{Total number of the elected members of both Houses of Parliament}}$$

Fractions exceeding one half being counted as one.

Reverting to the illustration given in the Draft Constitution:

"If the total number of votes assigned to the members of the Legislatures of the States in accordance with the above calculation be 74,940 and the total number of elected members of both the Houses of Parliament be 750, then to obtain the number of votes which each member of

53. See Foot-note to Article 44 (2), p. 17.

either House of Parliament will be entitled to cast at the election of the President. we should have to divide 74,940 by 750. Thus, the number of votes which each such member will be entitled to cast in the case would be  $\frac{74,940}{750} = 99\frac{23}{25}$ , i.e., 100 (the fraction  $\frac{23}{25}$  which exceeds one-half

being counted as one)."

The three important features of the Presidential election system and procedure, therefore, are:

- (1) proportional representation by means of single transferable vote;
- (2) parity of votes between the members of the State Assemblies on the one hand and elected members of both the Houses of Parliament; and
- (3) as far as practicable uniformity of representation of the various States according to their population ascertained at the last census.

The following table gives the actual number of votes a member of the Electoral College had in the 1967 Presidential election:

#### State Assemblies

<i>Name of the State</i>	<i>Total No. of MLAs</i>	<i>"Value" of single Vote</i>
Andhra Pradesh	287	125
Assam	126	94
Bihar	318	146
Gujarat	168	123
Haryana	81	94
Jammu and Kashmir	75	59
Kerala	133	127
Madhya Pradesh	296	109
Madras (now Tamil Nadu)	234	144
Maharashtra	270	146
Mysore	216	109
Nagaland	46	8
Orissa	140	125
Punjab	104	107
Rajasthan	184	110
Uttar Pradesh	425	174
West Bengal	280	125

#### Parliament

	<i>Total No. of MPs</i>	<i>"Value" of each Vote</i>
Lok Sabha	520	576
Rajya Sabha	228	576

The total "value" of the votes of all members of the Electoral College was 8,61,696. Dr. Zakir Hussain polled 4,71,244 votes and his close rival, K. Suba Rao, the former Chief Justice of India, 3,63,971 votes.

The Chief Election Commissioner fixes the programme for election. The nomination papers are called to reach the Returning Officer by the appointed date. Members of Parliament and Members of State Assemblies only can propose a candidate for election. Nominations are then scrutinised and the names of the validly nominated candidates are published in the Gazette of India. The election is held on the fixed date in accordance with the system of proportional representation by means of a single transferable vote, the voting being done by a secret ballot. The candidate who secures votes more than or equal to the quota is declared elected. If at the first count no candidate is able to secure the requisite quota of votes, the candidate securing the least number of votes is eliminated and his votes are transferred among other candidates according to the second preferences on the ballot papers of the voters who gave him first preference. The process of elimination and transfer of votes continues, in accordance with Rule 6 of the Presidential Election Rules, till such a candidate is found who has obtained the requisite quota of votes. Disputes, if any, about the election of the President are heard and decided by the Supreme Court.<sup>54</sup>

**Oath or affirmation by the President.** Every President and every person acting as President or discharging the functions of President is required, before entering upon his office, to make and subscribe in the presence of the Chief Justice of India, or in his absence, the seniormost Judge of the Supreme Court available, an oath or affirmation in the prescribed form.<sup>55</sup> The oath or affirmation which the President of India is required to take demands from him:

(i) to faithfully execute the office of the President or discharge the functions of the President;

(ii) to preserve, protect and defend to the best of his ability the Constitution and the law; and

(iii) to devote himself to the service and well-being of the people of India.

The American President, too, has to take an oath or affirmation before entering on the execution of his office to "faithfully execute the office of the President," and to the best of his "ability preserve, protect, and defend the Constitution of the United States." Both India and the

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54. The several defeated candidates in the 1967 Presidential elections challenged Dr. Zakir Hussain's election and the Supreme Court dismissed their petitions. The petition challenging the election of V.V. Giri is now pending in the Supreme Court.

55. "I A.B. do swear in the name of God that I will faithfully execute  
solemnly affirm

the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well being of the people of India."

56. Art. II, Sec. I (8).



United States resemble to that extent and the language of the oath or affirmation prescribed in the Constitutions of both the countries is very much alike. The idea of devotion to the service and well-being of the people in the Indian Constitution has been borrowed from Eire Constitution.<sup>57</sup>

The oath which the executive Head of the State is required to take before assuming the office does not, according to Willoughby, add to the legal liability nor his powers as provided for in the Constitution.<sup>58</sup> The object is simply to impose a moral obligation.

## THE VICE-PRESIDENT

**The Vice-Presidency.** The Constitution provides for the Vice-President and the office is modelled partly on the similar institution in the United States. Like the American Vice-President, the Indian Vice-President is the *ex-officio* Chairman of the Federal Upper Chamber, the Rajya Sabha (Council of States). The similarity between the two offices ends here. In the United States the Vice-President must meet all the qualifications of a President and he is elected by the same popularly elected electoral college which elects the President. The reason is obvious. The American Vice-President succeeds to the Presidency in the event of the President's death, resignation or removal and continues in the office for the unexpired portion of his predecessor's term, as did Harry Truman on the death of Franklin D. Roosevelt and Lyndon Johnson on the assassination of President Kennedy. The Vice-President of India, on the other hand, only *acts* as President in any casual vacancy in the office of President until a new President is elected in accordance with the provisions made in the Constitution to fill such a vacancy.<sup>59</sup> The terms of office of the President and the Vice-President in the United States are identical and both are subject to earlier removal only by the process of impeachment. The Vice-President of India is elected for a term of five years by the two Houses of Parliament at a joint session and may be removed from office by a resolution of the Rajya Sabha (Council of States), agreed to by the Lok Sabha (House of the People).

But the most important dissimilarity between the two offices is relating to their respective duties and functions. The Indian Vice-President is only the *ex-officio* Chairman of the Rajya Sabha and he draws his salary as such. In between the sessions of the Rajya Sabha, he may even go abroad on goodwill mission, as Dr. Radhakrishnan and Dr. Zakir Hussain had gone so often, but he has no participation in the Government of the country either directly or indirectly. Nor does he speak on behalf of the Government of India. Even the framers of the American Constitution were not too enthusiastic about the Vice-Presidency. Benjamin Franklin

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57. Art. 12(8). Also refer to Sec. 51 of the Constitution of Burma. It, *inter alia*, demands from the President to "diligently avert every injury and danger to the Union."

58. *Constitutional Law of the United States*, vol. 3, p. 1173.

59. Article 66 (1).

took the position so lightly that he liked to have its holder addressed as "His Superfluous Highness." John Adams, the first holder of the office of the Vice-President, described it as "the most insignificant that ever the invention of man contrived." Another Vice-President described the position of the occupant of that office like "a man in a cataleptic fit. He is conscious of all that goes on but has no part in it." During recent years, however, the possibilities of the office have been fully demonstrated. President Harding associated Vice-President Collidge with Cabinet work. Franklin Roosevelt entrusted many responsibilities to Henry A. Wallace. Although less close to Roosevelt in outlook, Harry Truman, as Vice-President, was able to help the President with Congressional problems. Richard Nixon was the first Vice-President to take an active part in the formulation and explanation of policy and he had been an integral member of the President's team. President Eisenhower had personal knowledge of the chaos that ensued when Truman stepped, almost wholly unprepared, into Franklin Roosevelt's shoes. Since the Vice-President succeeds to the Presidency in the event of the President's death, resignation or removal, it is now felt a national necessity to associate the Vice-President with the administration of the country so that he may have a thorough grasp of the major national and international policies. President Eisenhower, accordingly, insisted from the very beginning of his Presidential term that Nixon should see every State paper, and preside in his absence over meetings of the 'Cabinet' and the National Security Council. Kennedy followed Eisenhower. But this is not possible in India. The Vice-President does need no training like his counterpart in the United States as he fills in only a casual vacancy and takes over the **Rashtrapati Bhavan** until the President resumes his duties or a new President is elected and in no case later than six months from the date of the occurrence of the vacancy. Dr. Radhakrishnan acted twice for Dr. Rajendra Prasad and then reverted to his own position of Vice-President and so did Dr. Zakir Hussain when Dr. Radhakrishnan fell ill. V.V. Giri became the Acting President on the death of Dr. Zakir Hussain on May 3, 1969. It may be of interest to note that the Constitutional Adviser, B.N. Rau, did not contemplate in his first draft the creation of the office of the Vice-President. In the event of the death of the President or his removal from office or incapacity to discharge his functions, the Constitutional Adviser proposed a Commission consisting of the Chief Justice of the Supreme Court and the Presiding Officers of the two Houses of Parliament to carry on the administration until the election of a new President.

**Election of the Vice-President.** The Vice-President is elected by the members of both Houses of Parliament assembled at a joint meeting in accordance with the system of proportional representation by means of single transferable vote. The voting is by secret ballot. A candidate for the office of the Vice-President must be: (1) a citizen of India; (2) not less than thirty-five years of age; (3) eligible for election as a member of the Rajya Sabha; (4) he must not hold any office of profit under any Government, Central, State or Local; and (5) he must not be a member of either House of Parliament or of a House of the Legislature of any State. If he is a member of any House of Parliament or a House of State Legislature, he must resign before he enters upon his office as Vice-President.

The term of office of the Vice-President is five years. But he may resign his office before the expiry of the normal term. The letter of resignation must be addressed to the President of India. When V.V. Giri resigned on July 20, 1969, he addressed his letter of resignation to the President of India, although he himself was the Acting President. This procedure was followed on the advice of the Attorney General.

The Vice-President may also be removed from his office by a resolution of the Rajya Sabha (Council of States) passed by a majority of all the then members of the Rajya Sabha and agreed to by the Lok Sabha. The Constitution does not fix any minimum number for the members of the Rajya Sabha to move such a resolution. But no resolution for the removal of the Vice-President can be moved unless fourteen days notice has been given to that effect. The Vice-President, however, continues to hold office, notwithstanding the expiration of his term, until his successor enters upon his office.<sup>60</sup> All doubts and disputes about the election of Vice-President, like that of the President, must be inquired into and decided by the Supreme Court whose decision on the matter is final.<sup>61</sup> The Vice-President has, before entering upon his office, to make and subscribe before the President, or some other person appointed by him, an oath or affirmation in the prescribed form.<sup>62</sup> He swears to bear true faith and allegiance to the Constitution of India and to faithfully discharge the duty of his office.

**Duties of the Vice-President.** The duties of the Vice-President are two-fold. He is the *ex-officio* Chairman of the Rajya Sabha, presides over its meetings, and draws his salary in that capacity.<sup>63</sup> The office of the Vice-President itself carries no salary. But for the time when the Vice-President acts as President of the Indian Republic or discharges the functions of the President, he ceases to perform the duties of the office of the Chairman of the Rajya Sabha and is, accordingly, neither entitled to salary nor allowances payable to that office.<sup>64</sup>

Secondly, the Vice-President acts for the President in the event of a vacancy in the office of the President by reason of his death, resignation or removal by impeachment<sup>65</sup> until the election of a new President, which must take place within six months of the date of the occurrence of the vacancy.<sup>66</sup> When the President is unable to perform his functions owing to absence, illness or any other cause, the Vice-President discharges his functions until the President resumes duties of his office.<sup>67</sup> Whenever the Vice-President acts for or discharges the functions of the President he

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60. Article 67 (c).

61. Article 71. The election petition against the present incumbent of office Dr. G.S. Pathak is pending in the Supreme Court.

62. Article 69.

63. Article 97.

64. Article 64.

65. Article 65 (1).

66. Article 62 (2).

67. Article 65 (2).

exercises all the powers, enjoys all immunities, and receives such emoluments, allowances and privileges to which the President is entitled to.<sup>68</sup>

The Constitution does not authorise any one to determine whether the President is "unable to discharge his functions" or not. When the Constitution is silent, then, it is for the President himself to determine whether he is at any time unable to discharge his functions. But if the President is unable to determine that, say, owing to a sudden attack of serious illness, then, Parliament may determine it under Article 70. It reads: "Parliament may make such provision as it thinks fit for discharge of functions of the President in any contingency not provided for in this chapter." There is no identical provision in the Constitution of the United States. Article II, Section I(6) simply provides: "In case of the removal from office, or of his death, resignation, or inability to discharge the powers and duties of the said office the same shall devolve on the Vice-President." The Constitution, therefore, does not define what is meant by "inability", and none is authorised to determine whether the President is suffering from inability at any moment. During the entire course of the history of the United States there has never been an occasion on which the inability to discharge the powers and duties on the part of the President may have resulted into the moving up of the Vice-President.

### POWERS AND DUTIES OF THE PRESIDENT

The powers of the President are summarised under the following hands:

**Executive Powers.** The President of the United States is the generalissimo of administration. There are some departments of government which are placed by law under his direct control. Others are under his direct supervision and direction. The President of India has no administrative functions to discharge and he has no power of control and supervision over the departments of government. The various departments of the Union Government are presided over by Ministers and all function under their direct control and responsibility. The President is only a necessary adjunct of the governmental machinery. His authority is formal, though all executive action of the Union Government must be expressed to be taken in the name of the President.<sup>69</sup> For that matter all contracts and assurances of property made on behalf of the Government of India are expressed to be made by the President and executed in such manner as the President may direct.<sup>70</sup> Moreover, all officers of the Union are his officers and consequently his subordinates,<sup>71</sup> and he has the right to be informed of all the affairs of the Union.<sup>72</sup> The President also makes rules for the convenient transaction of the business of the Government of India and for the allocation among Ministers of the said business.<sup>73</sup> He

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68. Article 66 (8).

69. Article 77.

70. Article 299 (1).

71. Article 53 (1).

72. Article 78 (b).

73. Article 77 (3).

has the right to be kept informed by the Prime Minister of all decisions taken by the Council of Ministers and seek such other information regarding the affairs of the Government of India as he may consider necessary and expedient. The President may also ask the Prime Minister to submit for the consideration of the Council of Ministers any matter on which a decision had been taken by a Minister but which has not been considered by the Council.

All important appointments are made by him and they include the Prime Minister of India,<sup>74</sup> other Ministers of the Union,<sup>75</sup> the Attorney-General of the Union,<sup>76</sup> the Comptroller and Auditor General,<sup>77</sup> Judges of the Supreme Court and the High Courts<sup>78</sup> and the State Governors.<sup>79</sup> Before appointing Judges, the President is bound to consult serving Judges, and he will be bound to make these appointments on the advice of the Ministry. With regard to the appointment of the Prime Minister, the choice of the President is obvious when the Constitution enjoins that the Council of Ministers shall be collectively responsible to the Lok Sabha.<sup>80</sup> Collective responsibility can only be enforced when the Council of Ministers is a team which plays the game of politics under the captaincy of the leader of the party in majority in the Lok Sabha. The President may have some discretion in the selection, if no single party has a majority in the Lok Sabha. But even in that case it is the duty of the President to turn to a person who must be able to secure colleagues and with his colleagues he must be able to secure the collaboration of the Lok Sabha. The President's choice, therefore, in the event of such a contingency is limited by political conditions. Legally, too, he cannot do otherwise as the President is under the constitutional obligation to exercise the executive power of the Union in accordance with the Constitution and the Constitution establishes a Parliamentary form of Government.

Besides the appointments of the high dignitaries of the State, referred to above, the President has also the power to appoint the following administrative Commissions: An Inter-State Council,<sup>81</sup> the Union Public Service Commission and a Joint Commission for a group of States,<sup>82</sup> the Finance Commission,<sup>83</sup> the Election Commission,<sup>84</sup> a Commission to report on the administration of Scheduled Areas,<sup>85</sup> Special Officer for Scheduled Castes and Scheduled Tribes,<sup>86</sup> a Commission to investigate into conditions of backward classes,<sup>87</sup> and a Commission on Languages.<sup>88</sup> But all this he does on ministerial advice.

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74. Article 75 (1).

75. Ibid.

76. Article 76 (1).

77. Article 148 (1).

78. Articles 124 and 217.

79. Article 155.

80. Article 75 (3).

81. Article 263.

82. Article 316.

83. Article 280.

84. Article 324 (2).

85. Article 339 (1).

86. Article 338 (1).

87. Article 340.

88. Article 344 (1).



For appointments other than those specified in the Constitution the Indian President has not, as the American President has, the power to appoint a large number of public servants. The power to legislate on the recruitment and conditions of service of public officials lies with the appropriate Legislature. The Constitution provides for the creation of Public Service Commissions, for the Union and the States<sup>89</sup> to advise the Government on matters of recruitment and the recommendations so made are generally accepted.

The President has the power to remove his Ministers,<sup>90</sup> the Attorney-General of India,<sup>91</sup> and the Governors of the States.<sup>92</sup> But ministerial dismissal by the Head of the State is not the essence of a Parliamentary system of Government. No Government in Britain has been dismissed by the Sovereign since 1783 and no Monarch may today venture it, whatever be the legal opinion, unless he or she is determined to gamble in the most dangerous manner. The role of the Indian President with relation to his Ministers is identical to that of the British Monarch. Dr. Ambedkar emphasised this point in the Constituent Assembly. He asserted, "Beyond the identity of names of the Heads of Governments of the Indian Union and the U.S.A., there is nothing in common between the form of government prevalent in America and that proposed in the Indian Constitution." He further added that the place of the President of India "in the administration is that of a ceremonial device on the seal by which the nation's decisions are made known. He will be generally bound by the advice of the Ministers. He can do nothing contrary to their advice; nor can he do anything without their advice. The President of the United States can dismiss any Secretary at any time. The President of the (Indian) Union has no power to do so, so long as his Ministers command a majority in Parliament." Even in case of floor-crossing—a situation which was not visualised by the Constitution-makers—the President shall not have the power to decide by extra-Parliamentary parleys that the Ministry has lost the majority. Parliament is the only forum where the loss of the majority should be demonstrated for it is impossible to predict that a Member or Members of Parliament who have decided to cross the floor, would not change their mind before the voting in Parliament. Moreover, it is Parliament's privilege to vote down a Ministry and the President will not prejudice it. Parliament meets at regular intervals and the defectors and their supporters could as well wait till the next session and move a no-confidence motion against the Ministry therein.

**Administration of Union Territories and Tribal Areas.** Besides the Seventeen States comprising the Indian Union there are ten "Territories": Delhi, Chandigarh, Himachal Pradesh, Manipur, Tripura, the Andaman and Nicobar Islands, the Laccadive, Minicoy and Amindivi Islands, Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry. These Union Territories are Centrally administered. Article 239 of the Constitution provides: (1) Save as otherwise provided by Parliament by law, every

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89. Article 309.

90. Article 315.

91. Article 75 (2).

92. Article 76 (4).

93. Article 156 (1).

Union Territory shall be administered by the President acting to such extent as he thinks fit, through an administrator to be appointed by him with such designations as he may specify. (2) Notwithstanding anything contained in para VI, the President may appoint the Governor of a State as the administrator of an adjoining Union Territory, and where a Governor is so appointed, he shall exercise his functions as such administrator besides his Council of Ministers." Parliament has been empowered to make any other provision by appropriate legislation for these territories in respect of their administration. The President may make regulations for the peace, progress and good Government of the Union Territories of Andaman and Nicobar Islands, and the Laccadive, Minicoy, and Amindivi Islands and all such regulations made by the President have the same effect as an Act of Parliament. The President is also competent to repeal or amend, through such regulations, any existing Act dealing with the administration of these Islands.

The President is empowered to make regulations for the administration of Tribal areas mentioned in the Sixth Schedule of the Constitution.

**The Military Powers.** The military powers of the President of India are lesser than those of the President of the United States and even to those of the British Monarch. The Constitution of India, no doubt, vests in the President the Supreme Command of the Defence Forces, but he is expressly required to exercise this power in conformity with law.<sup>94</sup> Parliament has exclusive legislative power<sup>95</sup> relating to the defence forces, war and peace.<sup>96</sup> Declaration of war and peace, as under the British Constitution, is an executive function, but the Indian President will not declare war or employ the forces without or in anticipation of Parliamentary sanction. There is no provision in the Constitution of the United States that the exercise of the power of the President as Commander-in-Chief of the army and navy shall be regulated by law. Though the power to declare war belongs to Congress, yet the President may through his conduct of the foreign affairs of the country bring about a situation when declaration of war becomes a virtual necessity.

**Foreign Affairs and Diplomatic Powers.** All matters affecting relations with foreign countries are within the exclusive legislative competence of Parliament<sup>97</sup> and, as such, executive power relating to foreign affairs is exercised by the Union<sup>98</sup> and the diplomatic business is conducted in the name of the President. Diplomatic envoys and consular agents are accredited in his name. All treaties and international agreements are negotiated and concluded in the name of the President, but they cannot be effective unless subsequently approved by Parliament. The American President has complete discretion to recognise or not new Governments or States. The treaties concluded by the President are, however, subject to the approval of two-thirds majority of the Senate. But there are many other methods by which the President may by-pass the Senate; the most

94. Article 53 (2).

95. Article 246.

96. Schedule VII, Entries 1, 2, and 15.

97. Schedule VII, List I, Entries 10, 14, 16-21.

98. Article 73.

important being executive agreements. Executive agreements are pledges of certain actions by executives of two countries and such agreements do not require the approval of the Senate. Emergence of such a form of agreements is not possible in India.

**Legislative Powers.** Like the British Monarch, the President of India is a component part of the Union Parliament. The Constitution provides that there 'shall be a Parliament for the Union which shall consist of the President and two Houses.' The powers vested in the President in relation to legislation may be summarised as follows.

(1) The President has the power to summon and prorogue Parliament, and dissolve the Lok Sabha. The power to summon Parliament is, however, subject to the conditions imposed by clause (1) of Article 85, i.e., the President must summon Parliament within six months from the last sitting of a session. If he fails to summon, there will be a breach of the Constitution. The President has also the power to summon a joint sitting of both Houses of Parliament in case of deadlock between them over a non-Money Bill.\* The President of America has no power of summoning ordinary sessions of Congress. The Constitution provides that Congress shall assemble at least once in every year and itself has fixed, January 3, as the opening date for Congressional session. But the President can convene extraordinary sessions of Congress for consideration of special matters of an urgent character. He has, however, neither the power to prorogue Congress nor to dissolve its Lower Chamber, the **House of Representatives**.

Power of dissolution is one of the most important features of a Parliamentary form of Government and it is vested in the Head of the State on Ministerial advice. Dissolution means the end of the life of the Lower Chamber of the Legislature and calls for a fresh election. During the last hundred years in Britain there is no instance of a refusal of a dissolution when advised by the Prime Minister. Nevertheless, the opinion has always prevailed in that country that the Monarch is free to disregard such an advice if he feels that the Prime Minister's right to ask for dissolution is being put to serious abuse. Sir Winston Churchill observed in the course of the debate on the Education Bill in March 1944, that the Prime Minister's advice to dissolve may, in exceptional circumstances, be disregarded. "This is one of the exceptional occasions when the prerogative of the Crown comes into play and when in doubtful circumstances would refer to other advisers. It has been done on several occasions." As recently as 1950, when Labour was returned to majority the question of dissolution assumed practical importance. A letter to **The Times** by Senex, widely understood to be a former Private Secretary to the King, expressed the view that the grant or refusal of a dissolution is a decision entirely personal to the Crown who is free to seek advice from anybody whom he thinks fit to consult. The Crown may advise dissolution even when the Prime Minister may not consider expedient to resort

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99. Article 79.

100. Article 85 (1), (2) (a).

101. Article 85 (2) (b).

102. Article 108 (1).

to it. There had been two definite occasions during the last sixty years when dissolutions took place at the express desire of the King. The first was over the Budget in 1910, at the desire of Edward VII, and the second over the power of the House of Lords in the same year at the desire of George V. On both these occasions the Prime Minister reluctantly acquiesced in the Sovereign's desire and the dissolutions were, as Laski said, "amply surrounded by the cloak of ministerial responsibility". In 1924, the Liberals withdrew their support from the Labour Government headed by Ramsay MacDonald. The Prime Minister advised the King to dissolve Parliament. George V consulted Lord Esher and accepted the Prime Minister's advice as neither the Conservatives nor the Liberals were in a position to form the Government. Referring to this case Sir Ivor Jennings remarked, "George V could have taken no other decision." Of course, His Majesty "could dispense with the advice of Ramsay MacDonald, but only if he could find in Baldwin or Asquith another Prime Minister to take the responsibility." The normal practice, however, is that the Sovereign should not refuse a request for dissolution for the first time if circumstances justified it.

In Canada, the Governor-General seems to possess a larger discretion and he would not grant a dissolution unless the chances of the formation of another Ministry have been fully explored. Referring to the practice obtainable in Canada, Ridell says, "The actions of the Governor-General in granting or refusing a general election are based on **well-established constitutional rules**. He must avoid becoming a party-man, he must not engage in party politics or political intrigue, he must hold the scales even in respect of all political parties, he must be guided by a fair and candid consideration of the welfare of the people at large, he must not grant a dissolution simply to enable a political party to continue in office when there is no real and important question at issue between the parties." It is important to note here that even Mackenzie King, who had complained of the Governor-General's refusal to grant him dissolution of the House of Commons in 1926, conceded the legitimacy of refusal if there was an alternative Prime Minister "who not only was willing, but who was able to demonstrate his ability when Parliament was in session to carry on its proceedings."

The issue of dissolution came for active consideration before the Constituent Assembly of India when Prof. K.T. Shah moved an amendment to Article 69 of the Draft Constitution, which corresponds to Article 85 of the Constitution, making it obligatory for the Prime Minister to give in writing the reasons for the dissolution of the House of the People. Dr. Ambedkar in reply observed, "If the object of Prof. K.T. Shah is that the Prime Minister should not arbitrarily ask for dissolution, I think that object would be served if the convention regarding dissolution was properly observed. So far as I have understood it, the King has a right to dissolve Parliament. He generally dissolves it on the advice of the Prime Minister, but at one time certainly at the time when Macaulay wrote English History, where he has propounded this doctrine of the dissolution of Parliament, the position was this: it was agreed by all politicians that, according to the convention then understood, the King was not necessarily bound to accept the advice of the Prime Minister who



wanted a dissolution of Parliament. The King could, if he wanted to ask the leader of the Opposition if he was prepared to form a Government and the leader of the Opposition could take charge of the affairs of Government and carry on the work with the same Parliament without being dissolved. The King also had the right to find some other member from the House if he was prepared to take the responsibility of carrying on the administration without the dissolution of the House. If the King failed either to induce the leader of the Opposition or any other member of Parliament to accept responsibility for governing and carrying on the administration he was bound to dissolve the House."

"In the same way, the President of the Indian Union will test the feelings of the House whether the House agrees that there should be dissolution or whether the House agrees that the affairs should be carried on with some other leader without dissolution. If he finds that the feeling was there was no other alternative except dissolution, he would as a Constitutional President undoubtedly accept the advice of the Prime Minister to dissolve the House. Therefore, it seems to me that the insistence upon having a document in writing stating the reasons why the Prime Minister wanted a dissolution of the House seems to be useless and not worth the paper on which it is written. There are other ways for the President to test the feelings of the House and to find out whether the Prime Minister was asking for bona fide reasons or for purely party purposes. I think we would trust the President to make a correct decision between the party leaders and the House as a whole. Therefore I do not think that this amendment should be accepted."

Dr. Ambedkar's exposition of the President's power to dissolve Parliament is similar to the practice obtainable in Canada. The Canadian Governor-General would not grant a dissolution unless the chances of the formation of another Ministry have been fully explored. Just as Ridell points out that "the actions of the Governor-General in granting or refusing a general election are based on **well-established constitutional rules**", similarly, the President of India is constitutionally bound to dedicate himself to the service and well-being of the people of India. While considering the possibilities of the formation of an alternative Ministry it is of fundamental importance that the President keeps himself above party politics and all his efforts are guided by considerations of the stability of government and welfare of the people. Dr. Ambedkar admitted that under a Parliamentary system of Government, "there are only two prerogatives which the King or the Head of the State may exercise. One is the appointment of the Prime Minister and the other is the dissolution of Parliament," and President of India can refuse dissolution if he felt that circumstances justified such a refusal. It is instructive to note that Article 85 merely says that the President **may** dissolve the House of People (Lok Sabha). The contrast is significant in the use of the word **may** in this Article. Most of the other Articles dealing with the powers of the President use the mandatory expression **shall**, as when it lays down that there shall be a Council of Ministers with the Prime Minister at its head to aid and advise the President in the exercise of his functions.

(2) The President has the right to address and send messages to Parliament. He may address either House of Parliament or both Houses



assembled together, and for that purpose require the attendance of members. Such an address is essential at the commencement of the first session after each general elections to the Lok Sabha, and at the first session of each year when the President informs Parliament of the causes of its summons. The King in Britain addresses Parliament now on ceremonial occasions, for example for delivering a Speech from the Throne. The Speech from the Throne, which the King delivers either in person or by commission, at the beginning of each session of Parliament, outlines the legislative programme with which Parliament shall be concerned and expresses the views and opinion of the Government on various matters of national and international importance. It is usually written by the Prime Minister and put in the hands of the Monarch to be read. The Monarch can make no alterations in it or introduce new subject matter.

The President's address to Parliament in India corresponds to the Speech from the Throne in Britain and it is used for political purposes in making pronouncements of the policy of Government, both on domestic and foreign affairs. In the United States there is no specific provision authorising or making it obligatory for the President to address Congress at the opening session. At the same time, there is no prohibition for him to send or read a message at the opening session of Congress and declare his policies. The Constitution prescribes that the President "shall from time to time give to Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary or expedient. . . ."<sup>103</sup> The information required to be furnished is communicated at the beginning of each session, and in special messages communicated from time to time during the session. The annual message is major in significance and it contains a review of the activities of Government during the preceding year, a declaration of party politics, and recommendations for such legislation as the President deems the interests of the country require. It may be delivered orally<sup>104</sup> in the presence of both Houses or sent to them in a document. The Annual message of the American President may roughly be compared to the Speech from the Throne in Britain or the Indian President's address, with the difference that in Britain and India it is the handiwork of the Prime Minister of the country concerned whereas President of the United States speaks with his own authority and the message is what he decides it should be.

Clause (2) of Article 86 empowers the President of India to send messages to either House of Parliament with respect to a Bill then pending in Parliament or otherwise, and a House to which any message is so sent shall with all the convenient despatch consider any matter required by the message to be taken into consideration. This power given to the President is, indeed, very wide as the message may relate to any pending Bill or to any other matter before Parliament. But such a power is incongruous in the context of a Parliamentary form of Government as established in India. It corresponds to the American President's power of sending messages to Congress covering a vast scale of problems indicating

103. Article II, Sec. 7.

104. Washington and Adams came in person to deliver the message. Jefferson adopted the practice of sending a written message and it continued till 1913, when Wilson returned to Washington's custom. Hoover discontinued it and Franklin Roosevelt again adopted it.

the needs of the government and the necessity of either amending the existing law or enacting new legislation. But the American Presidency is not a part of the legislature and the Presidential message is a gesture to friendly legislators by the President to support his policy and initiate the required measures. The President of India stands in no such need. His advisers are a part of Parliament chosen from it and responsible to it. They are always in Parliament to initiate new legislation or to offer amendments to expand policy and defend administration and to participate in debates. If the President sends a message on a Bill which has ministerial support it has no use and the President unnecessarily drags himself in politics. The real power of the President like the British Monarch, depends upon his willingness to keep off politics. If the President sends a message contrary to and without the ministerial advice, then, he ventures to interfere with the constitutional responsibility of the Council of Ministers to Parliament. Parliamentary system of Government cannot withstand such an interference. The President cannot speak to Parliament as the Constitution does not make him responsible to it.

(3) The President is required to lay before Parliament the Budget and Supplementary Budget if any, the report of the Comptroller and Auditor General of India relating to the accounts of the Government of India; the recommendations of the Finance Commission and the explanatory memorandum, of action taken thereon; reports of the Union Public Service Commission and various other reports like the report of the special officer for Scheduled Castes and Tribes and the report of the Commission to investigate into the conditions of the backward classes. He recommends measures to Parliament involving the expenditure of Union moneys. These functions the President clearly exercises on ministerial advice.

(4) The recommendations of the President are necessary before legislation can be introduced for the reorganisation of States or alteration of State boundaries. The views of the State Legislature or Legislatures must be ascertained before such a recommendation is made and the views so expressed are not binding on the President. As the President shall act on the advice of the Union Ministers, it, therefore, rests upon the decision of the latter whether the Bill should be introduced in opposition to the views of the State Legislatures or not.

(5) Similarly, sanction of the President is necessary before legislation can be introduced relating to Money Bills, Bills involving expenditure, Bills affecting taxation in which States are interested. No Bill

105. Article 75 provides that the Council of Ministers shall be collectively responsible to the House of the People.

106. Article 112 (1).

107. Article 115 (1).

108. Article 151 (1).

109. Article 281 (3).

110. Article 323 (1).

111. Article 338 (1).

112. Article 340 (3).

113. Article 113.

114. Article 3.

115. Article 117.

116. Article 117 (3).

117. Article 274 (1).

imposing restrictions on freedom of trade can be introduced in the State Legislatures without the previous sanction of the President.<sup>118</sup>

(6) In Britain the assent of the Sovereign is necessary for a Bill to become law. But the Royal assent is now only a matter of formality. The Sovereign has even ceased to give assent to Bills personally. It is given by five Commissioners appointed by the Crown under the Royal Sign Manual and the whole procedure is a picturesque formality. Therefore, the question of vetoing a Bill does not arise and if a daring Monarch ever attempts to venture it he may invite his own abdication. Both the Eire and the Burmese Constitutions specifically deny the vetoing power to their Presidents.

When a Bill passed by two Houses of Parliament is presented to the President of India, he may take any of the following three steps as provided by the Constitution:

- (1) he may give his assent to the Bill;
- (2) he may withhold his assent;
- (3) he may return it, if it is not a Money Bill, for the reconsideration of the two Houses of Parliament with a message for (a) a total reconsideration of the Bill, or (b) a partial reconsideration of the Bill, or (c) he may propose amendments to the Bill.

Withholding assent to a Bill passed by Parliament is inconsistent with the principle of ministerial responsibility and the President is not likely to venture it. The President has been given the power of veto over legislation with the intent that like the Sovereign in Britain he, too, should never use it. So long as the Council of Ministers commands a majority in Parliament and as long as Parliament remains representative of the people, it carries with it the mandate of the political sovereign. If the President withholds his assent, he tampers with the will of the political sovereign expressed through their representatives.

If the President sends back a Bill for reconsideration and if such a Bill is passed again by both Houses of Parliament with or without amendments as contained in the Presidential message, the President must give his assent thereto. This is of the nature of a 'suspensive veto' and is more or less identical to the suspensive veto power of the American President. If in the United States the President disapproves any Bill passed by Congress, he may return it to the House in which it originated within ten days of its presentation to him for reconsideration. If Congress passes the Bill again by a two-thirds vote in each House, it becomes a law notwithstanding the President's signatures. If the Bill fails to secure the requisite majority of two-thirds votes in each House the veto stands. The Indian Constitution does not prescribe any time limit within which the Bill must be returned by the President for reconsideration. It simply says that "The President may as soon as possible return the Bill after it is presented to him." Can the President indefinitely keep the Bill pending? The principle of ministerial responsibility again intervenes with political consequences if the President tries to put it in cold storage.

In fact, the provision of returning Bills, after they are passed by Parliament, is opposed to the basic principles of a Parliament form of

118. Proviso to Article 304.

Government. It is tantamount to directing the Ministry to revise its policy. If the President objects to some provisions of the Bill or has to offer some suggestions thereto, the best opportunity for him was to communicate his views to the Cabinet before introduction of the proposed legislation in Parliament. The Constitution imposes a duty on the Prime Minister to communicate to the President all decisions of the Cabinet relating to the affairs of Union and proposals for legislation and to furnish such information regarding administration of the affairs of the Union and proposals for legislation as the President may call for. "If the President is fully convinced of the futility of the measures of his ministers", says Sri Ram Sharma, "he can dismiss them straightaway when they inform him of their intention of introducing it rather than put them under the indignity of being told by implication that they are incapable of leading the country and therefore the President has taken charge of the administration."

The Constitution-makers perhaps did not foresee that by borrowing the instrument of 'suspensive veto' from the American Constitution they were not only creating legal complications but political confusion too. Dr. Rajendra Prasad, in spite of his unequivocal declaration on the nature of the Constitution in the Constituent Assembly as its President attributed to his office of President of India enormously greater powers than those given by the Constitution. On September 15, 1951, he sent a note to the Prime Minister in which he expressed the desire to act solely in his own judgment, independently of the Council of Ministers, when giving assent to Bills, when sending messages to Parliament and when returning Bills to Parliament for reconsideration. This desire was inspired by the Hindu Code Bill which had just been introduced in the provisional Parliament. Prime Minister Jawaharlal Nehru immediately wrote back to the President and reminded him that "These were serious matters of great constitutional importance. They might involve a conflict between the President on one side and the Government and Parliament on the other. They would inevitably raise the question of the President's authority and powers to challenge the decision of Government and of Parliament. The consequences would obviously be serious." The Prime Minister referred the President's letter to Alladi Krishnaswami Ayyar and the Attorney-General, M.C. Setalvad, for their opinions. The Attorney-General communicated his opinion on September 24, 1951 and informed the Prime Minister that the functions of the President "cannot be exercised by him without the concurrence of his Ministers and that in exercising them he is bound to

119. Sri Ram Sharma, *Parliamentary Government in India*, p. 41.

120. The President wrote, "...I propose to watch the progress of the measure (Hindu Code Bill) in Parliament from day to day and, if I feel at any stage that I should inform the Parliament also of my viewpoint, I may send to it a message when I consider it appropriate to do so. My right to examine it on its merits when it is passed by Parliament before giving assent to it is there. But if I find that any action of mine at a later stage is likely to cause embarrassment to the Government, I may take such appropriate action as I may feel called upon to avoid such embarrassment consistently with the dictates of my conscience." Munshi, K.M., *Indian Constitutional Documents*, Vol. I, p. 582.

121. Letter from Jawaharlal Nehru to Dr. Rajendra Prasad, September 15, 1951. *Ibid.*, p. 583.

act in accordance with the advice tendered by his Ministers." Alladi Krishnaswami wrote two letters to the Prime Minister. The first on September 20 wherein he expressed the opinion that it was "perfectly clear that our President's position was analogous to that of a constitutional Monarch in England... and there is no sphere of his functions in respect of which he cannot act without reference to the advice of his Ministers." In his second letter, October 8, 1951, he wrote that the President's arguments if conceded "will upset the whole constitutional structure envisaged at the time when the Constitution was passed, make the President a kind of dictator...." Alladi Krishnaswami Ayyar further said that Dr. Prasad "seems to read every Article of the Constitution in which the expression 'President' occurs as conferring powers upon the President in his individual capacity without reference to the Cabinet." But Article 74, "is all-pervasive in its character and does not make any distinction between one kind of functions and another. It applies to every function and power vested in the President whether it relates to addressing the House or returning a Bill for re-consideration or assenting or withholding assent to the Bill. It will be constitutionally improper for the President not to seek to be guided by the advice of Ministers in exercising any of the functions legally or technically vested in the President."<sup>122</sup> The expression "aid and advise" in Article 74 cannot be construed so as to enable the President to act independently or against the advice of the Cabinet."<sup>123</sup>

A.G. Noorani succinctly points out that "Dr. Prasad's demarche thus helped clarify the position once and for all, though with results he could have hardly liked".<sup>124</sup> Dr. Radhakrishnan, like a sensible President, overcame the defect of the Constitution and did not adopt his predecessor's stand. The principles and requirements of a Parliamentary form of Government cannot justly be mixed with the Presidential form of Government. Legislature in a Presidential system of Government is a co-ordinate branch of Government with the executive and there is no machinery provided for integrating their functions. Both act independently of each other and Presidential messages and returning Bills for re-consideration are the President's two formal contacts with the Legislature. In a Parliamentary system of Government, the real Executive is a part of the Legislature. This point was abundantly made clear by Prime Minister Nehru in his press conference on July 7, 1959. While reiterating that the system of Government in India was not Presidential, Nehru said, "The Cabinet is supposed to have the confidence of the majority in Parliament and is responsible to it. If it loses that confidence it ceases to function. People get mixed up a little here with what is called the Presidential system in the United States of America. Our system is not a Presidential system but the Cabinet system, the closest parallel being the system in the United Kingdom. So question does not arise."<sup>125</sup>

(7) The President also gives assent or may withhold his assent to

122. *Ibid.*, pp. 592-93.

123. *Ibid.*, pp. 586-88.

124. *Ibid.*, pp. 593-94.

125. "The President-41", *The Indian Express*, New Delhi, March 21, 1967.

126. *The Hindustan Times*, New Delhi, July 8, 1959.



Bills passed by State Legislatures, but reserved for his consideration by a Governor. Now that many States have non-Congress Governments, it is more than possible that some of them would undertake legislation within their legal competence to give shape to their economic and social ideologies and quite conceivably they would conflict with Congress Party's ideology. Should the Governor under the circumstances reserve such legislation for the consideration of the President and if he does should the Union Government advise the President how he should deal with the reference; whether he should return it to the State Legislature with a message for reconsideration, withhold his assent or keep the Bill pending indefinitely as no time limit is prescribed for the President's assent. It is, indeed, inconceivable that the Constitution had intended to vest the Union Government in a Federal State with such a sweeping power as to reduce the States to the subordinate position of mere administrative units as was the case before 1920. There is also a similar provision in the Constitution of Australia empowering the Governor of a State to reserve a Bill for the consideration of the Crown. But it is important to note that the provision in the Australian Constitution differs from the Indian Constitution in two important respects. Firstly, that in Australia a Bill is reserved for the consideration of the Crown and not of the Governor-General. Secondly, the Crown is advised by the **State Cabinet** and not by the Commonwealth of Australia Cabinet. It, thus, clearly establishes that the Australian Constitution does not tamper with the autonomy of the States. This precisely a federal polity demands. It is, accordingly, hoped that the President of India would exercise his judgment when confronted with such a situation after seeking the views of the State Cabinet and it need be, the advice of the Supreme Court as was done in the case of the Kerala Education Bill passed by the Communist Government when it was earlier in power. "This alone would place the President," says Asok Chanda, "in correct relationship with the States and conforming to the democratic principles of a federal State."<sup>127</sup>

(8) The President has been given far-reaching powers in the sphere of legislation when Parliament is not in session. "In no country with a written Constitution and the parliamentary type of government is the chief of the State the repository of such prodigious legislative powers."<sup>128</sup> Clause (1) Article 123 provides: "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require." Clause (2) of the same Article provides that the ordinance has the same force as an Act passed by Parliament. The ordinance so promulgated must be laid before both Houses of Parliament immediately after it re-assembles. If Parliament disapproves the ordinance it lapses. If it is not disapproved, it will automatically cease to operate at the end of six weeks from the re-assembly of Parliament. Since the maximum period which can elapse between two sessions of Parliament is six months, the maximum duration of an ordinance, unless previously terminated by Parlia-

127. "Scope for President to use his Judgment". *The Statesman*, New Delhi, March 31, 1967.

128. Lal, A.B. (Editor), *The Indian Parliament*, p. 22.

ment, can be six months<sup>129</sup> and six weeks. The President may withdraw the ordinance at any time.

This ordinance issuing power of the President is a relic of the Government of India Act of 1935. In Britain the Executive does not possess such an independent power of legislation. There is no precedent of such a power to exist in the Dominions. In the United States all legislative power is vested in Congress and it cannot delegate its authority of law-making to any other authority. But the President of India is empowered to issue ordinances when Parliament is not in session and these ordinances have the force of law as passed by Parliament. The courts cannot question the bona fides of the President's action in issuing an ordinance or whether there existed reasonable necessity for such an action. President is the sole judge of the necessity of issuing an ordinance and he is not to give reasons for promulgating it. What the Courts can do is to examine the ordinance issued and promulgated and see whether it has been issued within the scope of powers conferred by the Constitution.

It has been suggested that the words "is satisfied", and "as the circumstances appear to him" as contained in Article 123(1) authorising the President to issue ordinances require the President to apply his mind to the circumstances of the case before it can be said that he is "satisfied". It is argued that the initiation of an ordinance may no doubt be made by the Council of Ministers, but a stage comes when the President must be "satisfied" and the circumstances must "appear to him" to require its promulgation. The Council of Ministers' satisfaction cannot be a real substitute for the President's<sup>130</sup> satisfaction. The President, therefore, may act in his own judgment if he is satisfied that the circumstances do not justify the issuing of an ordinance. "Unthinking and supine acceptance of the advice tendered would not be in consonance with the Constitution." K.B. Subba Rao, former Chief Justice of India, maintains that the expression "satisfaction" is a mental process and it involves the pros and cons of the question. The President may take the advice of the Ministry but is not bound by it. "Even if", he says, "a contrary construction is possible, it is necessary to develop conventions to enable the President to exercise his discretion in such situations."<sup>131</sup> But this is not exactly the essence of a Parliamentary system of government. The President has, no doubt, the right to resist the advice tendered to him if he is not satisfied with such advice, but he should not persist after, what Bagehot describes as "warning" has been given. The ultimate responsibility is that of the Council of Ministers. The President has no functions to discharge on his own authority and no discretion to exercise in his individual judgment. When the Constituent Assembly was debating the powers of the President, the Law Minister categorically affirmed that if the President acted except on the advice of his Council of Ministers it would be tantamount to a violation of the Constitution and would make him liable to

129. Article 85.

130. K.C.S., "The President and his Powers II", *The Indian Express*, June 2, 1967.

131. *Ibid.*

132. "Spokesman of Nation, Not Agent of Central Government." *The Tribune*, Chandigarh, August 15, 1969.

impeachment. The Government of India Act, 1935 specifically provided for the exercise of individual judgment and discretion by the Governor-General in certain circumstances. This provision was deleted from the Constitution and it strengthens the view that discretionary powers were advisedly withdrawn as being inconsistent with the principles of Parliamentary democracy.

The ordinance-issuing power vested in the President may be described as an emergency power to meet the extraordinary situation in which it is not possible for the Government to obtain the necessary legislation enacted immediately by Parliament. But unfortunately, there has, of late, been a tendency on the part of the Government to resort to this ordinance-making power oftener than seems desirable. Ananthasayanam Ayyangar, the then Speaker of the Lok Sabha, who presided over a symposium on "Law and Democracy in India," deplored the arbitrary manner in which the executive was prone to use the ordinance-making power of the President. "At times one felt," he said, "that the promulgation of an ordinance was delayed until a Parliament session was prorogued." Such a procedure is highly objectionable, and in the words of Ananthasayanam Ayyangar, "a negation of parliamentary democracy." When the framers of the Constitution provided that any ordinance issued must receive legislative sanction within the specified period, they were anxious that, as far as possible, democratic procedures and processes should be enforced by the party in power in making laws. And, thus, emergency powers were to be exercised sparingly and only in case of real emergency. That the Executive has paid scant attention to the intentions of the Constitution-makers is reinforced by the promulgation of the ordinance nationalising fourteen major Banks on July 19, 1969 just two days before Parliament was to meet for its monsoon session.

(9) Finally, the President nominates 12 members of the Rajya Sabha from among persons having special knowledge or practical experience of Literature, Science, Art and Social Service. He can also nominate two Anglo-Indians to the Lok Sabha if no Anglo-Indians otherwise get themselves elected to that House.

**Judicial Powers.** The President may grant pardons and reprieves, and suspend, remit or commute sentences to persons convicted by Court Martial, and in all cases in which sentences to death have been passed. But the President's power of pardon does not affect the similar power of the Governors of the States and military officers with respect to Court Martial. The President's power of pardon covers offences against acts relating to matters on the Union List. It does not relate to offences committed against matters on the Concurrent List unless Parliament has expressly excluded the executive power of the State on such matters.

The President's power of pardon is exercised on the advice of Ministers. In Britain pardoning is a Royal prerogative. But it is primarily a matter for the Home Secretary and the Royal share is mainly formal. Ordinarily, the power is exercised after sentence, although pardon is available before conviction. In the United States the President

can "grant reprieves and pardons for offences against the United States except in cases of impeachment." If he chooses he may grant pardon before as well as after conviction. The Indian President's power of pardon can only be exercised after conviction. Grant of amnesty requires parliamentary approval. In America the President's power of pardon is exclusive.

**Miscellaneous Powers.** There are many miscellaneous powers of the President: making of rules as to the manner in which orders and instruments made by the Government of India, in the name of the President, shall be authenticated, rules for the convenient transaction of the business of Government of India and for the allocation among ministers of the said business, rules, in consultation with the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha, as to the procedure with regard to joint sittings of, and communications between the Houses. The President's approval is also necessary for rules made by the Supreme Court for regulating the practice and procedure of the Court. The President makes regulations determining the number of members of the Union Public Service Commission, their tenure and conditions of service, etc. He also makes regulations specifying the matters in which it shall not be necessary to consult the Union Public Service Commission in respect of services of the Union.

The Constitution also confers on the President the power of taking the opinion of the Supreme Court on questions of public importance involving a question of law as well as a question of facts. It means that the President can refer to the Supreme Court the question whether a proposed Bill will be *ultra vires* of the powers of the Legislature. The advisory opinion given by the Supreme Court is not binding on the President.

### EMERGENCY POWERS OF THE PRESIDENT

✓ **Different kinds of Emergency.** Besides the powers enumerated above, the President of India has been vested with vast emergency powers which are divided under three distinct heads:

(1) An emergency arising out of a threat to the security of India or any part of it by war, external aggression or internal disturbance. A Proclamation of Emergency may be made by the President at any time if he is satisfied that the security of India is in danger or is likely to be in danger either due to war or external or internal aggression.<sup>134</sup>

(2) Failure of constitutional machinery in a State. The President is empowered to make a Proclamation when he is satisfied that the Government of a State cannot be carried on in accordance with the provisions of the Constitution on the report of the Governor of the State or otherwise.<sup>135</sup>

(3) Financial Emergency. The President is empowered to make a declaration of financial emergency whenever he is satisfied that the financial stability or credit of India or any part thereof is threatened.<sup>136</sup>

134. Article 352.

135. Article 356 (a).

136. Article 360 (b).

The two kinds of Proclamations—Proclamation of Emergency and Proclamation of failure of constitutional machinery in a State—differ on the grounds leading to the proclamation as well as to the effects. The Proclamation of Emergency may be necessitated whenever the security of India is threatened or is deemed to be threatened either due to external aggression or internal disturbance, or whenever the financial stability or credit of India is threatened. The Proclamation of failure of constitutional machinery, on the other hand, is necessitated whenever the Government of a State cannot be carried on in accordance with the provisions of the Constitution. A threat to the security of India or a threat to her financial stability may not lead to the Proclamation of the failure of the constitutional machinery in a State. The obvious ground in the latter case is either the failure of the constitutional machinery in a State, or the refusal of a State to discharge its constitutional obligations.

When a Proclamation of Emergency is in operation the Fundamental Rights to the Seven Freedoms—freedom of speech, freedom of assembly, freedom of association, freedom of movement, freedom to choose one's residence, freedom to deal with property, and freedom to follow an avocation, are automatically suspended, and the President may also suspend the right to move the Courts for the enforcement of Fundamental Rights. Nothing of this kind happens when a Proclamation of failure of constitutional machinery in a State is made. Neither the Fundamental Rights to Seven Freedoms stand automatically suspended nor the right to move the Courts for the enforcement of Fundamental Rights is liable to be suspended.

Secondly, the object of the Proclamation of Emergency is to confer wider powers, executive and legislative, upon the Union Government in order to meet the threat to the security of India or its financial stability. The State authorities do not cease to function. The organs of the State Governments continue to function as before under normal conditions, except (i) that the Government of India can give directions to the States as to the manner in which the executive power thereof is to be exercised, \* (ii) the legislative competence of the Union Parliament is widened and it acquires the power to legislate on subjects included in the State List, and (iii) the President is empowered to modify, by his own orders, the provisions of the Constitution with regard to financial matters. But in case of a proclamation of failure of constitutional machinery the Government of a State concerned is superseded by the Union, except the High Court. The State Legislature is suspended altogether and the State executive in whole or in part.

**Emergency by External or Internal Aggression.** A Proclamation of Emergency may be issued by the President if he is satisfied that a grave menace exists whereby the security of India or any part of its territory is threatened or is likely to be threatened either by war or external aggres-

137. Article 358 (1).
138. Article 359.
139. Article 353 (a).
140. Article 353 (b).



sion or internal disturbance."<sup>141</sup> The Constitution definitely provides that a Proclamation of Emergency can be made even before the actual occurrence of war, external aggression or internal disturbance if the President is satisfied that there is imminent danger thereof.<sup>142</sup> It is the satisfaction of the President alone which may lead to the declaration of emergency. The Courts have no jurisdiction to question either the validity of such a Proclamation or its desirability. The President is the sole judge and his determination cannot be questioned. But the satisfaction of the President really means the satisfaction of his Council of Ministers and he acts on their advice while making a Proclamation of Emergency.

A Proclamation of Emergency may be revoked by a subsequent Proclamation<sup>143</sup> or it ceases to operate at the end of two months unless it has been approved within that period by resolutions of both Houses of Parliament.<sup>144</sup> If the Proclamation is issued at a time when the Lok Sabha (House of the People) has been dissolved or if its dissolution takes place during the period of two months, then the Proclamation must be approved by the Rajya Sabha (Council of States) within the specified period of two months and by the newly elected Lok Sabha within thirty days of its first sitting. If the newly elected Lok Sabha does not approve it, the emergency ceases to operate after the expiration of thirty days from the date when the Lok Sabha meets for its first sitting.<sup>145</sup>

While the Proclamation of Emergency is in operation, it may have the following constitutional consequences:

1. (a) Parliament will have unrestricted power to make laws for the whole or any part of India with respect to any of the matters enumerated in the State List.<sup>146</sup> Laws so made by Parliament shall become inoperative six months after the Proclamation of Emergency has ceased to operate.<sup>147</sup>
- (b) Any law made by the State Legislature which is inconsistent with such laws made by Parliament will be void to the extent of inconsistency.<sup>148</sup>
- (c) During the operation of the Proclamation of Emergency the President may, when Parliament is not in session, promulgate ordinances in respect of matters included in the State List. The President's legislative power under Article 123 is enlarged accordingly.
- (d) Parliament has the power to make laws and confer powers and impose duties upon the Government of India and its officers in order to carry out the laws made by Parliament under its

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141. Article 352 (1).

142. Article 352 (3).

143. Article 352 (2) (a).

144. Article 352 (2) (c).

145. Proviso to Article 352 (2) (c).

146. Article 250 (1).

147. Article 250 (2).

148. Article 251.

extended jurisdiction as a result of the Proclamation of Emergency.

- (c) Parliament has the power to extend its own life by law for a period not exceeding one year at a time. Such an extension in its term cannot last beyond six months after the proclamation has ceased to operate.<sup>149</sup>
2. The executive power of the Union shall, during the operation of the Proclamation, extend to the giving of directions to any State as to the manner in which its executive power is to be exercised.
3. While the Proclamation of Emergency is in operation, the President may by his order modify the provisions relating to distribution of revenues between the Union and the States, with a view to securing adequate revenues for the Government of India to meet the situation created by the emergency. But such orders of the President must be laid before each House of Parliament immediately after they are made. In no case such orders shall be valid beyond the financial year in which the Proclamation of Emergency ceases to operate.<sup>150</sup>
4. (a) While a Proclamation of Emergency is in operation, the Fundamental Rights to the Seven Freedoms, as contained in Article 19, are automatically suspended. The Constitution does not make any distinction for purposes of suspension of the Rights to Seven Freedoms between times of war and times of peace. Whether it is due to war, internal disturbance, or a danger thereof operation of Article 19 is suspended as soon as the Proclamation of Emergency has been made.
- (b) When the Proclamation of Emergency is in operation, restrictions imposed by Article 19 on the executive and legislative authority of the Union, States, and local authorities are suspended and, accordingly, a law or an administrative action cannot be challenged in the Courts on the ground that it contravenes the provisions laid down therein.
5. The President is also empowered to suspend the right to move the Courts to enforce any other Fundamental Rights. Such a suspension shall be in force during the operation of the Proclamation of Emergency and it is required to be laid before each House of Parliament "as soon as may be after it is made." The President's order suspending the enforcement of Fundamental Rights is, thus, not final. Parliament by law can revoke or cancel the order of the President. But the President can, if he wishes, delay in giving Parliament the opportunity to take action.

149. Article 353 (b).

150. Proviso to Article 83 (2).

151. Articles 268 to 279.

152. Article 354 (2).

153. Article 354 (1).

154. Article 358.

upon it.<sup>155</sup> The Constitution does not fix any time-limit for the order to be laid before Parliament. It simply says that every order made by the President "shall, as soon as may be after it is made, be laid before each House of Parliament." It is, therefore, for the President to determine when the order shall be laid before Parliament.

**Failure of Constitutional Machinery in a State.** Article 355 of the Constitution imposes on the Union Government the duty to protect every State against external aggression or internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. Article 356 further provides that if the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which a Government of a State cannot be carried on in accordance with the provisions of the Constitution, the President may by Proclamation:

- (a) assume to himself all or any of the functions of the Government of the State including all or any of the powers vested in or exercisable by the Governor, or any other body or authority in the State;
- (b) declare that the powers of the State Legislature shall be exercisable by or under the authority of Parliament;<sup>156</sup>
- (c) make such consequential provisions as may appear to him to be necessary for giving effect to the objects of the proclamation including provisions for suspending any part of the Constitution of the State.

If the proclamation has declared that the powers of the State Legislature shall be exercisable by or under the authority of Parliament it shall be competent: (i) for Parliament to confer on the President the power to make laws or to authorize the President to delegate such power to any other authority, and (ii) for the President, when the Lok Sabha is not in session, to authorise expenditure pending sanction of such expenditure by Parliament.

The President, however, cannot assume to himself any of the powers vested in or exercisable by the High Court. Nor can he suspend, either in whole or in part, the operation of any provision of the Constitution relating to High Courts.<sup>157</sup>

The Proclamation may be revoked or varied by a subsequent proclamation.<sup>158</sup> Every Proclamation issued in connection with the failure of constitutional machinery in a State requires to be laid before each House of Parliament and it ceases to operate, except where it is a proclamation revoking a previous proclamation, after the expiry of two months unless before the expiration of that period it has been approved by resolutions

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155. Basu, Durga Das, *Commentary on the Constitution of India*, op. cit., p. 810.

156. Article 356 (1).

157. Proviso to Article 356 (1).

158. Article 356 (2).

of both Houses of Parliament. If approved by Parliament, the Proclamation remains in force for six months and may be extended to a maximum period of three years, but such extension must not exceed for more than six months at a time.

The expression in Article 356 that "the Government of the State cannot be carried on in accordance with the provisions of the Constitution" has a very wide scope. There is no necessary connection between the conditions of emergency due to war, external aggression or internal disturbance or a threat thereto and the failure of the State Government to work according to the Constitution. But a Proclamation of failure of the constitutional machinery in a State or States can be made, if the President is satisfied that the measures taken to meet the emergency created due to war or internal disturbance, under Articles 352 and 353, are not adequate or are not likely to be adequate. The President can also make the proclamation of the failure of constitutional machinery, if he is satisfied that there is a political breakdown and there is no stable majority in the State Legislature to form the Ministry or the party wrangles within the majority party itself do not satisfy the conditions of a stable government. It happened in the four States of Punjab, Travancore-Cochin, Patiala and East Punjab States Union, and Andhra of the pre-reorganisation period and is now a common feature of the United Fronts wherever they came into power. United Fronts were set up in several non-Congress States after the 1967 General Elections, but they could not form an effective alliance with one another. There is no common goal, no common approach. The only concern of the components of the United Fronts is to get into power, to outwit the other partners and to create a constitutional crisis wherever and whenever possible. Finally, failure to comply with the directions of the Union Government may also lead to the proclamation of failure of the constitutional machinery.<sup>159</sup> It is important to note, once again, that in order to issue a proclamation of failure of constitutional machinery in a State the President need not wait for the report of the Governor. The President is empowered to take action on his own initiative and it is all a matter of his satisfaction.

The constitutional consequences of failure of the constitutional machinery are:

- (1) the assumption by the President of all functions of the Government of the State, and all powers vested in or exercisable by the Governor;
- (2) the Legislature of the State concerned is suspended and all powers thereunder are exercised by or under the authority of Parliament;
- (3) the President may make any necessary, incidental and consequential changes in the provisions of the Constitution relating to any State authority so as to give desirable effect to the objects of the Proclamation;
- (4) Parliament may confer, during the operation of the Proclamation, on President legislative powers exercisable by the State

Legislature. Parliament may do this to relieve itself of extra burden of work. But such a delegation of legislative authority is made subject to the ultimate authority of Parliament. The President in his own turn may delegate such powers to subordinate officers;

- (5) Parliament, President, and other authorities vested with the power to make laws for the State during the operation of the proclamation may confer powers and impose duties upon the Union, its officers and authorities.
- (6) When the Lok Sabha is not in session the President may authorise, by his executive order, expenditure out of the Consolidated Fund of the State subject to the sanction of Parliament.

The powers of the President to supersede the Government of a State are very wide and even drastic. Alladi Krishnaswami Ayyar, a member of the Drafting Committee, supporting the provisions of this Article maintained that if the Constitution of a State was worked efficiently ensuring the proper functioning of a Responsible Government, the Union would not and could not interfere. "Far from being an impediment to State autonomy, they were a bulwark in favour of State autonomy, because the primary obligation was cast upon the Union to see that the Constitution was maintained." He further said that the "President" meant the Union Cabinet responsible to Parliament, a representative body of the Union and the component parts. He had no doubt that not merely the State conscience of the representatives of the particular State concerned but also conscience of the representatives of all other units would be quickened and they would see to it that the provisions in these Articles were properly worked. Pandit Hriday Nath Kunzru opposed the Article. His contention was that if real Responsible Government was to be established in the States, "the electors must be made to feel that the power to apply proper remedy, if any mismanagement occurred, rested with them. It depended upon them to choose their representatives who would be capable of working in accordance with their best interest. If the Central Government or Parliament were given power to interfere, there was a danger that whenever there was a dissatisfaction in a State, appeals would be made to the Central Government to come to their rescue. The State electors would throw their responsibility on the shoulders of the Central Government. It was not right to encourage this tendency."

Dr. Ambedkar, the Chairman of the Drafting Committee, while defending these provisions maintained that no departure from the established principles had been made by providing powers to the Centre to take over the administration of a State if its constitutional machinery failed. He cited the Constitution of the United States which made an obligation on the part of the National Government to see that the State maintained the Republican form of Government. Replying to the criticism that these Articles were liable to be abused, Dr. Ambedkar said, "I may say that I do not altogether deny that. There is a possibility of these Articles being abused and being employed for political purposes. That objection applies to every part of the Constitution, wherever the Centre has been given power to override the States. I share the sentiments expressed by



Gupta that the proper thing we ought to expect with regard to this Article is that they will never be brought into operation and they will remain as a dead letter. If at all they are brought into operation, I hope the President who is endowed with powers will take proper precaution before actually suspending the Constitution" C.L. Anand analysing Dr. Ambedkar's speech says, "Ambedkar thought that the President would issue a warning to the State concerned that things were not happening the way they should, and if the warning failed to have any effect, he would then order an election to allow the people of the State to settle the matter themselves. Only when the two remedies failed he would resort to the provisions of Article 356."<sup>100</sup>

But what Ambedkar had thought did not actually happen. Provision of Article 356 had been employed for political purposes, and not one single uniform method governed the suspension of the constitutional machinery in the pre-reorganised States of Punjab, PEPSU, Andhra and Travancore-Cochin. The President's rule based on Article 356 was established in the Punjab State, when after the dramatic resignation of Dr. Gopi Chand Bhargava, "no alternative Ministry could be formed," although the Congress Party, whose leader Dr. Bhargava was, still commanded an overwhelming majority in the State Legislative Assembly. The President proclaimed the emergency on a report received from the State Governor. The Governor became the delegate of the Centre and the agency of local executive power. The legislative powers of the State were transferred to Parliament. Another case was of the PEPSU, a Part B State. The Congress Ministry lost its majority in the State Assembly in 1952 and was replaced by a coalition led by the Akalis and given the name of the United Democratic Front. It soon became evident that the Front was a strange combination and it could remain united only by interpreting democracy in eccentric ways. It felt shy in meeting the Assembly and dubious methods were employed after November 1952 not to call its meetings. In the meanwhile, the Election Tribunal was examining the unusually heavy crop of election petitions, 23 out of a total of 60 members. Of 17 petitions decided upon by early 1952, as many as 9 were upheld and out of the 6 members of the Council of Ministers three had been unseated, while a petition was still pending against another. This had an aggravating effect on the tottering Front Ministry necessitating the Presidential Proclamation under Article 356 issued in March 1953, originally for six months and later extended by Parliament for further six months. The Rajpramukh, assisted by an Adviser, appointed by the Centre, became the agency of local executive power. The legislative power of the State was transferred to Parliament.

The position in Travancore-Cochin after the elections of 1952 was not comfortable for any single party. In an Assembly of 109, Congress secured only 45 seats. A Congress Government was, however, formed with the support of the 8 members of the Travancore Tamil Nad Congress, really a section of Congressmen who differed with the parent party on the separation of Tamil-speaking districts from the Malayalam-speaking remainder of the State and their merger with Madras, and a sufficient num-

ber of Independents. In September 1953, the leader of the T.T.N.C., who had been given a place in the State Cabinet, resigned from the Government and a few days later his party voted with the Opposition to defeat the Government. The Chief Minister advised the Rajpramukh to dissolve the Assembly and he continued in office till the new elections were held. There were loud protests by the parties of the Left who argued that the Government could have been formed by the Opposition groups and the Rajpramukh would have, therefore, sent for the leader of the Opposition. The Praja Socialist Party even insisted on the Proclamation of the President's rule under Article 356. New elections were held and the Congress failed to command a majority when it resigned. The Praja Socialist Party, with its 19 members, agreed to form the Government with the support of the Congress Party which commanded 45 members. The P.S.P. Government did not last long. The Congress Party in the State had become restive and asked the Party's Central Parliamentary Board to permit them to withdraw support from the Government. The permission was given and the Congress Party was able to form a Government in February 1955, with 46 Congress votes, 12 of the unreliable T.T.N.C. and two or three former P.S.P. members (including the Speaker) who resigned from their party. The Government fell in March 1956, because of the defection of six discontented members of the Congress Party. Consequently the President proclaimed suspension of the constitutional machinery in the State under Article 356.

In the newly created State of Andhra the Congress had 46 seats out of a total of 140. There were 45 Communists. A Congress Coalition Ministry was formed with Prakasam as Chief Minister, who had resigned from the P.S.P. Prakasam Ministry was defeated on the issue of prohibition and it resigned. Prakasam was unwilling to carry on as a caretaker government until the end of the elections and the President took over the administration of the State, by proclamation of emergency under Article 356 on November 15, 1954. When the President's proclamation was approved in the Lok Sabha, an amendment was accepted by the House declaring that the action of the Centre was "the only proper constitutional remedy for the crisis that arose on the resignation of the Prakasam Ministry." In the debate in the House, on November 20, 1954, the Communists claimed that they could have formed a stable ministry and should have been invited to do so. The P.S.P. also said that an attempt ought to have been made to find alternative government. The spokesman of the Union Government was of the opinion that no stable government could have been formed, although he admitted that it would be a normal parliamentary practice for a defeated ministry to carry on until a new one was appointed.

But what happened in Kerala on July 31, 1959 shall go deep in history. This was the first time since Independence that considerations other than ministerial instability, due to internal party wrangles or the shifting allegiance of the members of the Legislature, had led to the drastic action taken by the President under Article 356 of the Constitution. The Presidential proclamation issued on July 31, 1959 simply said, "...that a situation has arisen in which the Government of that State cannot be carried on in accordance with the provisions of the Constitution of India."

But the facts were familiar to the public all over India. The Communist Party emerged the largest single party in the State of Kerala in the last General Elections and with the help of five Independent members of the Assembly assumed office on April 5, 1957. During twenty eight months of its tenure the Opposition parties, including the Congress, were unable to overthrow it by purely constitutional means. The combined Opposition resorted to direct action on June 12, like picketing of schools, buses and Government offices and violation of lawfully promulgated orders." Prime Minister Nehru visited Kerala, in response to the appeal of the Kerala Chief Minister, and remained there for three days studying the situation and meeting all the parties, groups and interests. At the end of his visit Nehru, *inter alia*, suggested mid-term General Elections. The Prime Minister characterised the movement in Kerala as "a vast mass upsurge" the like of which had not been seen by him before.

Namboodiripad, the Kerala Chief Minister, did not agree to the proposal of mid-term General Elections. The Opposition thereupon prepared for an intensification of the agitation which was to culminate on August 9 in a major demonstration threatening grave disorder. Dr B. Ramakrishna Rao, Governor of Kerala, sent his report to the President wherein he described that the agitation against the Government was reaching a stage where orderly administration would have become impossible. The Constitution was accordingly suspended by the President on July 31, as stated above. While justifying the intervention of the Union, the Prime Minister told the Lok Sabha on August 19, 1959 that a stage had been reached in Kerala, when there was no other way out except the President's Proclamation, and the alternative was a disaster on a big scale in that State.

Some lawyers from Kerala and a few from outside, such as K.M. Munshi, suggested that the Centre had a duty under the Constitution to intervene in Kerala, dismiss the Ministry and order fresh elections. In their opinion, "If the party having a majority in a State Legislature is wedded to a doctrine or in fact carries on administration persistently in a manner, which denies all the citizens of the State, equality of status and opportunity and the State administration is carried on in the aforesaid way with the majority vote of the Legislature, and which evokes overwhelming resentment and situation, a situation must...be regarded as having arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution....To say that such a Government can still be carried on in accordance with the provisions of the Constitution merely because the ruling party has the major-

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161. Refer to the speech of N.V. Gadgil, Governor of Punjab at the Rotary Club, Jullundur, on July 4, 1959, wherein he deplored the movement of direct action. *The Tribune*, Ambala Cantt., July 7, 1959.

162. Gadgil also said that the Communist Government in Kerala was fully entitled to continue in office for five years unless it was voted out or it resigned of its own accord. He further added that the Party in power must have stability to implement its assurances held out to the electorate during elections.

ity vote is to ignore altogether the other provisions of our Constitution<sup>163</sup>

But this is not the correct constitutional position. Under the Constitution as long as a State Ministry has the confidence of the people, as expressed through their representatives in the State Legislature, it has a right to govern and aid and advise the Governor for their full term of office. The democratic right of the people of each State to manage their affairs through their representatives is enshrined in the Constitution and it insists that the confidence of the State Legislature in the Government of the day is the only expression of the will of the people. The Centre can intervene only in two contingencies: (1) either a grave emergency where the security of India or any part thereof is threatened by external aggression or internal disturbance, or (2) where there is a breakdown of the constitutional machinery in a State.

The imposition of President's Rule in the States of Rajasthan and Haryana after the 1967 General Elections presents a revealing study. In Rajasthan no single Party succeeded in securing absolute majority in the State Assembly. The Governor called upon Mohan Lal Sukhadia, leader of the Congress Party which was the largest single Party in the State Assembly, to form a Government. Sukhadia accepted the invitation. The non-Congress Parties joined forces as the Samyukta Dal and claimed that they collectively commanded absolute majority in the Assembly and their leader should have been summoned by the Governor to form a Government. They publicly demonstrated their strength by launching an agitation which quite predictably turned violent. At almost the last moment Sukhadia declined to form a Government on the ground that the Opposition was creating a situation endangering law and order. On the report of the Governor and within a few hours of the new Congress Ministry assuming office at the Centre, the President's Rule was imposed. The Governor's view was that by threatening mass march to the Assembly at its inauguration, the Opposition tried to force upon him a minority Government. How did the Governor evaluate it before allowing the Assembly to meet to find out is inexplicable? The Proclamation of the President's Rule merely suspended the newly elected Assembly; it was not dissolved. When the President's Rule was lifted Mohanlal Sukhadia formed the Ministry with a comfortable majority as many members belonging to the Opposition parties by then had defected to the Congress. The manner in which the President's Rule was proclaimed created an impression that the Governor acted as partisan and the Congress Government at the Centre wished to come to the aid of the Congress Party in Rajasthan. There is no denying the fact that imposition of the President's Rule helped Sukhadia in forming a Congress Government.

The Haryana non-Congress Government headed by Rao Birendra Singh fell on November 21, 1967 a prey to the latest sickness in Indian politics—opportunistic politicians who oscillate across the floor unaided by any principles. The General Elections in February 1967 had tilted in favour of the Congress Party and Bhagwat Dyal Sharma formed the Government. Internal dissensions and group rivalries tore asunder the Party

163. The lawyers who issued this opinion were Mr. Jamshedji Kanga, a former Advocate-General of Bombay, Mr. M.P. Amin, another former Advocate-General of Bombay and Mr. N.A. Pakhiwala. *The Hindustan Times*, New Delhi, August 1, 1959.



and many legislators led by Rao Birendra Singh defected from the Congress Bhagwat Dixal Ministry having been reduced to a minority in the State Assembly, it resigned. Rao Birendra Singh thereupon formed a Coalition Government and it included all the non-Congress Parties in the State Legislature. Thirty-seven members of the Assembly crossed the floor at one time or the other during the eight months of Rao's Coalition Ministry, and four of them did four times each. Almost every defector from the Opposition was promptly rewarded with an official office. Then the Opposition had its turn which beat the Rao's Government in its own game of trading in turncoats. Devi Lal Group and a few others defected to the Opposition and although Rao Birendra Singh's United Front commanded 40 members in an effective House of 78, the Governor dismissed the Ministry and the President's Rule was imposed. In his report to the President, the Governor said, "The only ally can be a minority tomorrow and cannot be relied upon." Punjab, Bihar, Uttar Pradesh and West Bengal have their own tales to tell. All these States went again to the polls just two years after the Fourth General Elections. The United Front in Punjab comprising the Akalis and the Jan Sangh formed the Government. The Akalis now command an absolute majority in the State Assembly which is sure to become a comfortable majority with a few more defections from the Congress and these are on the cards. The Akali leader, Sant Fateh Singh, talking to newsmen at Chandigarh on September 12, 1969, said that legislators defecting from the Congress to the Akali Dal would be welcome and the party had ~~planned~~ no ~~plan~~ on their joining the State Cabinet. But amongst the Akalis themselves, there is a deep rift and Darshan Singh Pheruman's last ~~unto~~ death of the Chandigarh issue brought it into the open. Jan Sangh directed its two Ministers in the Cabinet to resign on September 16, 1969 if the language issue was not decided to their satisfaction by September 15. Bihar is again under President's Rule after experimenting with two Coalition Governments within a brief period of four months. In Uttar Pradesh the Congress could secure a comfortable majority in the mid-term elections in February 1969 and formed the Government. Now the two warring groups of the Congress are on each other's throat as a result of split in the Indian National Congress. In West Bengal open and violent clashes between the workers of the component parties of the United Front Government are a daily feature of the Bengal politics. Even the Chief Minister of Bengal went on three-days fast as a protest against the prevailing lawlessness in the State. Kerala United Front disintegrated and Nambudiripad Government had to quit office.

**Financial Emergency.** If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part thereof is threatened, he may by Proclamation make declaration of Financial Emergency. The Proclamation of Financial Emergency, like the Proclamation of Emergency due to war, external aggression or internal disturbance, remains in operation for two months unless before the expiration of that period it has been approved by a resolution of both Houses of Parliament. If the Proclamation is made at a time when the Lok

164. The issue has since been amicably decided.

165. Article 360 (1).



Sabha is dissolved or its dissolution takes place within two months of the Proclamation, it must be approved by the Rajya Sabha within the specified period of two months and by the newly elected Lok Sabha within thirty days of its first sitting. If the Lok Sabha does not approve it, the Emergency ceases to operate after the expiration of thirty days from the date when the Lok Sabha meets for its sitting.<sup>166</sup>

During the period the Proclamation relating to Financial Emergency is in operation, the executive authority of the Union extends to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions and such other directions as may be deemed necessary and adequate by the President for maintaining financial stability and credit of India.<sup>167</sup> Notwithstanding anything contained in the Constitution such directions may:

1. (a) ask a State to reduce salaries and allowances of all or any class of public servants connected with the affairs of a State;
- (b) reserve all Money Bills for the consideration of the President after they have been passed by the State Legislature.
2. While the Proclamation of Financial Emergency is in operation, the President is competent to issue directions for the reduction of salaries and allowances of all or any class of persons including the judges of the Supreme Court and High Courts.

**Emergency powers evaluated.** Emergencies must arise in the life of every nation and there must be adequate provisions to meet them. "Self-preservation," as one writer has said, "is the first law of every nation and there must necessarily exist the competence to meet exigencies when they arise. The capacity for protection and self-defence is a necessary concomitant of sovereignty and nationality." The Central Government, therefore, in every State is constitutionally made responsible for protecting the country from external aggression and securing it from internal disturbances and violence.

The Constitution of the United States does not specifically provide for any kind of emergency. The Supreme Court, too, has held that "emergency does not create power"; nor does it increase power already given in the Constitution.<sup>168</sup> The Constitution simply provides that, "the United States shall guarantee to every State in the Union a Republican form of government, and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."<sup>169</sup> In pursuance of this provision, the National Government had exercised tremendous powers. Invasion of the country must be met with all the might at the disposal of the Government. Congress had always faced the situation by enacting blanket legislation giving the President discretionary authority in matters

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166. Article 360 (2) makes the provisions of clause (2) of Article 352 applicable to Proclamation of Financial Emergency as they apply to a proclamation of Emergency in case of war or external aggression or internal disturbance.

167. Article 360 (3).

168. *Home Building and Loan Association v. Blaisdell*.

169. Article 4 (4).

of vital importance, domestic and foreign. In World War I President Wilson was given power to control production, purchase and sale of various kinds of material for war purposes and food supplies for troops. He had a vast reservoir of power in planning broad strategy, raising military and industrial manpower, and mobilising the nation's economy for war. In World War II, Roosevelt became a sort of a constitutional dictator. It, no doubt, meant abridgement in the liberties of the people but there is no provision in the American Constitution whereby Fundamental Rights except the writ of **habeas corpus**, can be suspended either during war or any other kind of emergency. The writ of **habeas corpus** can only be suspended when there is actual invasion of the country or an open rebellion in the country.

There has been no occasion in the United States when the Central Government might have suspended or interferred with the State Government on the ground that it has been recalcitrant in the performance of its constitutional obligations. If there is domestic violence which renders the smooth working of the State Government impossible, the Federal Government comes to the aid of the State authorities with its military forces. But federal intervention is occasioned only if the State desires that assistance and the State authorities are unable to control the internal disorders. The normal course is that the request for aid and assistance is made to the President either by the State Legislature or by the State Governor, if the Legislature is not in session. The President intervenes on his own initiative when it is felt that enforcement of the federal law or treaties would encounter violent resistance or federal property is in danger. In 1894, President Cleveland, despite the protests of the Governor of Illinois, sent soldiers to Chicago where a great railway strike, affecting the movement of commerce and mails, had taken place. President Woodrow Wilson, too, resorted to the same action on the occasion of the labour dispute among the steel workers at Gary, Indiana. President Harding ordered the troops to stand by in 1922, when the strike threatened to tie up the railways. Troops were sent to take over the plant of the North American Airplane Corporation in 1944, when strikers refused to heed the repeated appeals of the President. But examples of such intervention by the President on his own initiative are not common and whenever the President takes the initiative it is not due to the failure of the State authorities to meet the situation and maintain peace, but because of the right of the National Government to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The State Constitution operates as before and the machinery of the State Government functions according to its laws.

In Britain there is no prerogative of the Crown to make a Proclamation of Emergency. The Emergency powers are given to the Executive, both during war and in the exigencies of internal disorder, under the authority of Parliament. The Acts of Parliament empower the Crown to declare a state of emergency and issue regulations thereunder by Orders-in-Council for the safety of the realm. Since these Regulations are made

under statutory authority, they must be in conformity with the conditions prescribed in the Statute itself. If they are not, their validity can be questioned in Courts.

Article 48 of the Weimar Constitution provided: "Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures necessary for their restoration, intervening in case of need with the help of armed forces. For this purpose, he is permitted, for the time being, to abrogate either wholly or partially the fundamental rights laid down in Articles. . . . The President of the Reich must, without delay, inform the Reichstag of any measures taken in accordance with. . . . this Article. Such measures shall be abrogated upon the demand of the Reichstag." This provision empowered the President to take any measures which he deemed necessary including the abrogation of Fundamental Rights, either partially or wholly, whenever it appeared to him that public security and order were seriously disturbed and endangered within the Reich. President Von Hindenburg, in pursuance of this constitutional provision, placed the City of Berlin in 1920 and the whole State of Germany in 1924-25 under Martial Law. The emergency powers of the President were, therefore, drastic both in case of external or internal aggression or disorder.

The Constitution of Switzerland, too, provides for emergency powers. The Federal Council must ensure due observance of the Constitution, the laws and decrees of the Confederation, and Federal Treaties. The Federal Council is, accordingly, empowered to intervene and take necessary action, either on its own initiative or in response to an appeal against a grievance, if the Cantonal Governments do not co-operate in the proper execution of Federal laws, decrees and international treaties. The action taken by the Federal Government may amount to withholding the subsidies given to the Canton and even troops may be sent for enforcement. In 1914 and especially in 1939 the Federal Assembly granted the Government exceptional and unlimited powers to protect the security, integrity and neutrality of the country, and to safeguard its credit, economic interest and food supply.

The Constitutions of the Cantons must comply with the provisions of the Federal Constitution. The National Government guarantees the Cantonal Constitutions provided they: (a) do not contain anything contrary to the provisions of the Federal Constitution; (b) provide for the exercise of political rights in conformity with the Republican or democratic forms of government, and (c) have been accepted by the people and may be amended on the demand of the absolute majority of the citizens. But there is no instance when the Federal Government had taken steps to suspend or interfere with a Cantonal Government on the ground that the latter had not fulfilled its constitutional obligations.

These instances abundantly make it clear that the Constitutions of every country adequately provide for emergency powers to meet aggression, external or internal, and other national emergencies, and during periods of emergency the rights and other constitutional guarantees are so modified as not to impede the Executive in taking such action as it may deem expedient and necessary. In Britain the maxim is **Inter arma silent**

leges, when there is an armed conflict the laws remain silent and the Courts have tolerated it in the interests of the country. But almost in every country Executive assumes emergency powers under Executive authority. In Britain, Parliament itself endows the Executive with authority to arrest without trial suspected persons by passing such Acts as the Defence of the Realm Act, 1914 and Emergency Powers (Defence) Act 1939. And a distinction is always made between an emergency due to war and an emergency due to internal disorder. Whatever is the nature and extent of emergency, the Rule of Law is always kept unimpaired. The Constitution of the United States orders that "The privilege of the writ of **habeas corpus** shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." It will be clear from this provision that only actual invasion or rebellion justifies the suspension of the writ of **habeas corpus**. Internal disturbance, such as strike or any other similar cause, does not justify it. It has been further held that the power to suspend the writ is the exclusive right of Congress,\* and it is for the Courts to determine whether the conditions justify or not the exercise of this right by Congress. There is no provision in the Constitution which empowers either the Executive or the Legislature to suspend any of the Fundamental Rights either during war or any other emergency. In a recent case it was held† that "Even war does not remove constitutional limitations safeguarding essential liberties." Every restriction on the rights and liberties of the people as a result of the 'police power' of the State "must be weighed by the balance of justice."

Under the Constitution of Ireland the Executive has no emergency powers independent of the Legislature—except the immediate steps which may become necessary to take for the protection of the State in the event of actual invasion. But the Constitution also prescribes that if Dail Eireann is not sitting it "shall be summoned to meet at the earliest practicable date."‡ In Switzerland the Federal Council is the servant of the National Assembly. It has no initiative of its own, and when it exercises the prerogatives relating to foreign affairs, to the armed forces, or to the ordinary conduct of public administration, there must be either previous authority of the Assembly for all those acts or subsequent ratification. The Federal Council cannot dominate the National Assembly.

India is the only country which follows the Weimar Constitution and vests Emergency Powers in the President. It is true that the President of India acts on the advice of his Council of Ministers in declaring Emergency, and on the assumption of Emergency Powers he is guided by his Ministers who derive their authority from and are responsible to Parliament. It is, again, true that the Proclamation of Emergency is laid before each House of Parliament and it ceases to operate at the expiration of two months unless before the expiration of that period it has been

171. Article I, Section 9 (2).

172. *Ex parte Bollman*.

173. *Ex parte Miligan*.

174. *Home Building Association v. Blaisdell*.

175. Article 28, Sec. 3 (3) and as amended by the Amendment of 1939.

175. Article 28 (3).

approved by a resolution of both Houses of Parliament. Moreover, the power of the President, under Article 359, to suspend the right to move the Courts for enforcement of any of the Fundamental Rights included in Part III of the Constitution is only an *ad interim* power, for every order issued by the President is required, as soon as may be after it is made, to be laid before Parliament. It is Parliament, under the circumstances, which may be said to be an ultimate authority with regard to the exercise and continuance of the Proclamation of Emergency.

But this is not sufficient to evaluate the exercise of Emergency Powers precisely. We must take cognisance of the following important facts:

(1) The Proclamation of Emergency remains valid for two months without its reference to Parliament. If its continuance is desired, it is only then that approval of Parliament becomes necessary and the approval is required to be obtained before the expiration of two months. The right of the Executive to issue the Proclamation of Emergency is, therefore, unfettered for two months.

(2) The President is the sole judge to determine whether conditions exist for the Proclamation of Emergency, and his decision or the justification of such a decision cannot be questioned in Courts.

(3) No distinction is made between an emergency due to war and an emergency in times of peace, that is, due to internal disturbances. Any kind of internal disturbance or a threat thereto, such as even a general strike, may lead to the Proclamation of Emergency and with same consequences as in the event of actual invasion of the country or a rebellion.

(4) The Proclamation of Emergency automatically suspends the right to seven freedoms guaranteed in Article 19.

(5) In normal circumstances the Fundamental Rights of citizens as contained in Chapter III of the Constitution, cannot be taken away by any law of Parliament or of the State Legislatures. But during the operation of the Proclamation of Emergency restrictions so imposed on the Legislative and Executive authorities of the Union and States are suspended and action taken by them as such cannot be challenged in a Court of law.

(6) The President may, during the operation of the Proclamation of Emergency, suspend the enforcement of Fundamental Rights. It is, however, not obligatory that he must suspend the enforcement of all the Fundamental Rights. He determines by an order the Rights the enforcement of which he deems necessary to remain suspended. But there is no bar on his power if he suspends the enforcement of all the Fundamental Rights.

(7) The order of the President suspending the enforcement of Rights is required to be laid before each House of Parliament. But when that order is to be laid before Parliament, it is for the President to decide and determine. The Constitution simply provides that the order shall, as soon as may be after it is made, be laid before each House of Parliament.

(8) It is rather unprecedented that a federal polity should go to the



extent of superseding the Governments of the constituent States and abrogate their constitutions so long as the Presidential Proclamation remains in operation. The failure of the Constitutional machinery in a State can be declared, as it was done in the Punjab, PIPSL, Travancore-Cochin, and Andhra, Haryana, West Bengal, Bihar and Uttar Pradesh when there is a "political breakdown," or if the ruling party at the Centre so determines even if the State Ministry enjoys a stable majority and confidence of the Legislature, as it happened in Kerala in 1959. But what happened immediately after the 1967 General Elections shall, perhaps, remain unprecedented in the Constitutional History of India. Within a few hours of assuming office, the new Ministry at the Centre, on the advice of Governor Sampurnanand, whose conduct had been widely regarded as of very questionable democratic propriety, recommended to the President to impose his Rule. And all this happened on the very date the State Legislature was due to meet. Even failure to comply with the directions of the Union Government on the part of a State may lead to the issuing of Proclamation of the failure of the constitutional machinery in that State.

The Emergency Powers, as provided in the Indian Constitution, have been variously discussed. Article 359, empowering the President to suspend the right to enforce Fundamental Rights, had been the subject of a scathing criticism in the Constituent Assembly. Some members characterised it as the "grand finale and crowning glory of the most reactionary Chapter of the Constitution." Others called it an "arch of autocratic reaction," and a "plagiarised version of the British Emergency Powers Act, 1920." It was further asserted that in no other country the Executive exercised such a drastic power as the Union Executive in India. Even Dr. Ambedkar himself claimed in the Constituent Assembly that India was a federation during times of peace and a unitary State during times of war. While summing up the position of the Centre, Professor Bodh Raj Sharma writes, "Hence also the framers of the Indian Constitution have acted very wisely in making the Centre strong and in giving it powers to interfere in the affairs of the units in emergencies."<sup>17</sup>

But it may be repeated that though Britain is a unitary State, yet the Crown has no prerogative to make a proclamation of emergency. The Crown derives emergency powers from Parliament and every individual has an unrestricted right to go to Courts of law and get it determined whether infringement of his liberties is in due conformity with the law enacted by Parliament. The principles of Sovereignty of Parliament and Rule of Law remain unimpaired during emergencies created by war or internal disorders.

Emergencies do require concentration of authority in the national Government. This is at least the verdict of history in every country. In India, the task of the Constitution-makers was pre-conditioned by inescapable factors of the previous regime and politico-economic set up of the country. It is, therefore, not surprising if the Emergency powers are drastic in many respects. But the exercise of such powers should be "constitutionally sanctioned." It has been argued that the Constitution

177. "Position of the Centre in the New Indian Constitution", *The Indian Journal of Political Science*, July-Sept. 1951, p. 62.

provides sufficient safeguards against the misuse of power by the Union Executive. The responsibility of the Union Executive to Parliament, it is contended, is itself an adequate safeguard, and the Proclamation remains in operation so long as Parliament wills it. This is, indeed, true, but the snag still remains there. The President can issue the Proclamation of Emergency for a period of two months without going to Parliament for its ratification. And Proclamation of Emergency means automatic suspension of the essential freedoms of citizens and depriving them of their inalienable right to get redress from Courts. Article 359 leaves no opportunity to a citizen to have the excess of authority weighed by the balance of justice. This is rather unprecedented, if not atrocious in the context of a democratic set up. Neither the British nor the American Constitution contains anything corresponding to these provisions of the Indian Constitution.<sup>178</sup> It may not be relishing, but there is a perennial truth in the pronouncement of the American Supreme Court in the famous case *Ex-parte Miligan*. The Court observed, "No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its (Bill of Rights) provisions can be suspended during any of the great exigencies of the Government."

### THE ROLE OF THE PRESIDENT

The role which the President of India can play in the body politic of the country has been the subject of wide speculation. "Time alone will show", remarks Gledhill, "the extent to which the personal views of the President will prevail in the exercise of his functions." The Canadian and Australian Constitutions, he argues, draw distinctions between functions which their Governors-General are to exercise in their individual judgment, and those which they are to exercise on the advice of the ministers, but conventions have made this distinction obsolete and they exercise their functions now almost invariably on ministerial advice. "Though there may be a similar development in India," Gledhill adds, "it cannot have been the intention of the Founding Fathers that it shall follow as a matter of course."<sup>179</sup> Then, he says, "It is possible to contend that the Constitution does not sufficiently guard against the President becoming a dictator." His apprehensions are that an inordinately ambitious and unscrupulous President may not observe the spirit as well as the letter of the Constitution and yet without violating the Constitution he can achieve his ambition by establishing an authoritarian system of government. Dr. B.M. Sharma maintains that the Constitution of India "has given very large powers to the President and does not make any definite provisions in regard to the manner in which he is to exercise his powers. It is all left to the arising of conventions how the President will carry out his duties, whether he will remain a constitutional head of the State or will be also head of the executive."<sup>180</sup> Professor Mrityunjoy Banerjee

178. Except the suspension of the writ of *habeas corpus* in America in emergencies of rebellion or actual invasion. In England since World War I, the practice of suspending the writ of *habeas corpus* has been abandoned.

179. *The Republic of India, op. cit.*, pp. 107-108.

180. *Indian Journal of Political Science*, October-December 1950, p. 8.

uses rather severe language. He says, "It is very difficult to foresee the correct position which only future experience can show... still one cannot minimise the serious error committed by the founding fathers in India enacting a vague and ambiguous Constitution in laying down one provision and meaning another. A written Constitution is devised to prescribe in clear, unambiguous language the powers and functions of different bodies so as to reduce to the minimum the chances of friction between them. But the Indian Constitution-makers miserably overlooked this point in framing the Constitution, for which they may have one day to account to posterity. After all, nothing would have been lost and their prestige would not have been lowered in any way if a specific provision were enacted in the Constitution that the President in the exercise of his functions shall be guided by the advice of his Council of Ministers."<sup>181</sup>

Even in the deliberations of the Constituent Assembly provisions relating to the powers of the President were vehemently criticised. It was argued that the powers vested in the President to make for the convenient transaction of business of the Government: "to refer decisions of individual Ministers to the Council of Ministers," "to send messages to Parliament whether with respect to a Bill then pending in Parliament or otherwise,"<sup>182</sup> to veto bills or refer them back for reconsideration by Parliament "were all inconsistent with the system of Cabinet Government. These powers of the President of India, it was maintained, were more or less similar to the powers of the American President and, consequently, likely to create conflicts between the President and Parliament, as also constant interference by the President in the smooth working of the Cabinet. It was also contended that the absence of a specific provision in the Constitution that the President must always act on the advice of his Council of Ministers, might prompt the President to disregard the advice tendered by his Ministers and act independently of that advice. In support of their argument Dr. Rajendra Prasad was freely quoted. Referring to Article 74(1) of the Constitution Dr. Prasad had observed in the Constituent Assembly, "I have my doubts that these words will bind the President. The Article does not say that the President shall be bound to accept that advice. Is there any difficulty in making a specific provision that the President is bound to accept the advice?"

It has been further argued that conventions which bind the King of Britain to always act on the advice of his Ministers cannot be developed to that extent in India. A Constitution, it is asserted, like a tree is peculiar to a country and does not thrive on foreign soil. Britain is a country with an unwritten Constitution whereas India possesses a written Constitution and a written Constitution must be clear, definite and precise. A written Constitution is always supreme. It means, *inter alia*, that nothing may be done or enacted which conflicts with the provisions of the Constitution. Then, there is a sharp difference in the nature and politi-

181. *Ibid.*, pp. 14-15.

182. Article 77 (3).

183. Article 78 (3).

184. Article 86 (2).

185. Article 111.

cal habits of the people in both the countries. Conventions, which are the *sine qua non* of the British Parliamentary system of Government, may not constitute a moral code for the guidance of Indian public men in the field of practical politics. The Presidents may, accordingly, find inspiration and legal backing in the provisions of the Constitution to establish themselves in the position of the real heads of the Executive. The Weimar Constitution provided an abiding lesson.

A spade of controversy was created by Dr. Rajendra Prasad, then President of India, when, in the course of his speech, November 28, 1960, on the occasion of the laying of the foundation stone of the Indian Law Institute, he said that "a close study should be made of the powers of the President of India under the Constitution"; that "in equating the powers of the President with those of the British Monarch, the Constitution was being wrongly interpreted"; that "there is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of the Council of Ministers"; that "the Indian Constitution was often being wrongly interpreted on the lines of the British Constitution"; and that "it was a pity that people in this country had got used to relying on precedents of England to such an extent that it seemed 'almost sacrilegious' to have a different interpretation even if conditions and circumstances in India might seem to require a different interpretation".

It is true that the Indian Constitution differs materially from the British Constitution not only being a written instrument but also in its contents. The Head of the State in the latter country is a hereditary Monarch and it is the accident of birth that determines the occupant of the Throne. In India, the Head of the State is an elected President who is eligible for re-election. He is, accordingly, answerable to his constituents for his official acts, which implies that he must have freedom to act as he thinks right and be in a position to justify his actions if the provision of re-election can have any substance. "He should not, therefore, be held to be bound by any convention to act upon the advice of others even when he considers such advice unsound." Then, Parliament in Britain is Sovereign and as Bagehot said, "The Queen of England must sign her death warrant, if the two Houses of Parliament unanimously sent it up to her." In India, the Constitution is supreme and Parliament exercises powers assigned to it by the Constitution. Its authority is limited and it has no jurisdiction to deprive the President of the powers conferred upon him by the Constitution. Furthermore, the British Constitution has nothing corresponding to the Directive Principles of State Policy as contained in the Indian Constitution. These Directive Principles are expressly stated to be fundamental in the governance of the country "and it shall be the duty of the State to apply these principles in making laws."<sup>176</sup> Suppose a Bill is passed by both Houses of Parliament which, in the opinion of the President, violates one of these Principles and suppose the Council of Ministers advise the President to assent to it. If he acts on that advice he will be doing something which in his view will be a violation of the Con-



stitution and may even make him liable to impeachment." It follows that the President must be free to exercise his own free and unfettered judgment in such matters notwithstanding the well established conventions observed in Britain and other parts of the world. We cannot borrow a convention from Great Britain or any other country without examining the reasons which have led to its adoption in that country or the differing circumstances that prevail in our own."<sup>187</sup>

But all this is too legalistic a view. The points raised by Dr. Rajendra Prasad in his statement, referred to above, had been anticipated by him and he himself gave their answer as President of the Constituent Assembly on November 26, 1949. He unequivocally stated that "We have had to reconcile the position of an elected President with an elected legislature, and in doing so, we have adopted more or less, the position of the British Monarch for the President. . . His position is that of a constitutional President. Then we come to Ministers. They are, of course, responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there is no specific provision in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England the sovereign always acted on the advice of his Ministers would be established in this country also and that the President, not so much on account of the written word in the Constitution but as a result of this very healthy convention, would become a constitutional President in all matters." Dr. Prasad was really unfolding the system of Government as established by the Constitution and reiterated the categorical statements made by Dr. Ambedkar and other members of the Drafting Committee in the Constituent Assembly. Dr. Ambedkar, introducing the Draft Constitution on November 4, 1948, said, "In the Draft Constitution there is placed at the head of the Indian Union a functionary who is called the President of India. The title of this functionary reminds one of the President of the United States. But beyond identity of names there is nothing in common between the form of Government prevalent in America and the form of Government proposed under the Draft Constitution. The two are fundamentally different. Under the Presidential system of America, the President is the chief head of the Executive. The administration is vested in him. Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the nation but does not rule the nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known. He will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice."<sup>188</sup>

During the general discussion on the Constitution T.T. Krishnamachari said, "It has been mentioned that one of the chief defects of this

187. Article 60.

188. Article 61 (1).

189. Refer to B.N. Rau's, *Indian Constitution in the Making*, p. 377.

190. *Constituent Assembly Debates*, Vol. X, p. 988.

191. *Constituent Assembly Debates*, Vol. VII, p. 32.



Constitution is that we have not anywhere mentioned that the President is a constitutional head and the future of the President's powers is, therefore, doubtful. . . . This is a matter which has been examined by the Drafting Committee to some extent. The position of the President in a responsible government is not the same as the position of a President under a representative Government like America and this is a mistake that a number of people in the House have been making, when they said that the President will be an autocrat, and no one appears to realise that the President has to act on the advice of the Prime Minister. . . . So far as the relationship of the President with the Cabinet is concerned, I must say that we have, so to say, completely copied the system of responsible government that is functioning in Britain today; we have made no deviation from it and the deviations we have made are only such as are necessary because our Constitution is federal in structure.<sup>192</sup> The Parliamentary form of Government has nowhere proved a workable system without the presence of a constitutional Head of the State whether he be the King or Queen as in Britain or an elected President as in India.

The controversial provisions of the Constitution' must be read in the light of the debates in the Constituent Assembly, for they reveal unmistakably the intention of the Constitution-framers. The Presidential form of Government was expressly rejected from the very start. A joint meeting of the Union and Provincial Committees held on June 7, 1947, opted, in Sardar Patel's words, for "the parliamentary system of Constitution, the British type of Constitution." B.N. Rau, the Constitutional Adviser to the Constituent Assembly, had suggested that the President should have powers to exercise in discretion but his suggestion was rejected. Moving for the consideration of the Report of the Committee on the Principles of the Union Constitution, Jawaharlal Nehru said (July 21, 1947). "Many members possibly at first might object to this indirect election and may prefer an election by adult suffrage. We have given anxious thought to this matter and we came to the very definite conclusion that it would not be desirable, first because we want to emphasise the ministerial character of the government, that power really resided in the ministry and in the legislature and not in the President as such. At the same time we did not want to make the President a mere figure-head like the French President. We did not give him any real power but we have made his position one of great authority and dignity. You will notice that he is also to be the Commander-in-Chief of the Defence Forces as the American President is."

As said earlier, the Draft of the Indian Constitution originally contained<sup>194</sup> a schedule of instructions to the President, and an Article one of whose clauses provided that in the exercise of his functions under the Constitution, he must be generally guided by these instructions. These instructions provided, *inter alia*, that the President must act on ministerial advice. The relevant instruction read: "In all matters, within the scope of the executive power of the Union, the President shall in the exercise of

192. *Constituent Assembly Debates*, Vol. X, p. 956.

193. Articles 52, 53, 54 and 74 (1).

194. Refer to B.N. Rau's, *India's Constitution in the Making*, pp. 378-79

the powers conferred upon him be guided by the advice of his ministers." After a lengthy discussion ultimately the instructions as well as the clause were omitted as unnecessary. Quite a good number of members objected to the omission as they thought it was not all clear how far the conventions of the British Constitution would be binding under the Indian Constitution. But Dr. Ambedkar emphatically ruled out such objections and asserted that the conventions of the British Constitution, which had now become classical for the smooth running of the Parliamentary system of Government, were as much binding in India as they were in Britain. B.N. Rau summed up the issue thus: "That the convention about acting on ministerial advice ought to be the same in India as in England no one appears to have doubted; the only doubt voiced was whether this was sufficiently clear in the Indian Constitution. The Constituent Assembly on the assurance of the Law Minister that the point admitted of no doubt, agreed to omit the schedule and the clause." H.V. Kamath reverted to the point again and on October 14, 1949, he bluntly asked Dr. Ambedkar, "If in any particular case the President does not act upon the advice of his Council of Ministers, will that be tantamount to the violation of the Constitution and will he be liable to impeachment?" Dr. Ambedkar's categorical reply was "that there is not the slightest doubt about it." Alladi Krishnaswamy Ayyar, another member of the Drafting Committee, too, thought "that the point as to the necessity of provision is entirely without substance." Article 61 of the Draft Constitution, [the present Article 74(1)] was "merely a euphemistic way of saying that the President shall be guided by the advice of his Ministers in the exercise of his functions."

The first essential principle of a Parliamentary democracy is that the Head of the State is not the head of the administration. He is the symbol of the nation and not the ruler of the nation. The ruling power lies with the Council of Ministers appointed by the President, but they must be the members of Parliament. Though legally the Ministers hold office during the pleasure of the President, yet the pleasure of the President is really the pleasure of Parliament. The Constitution definitely prescribes that the Council of Ministers shall be collectively responsible to the House of the People. Responsibility to the Lok Sabha (House of the People) is tantamount to its confidence and the President who ventures to dismiss his Council of Ministers holding the confidence of the Lok Sabha will be acting unconstitutionally and, thus, risking his own existence as Head of the State. Unlike the Governor of a State, the Constitution does not vest the President with the exercise of discretionary powers. A specific amendment was moved in the Constituent Assembly which sought to lay down that the President shall not be bound to accept the Ministerial advice where he has discretionary powers to perform and the amendment was rejected. Opposing the amendment the Law Minister said, "there is no case which can arise where the President would be called upon to discharge his functions without the advice of the Prime Minister." He added, however, that "under a parliamentary system of Government, there are only two prerogatives which the King or the Head of the State may exercise. One is the

195. Rau, B.N., *India's Constitution in the Making*, pp. 378-79.

196. *Constituent Assembly Debates*, Vol. X, pp. 268-71.

appointment of the Prime Minister and the other is the dissolution of Parliament." But the exercise of both these prerogatives is subject to well-recognised conventions. Neither of these he can exercise in his unfettered discretion.

If a Party has a clear majority in Parliament, the President has no choice in the appointment of the Prime Minister. He must summon the leader of the majority party to form a Government. But he has a choice when no Party in Parliament gains a majority. In such a case, the President will select a person who will be able to command a majority either by coalition or some compromise with other parties. When Jawaharlal Nehru died Gulzari Lal Nanda, the seniormost Minister, was immediately sworn in as the acting Prime Minister till the Congress Party had elected its leader. The Party elected Lal Bahadur Shastri as its leader and he, *ipso facto*, became the Prime Minister replacing Nanda. In his Republic Day Message the President referred to the "dignified and orderly transition" to the new leadership. Lal Bahadur Shastri died on January 11, 1965, the interim arrangement again made Gulzari Lal Nanda as the Prime Minister. The Congress Party elected Mrs. Indira Gandhi as its leader and she was appointed Prime Minister. This time there were two contestants for leadership, Mrs. Indira Gandhi and Mr. Morarji Desai. The President again referred to the election of the leader and the appointment of the Prime Minister in his Republic Day Message to the nation and said, "The election (between Mrs. Gandhi and Mr. Desai) was a contested one and its conduct proved a victory for sheer decency in public life. The two candidates were free from traces of bitterness or rancour. They both love the country and the ideals we cherish and our people will stand together as one in facing the tremendous task that awaits us." The Fourth General Elections gave the Congress Party, once again, a clear majority in the Lok Sabha and the Party elected Mrs. Indira Gandhi its leader and she was appointed Prime Minister for the second time.

As said earlier, authorities are divided on whether the Monarch in Britain can refuse to accept the advice of the Prime Minister to dissolve Parliament. There has never been a case during the last more than hundred years when dissolution might have been refused. The better view, however, is that while the power to refuse dissolution exists, it will be exercised only in "exceptional circumstances." Precisely the same role the President of India is to play.

It has been suggested that the power of the President under Article 78 which imposes a duty on the Prime Minister to submit, if the President so required, for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council, *prima facie*, is intended to be used by him in his discretion. Accordingly, the President, in appropriate cases, has the power to refer back to the Council of Ministers for its consideration and decision a matter on which the Council of Ministers has earlier taken no decision. The use of the word 'decision' here is of significant importance as it rebuts the argument that the President possesses discretion in this respect. The logical interpretation is that the Constitution demands from the Ministers and the Council of Ministers that they should make decisions. It is not the function of the President. The decisions

made by the Ministers and the Council of Ministers are enforced in the name of the President and for all such decisions the Council of Ministers is collectively responsible to Parliament. But all matters relating to Government and its different Departments are not discussed and decided in the meetings of the Cabinet. There are certain matters which are left to the individual responsibility of the Ministers in charge of different Departments and they take decisions thereupon. If the President feels that a decision taken by a Minister is of such importance that it ought to have been considered by the Council of Ministers he may direct the Prime Minister accordingly. But the ultimate decision will be that of the Council of Ministers. In Britain too the Monarch can suggest to the Prime Minister to consider the decision taken by a Minister if he so feels. The final decision is that of the Prime Minister. In India reference is made to the Council of Ministers for final decision and it is binding on the President in the same way and to the same extent as the final decision taken by the British Prime Minister is binding on the Monarch.

The provision in Article 78 is really intended to be a safeguard to ensure collective responsibility and solidarity of the Council of Ministers and it followed the practice as it existed on the eve of the commencement of the Constitution. As explained by Dr. Ambedkar while this provision was being discussed in the Constituent Assembly, the practice was to send weekly summaries prepared by each Ministry containing decisions taken by it to the Cabinet and the Governor-General. If on perusal of these summaries the Governor-General thought that a particular decision taken by a Minister was not good, he would place that matter for re-consideration of the Cabinet. The President does not preside over the Cabinet meetings and, accordingly, the Constitution has imposed a duty on the Prime Minister to submit it for the consideration of the Council of Ministers if it has not already taken a decision thereupon.

The Supreme Court of India has given an unequivocal judicial recognition, in its unanimous judgment in **Rai Sahib Ram Jiwaya Kapur and others v. The State of Punjab**, to the well established principles of the Parliamentary Government *vis-a-vis* of the relationship between the President of India and the Council of Ministers. The judgment, *inter alia*, declared "... The limits within which the Executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution though federal in its structure is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of government policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State.

"In India as in England, the Executive has to act subject to the control of the Legislature, but in what way is this control exercised by



the Legislature? Under Article 53(1) of our Constitution, the Executive power of the Union is vested in the President, but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. . . . In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen that joins, a buckle which fastens the legislative part of the State to the executive part.' The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."

When the President is to be entirely guided by the advice of his Ministers, the provision that the President makes rules for the conduct of government business and its allocation among Ministers has no constitutional importance. Even if it has, the President has no constitutional right to preside over the meetings of the Cabinet and it is always in the meetings of the Cabinet that matters of policy and administration are decided. Ministers preside over the Departments of Government and in the administration of their Departments they follow the directions of the Cabinet and enforce its decisions and policies. Any deviation therefrom is against the solidarity of the Government and the principle of collective responsibility enshrined in the Constitution.

The assumptions made by Gledhill<sup>197</sup> to prove that the President can without violating the Constitution establish an authoritarian system of government have no substance. Professor Gledhill invited the reader to imagine a situation in which notice having been given under Article 61 of the Constitution to impeach the President for the violation of the Constitution, but before a resolution can be moved, after the expiry of fourteen days, he dissolves Parliament, dismisses the Ministers and appoints others of his own choice, as for six months it is not necessary that they should be members of Parliament. The President may issue Ordinances, which will be as valid as Acts of Parliament for six months. Then, he makes a Proclamation of Emergency, reduces the federation to a practically unitary State and suspends Fundamental Rights. As Commander-in-Chief he may use the armed forces in support of his policy and authority. "This may seem a nightmare," remarks Gledhill, "but it is not dissimilar to the way in which the Weimar Constitution was destroyed."

Gledhill makes much too much of the fact that the President is the Supreme Commander of the Defence Forces. There is no warrant for such a role by the President in the Constitution. Article 53(1) which vests the executive power of the Union in the President also "provides that it shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Clause (2) of the same Arti-

197. *The Republic of India, op. cit.*, p. 108.



cle which confers on the President the Supreme Command of the Defence Forces also lays down that 'the exercise thereof shall be regulated by law'.<sup>198</sup> Supreme Command of the Defence Forces therefore is no more than an adjunct to his office and is subject to those limitations that bind him in the primary role as Head of the State.

The major issue is then what are the Constitutional limitations on the exercise by the President of his all-embracing powers. This issue has been dealt quite at length in the preceding pages but never-ending controversy still rages on the issue and it gains added importance when a living-member of the Drafting Committee which drafted the Constitution, enters into the controversy and revises his former decision expressed on the Draft Constitution in 1948 and perhaps the best in defence of Parliamentary form of Government as established in India. K. M. Munshi in his Article, "Thoughts on the Constitution" says: "The history of the relevant constitutional provisions, however, shows that the Constituent Assembly chose neither the British Cabinet form of Government, nor the American Presidential form but a composite form in which the Parliamentary Executive and the President are to exercise their executive powers and functions within the framework of the express provisions of the Constitution". He further says that the provisions of the Constitution were the outcome of a definite decision that 'the President should not be the creature of Parliament nor the nominee of the Party in power at the Centre, nor a figurehead as the President in the French Constitution of 1875, but an independent organ of the State representing the whole Union and exercising independent powers'. Munshi, accordingly justifies the President assuming all the rights that the law allowed him. Earlier Munshi had said, "The President was expected to be a political force representing national unity, and as will be seen from the express provisions of the Constitution, was invested as such with authority, dignity and residual power, so that, when political parties develop inflexible attitudes, he being above party, could restrain their excesses and defend the Constitution. His principal role was 'to prevent a parliamentary government from becoming parliamentary anarchy', or a majority government from indulging in constitutional excess." He further said, "The importation of English conventions to supplant the trust reposed in the President or the powers and functions with which he is invested with the express provisions of the Constitution is tantamount to an amendment of the Constitution by convention, that is, without undergoing the formalities prescribed by the Constitution in respect of matters which are organic to the constitutional structure."<sup>199</sup> This is in sharp contrast to his views expressed in the Constituent Assembly. Munshi then had said, "Today the Dominion Government of India is functioning as a full-fledged parliamentary government. After this experience why should we go back upon the tradition that has been built over a hundred years and try a novel experiment." Munshi had also said that the strongest government and the most elastic

198. *Ibid.*

199. *The Indian Express*, New Delhi, March 13, 1967.

200. Munshi, K.M., *The President under the Constitution*, p. 26.

201. *Ibid.*, p. 30.

executive has been found in Britain "and that is because, the executive powers vest in the Cabinet supported by a majority in the Lower House . . . it is the rule of the majority in the legislature, for it supports its leader in the Cabinet, which advises the head of the State, namely the King. The King is thus placed above party. He is really made the symbol of the impartial dignity of the Constitution."<sup>202</sup> The Constitution, accordingly, established a Parliamentary form of Government under a President and not a composite form wherein the President exercises independent powers and his office is an independent organ of the State. There can be either a Parliamentary form of Government or Presidential but not a mixture of the two as both essentially conflict with each other in their basic principles.

At the International Legal Conference held in Delhi in 1953, Patanjali Sastri, a former Chief Justice of India, propounded the view that the exercise of Presidential authority is limited only to the extent specifically mentioned in the Constitution and that it cannot be further restrained by the application of precedents from other Constitutions. The contrary view was expressed by M.C. Setalvad, the former Attorney-General and supported by B.N. Rau, Constitutional Adviser to the Constituent Assembly, that the President has no functions to discharge of his own authority. Like the British Crown he has merely "the right to be consulted, the right to encourage and the right to warn." The Constitution of a country is not to be found in its laws alone. No Constitution can ever be complete by itself. Nor can it be ever in the minds of the Constitution-makers to work in all details a complete and final scheme of Government operative for generations to come. They always seek merely a starting point and, thus, provide a skeleton to be clothed by what Maitland has called "rules of constitutional morality", or the customs or the conventions and they always and everywhere constitute the essential parts of the basic framework of the fundamental rules of the government. Even a jurist like Sir John Salmond admitted that "The Constitution as seen in the eyes of law may not agree in all points with the objective reality. Much constitutional doctrine may be true in law but not in fact, or true in fact but not in law. Power may exist *de jure* but not *de facto* or *de facto* but not *de jure* . . . Nowhere is this discordance between the Constitution in fact and in law more serious and obvious than in England. A statement of the strict legal theory of the British Constitution would differ curiously from a statement of the actual facts. Similar discrepancies exist, however, in most other States. A complete account of a Constitution, therefore, involves a statement of constitutional custom as well as of constitutional law."<sup>203</sup>

In a Parliamentary form of Government a legal truth cannot always be a political truth as the real problem is not what is legally permissible but what is politically wise. The political wisdom demands from the President that "he should be more and more like the Monarch in England, eschewing legal power, standing outside the clash of parties and gaining

202. *Constituent Assembly Debates*, Vol. VII, p. 984.

203. *Jurisprudence* (10th ed. 1947), p. 141.

in moral authority." If the President differs in his views from those of his Ministers, but ultimately accepts their advice in deference to a well-understood convention and even if such acceptance of advice should result in a breach of some "fundamental right" or the "Directive Principles" enunciated in the Constitution the responsibility will be that of the Ministers and not of the President. At one time it was felt that the President by virtue of his powers vested in him under Articles 53, 77 and 111, and more especially under Article 111, should prevent legislation prejudicial to the Directive Principles, but the Law Minister ruled it out on the ground that the Constitution does not warrant it as ours is a parliamentary system of Government wherein the President functions only with the aid and advice of the Council of Ministers.

To sum up, both the laws and conventions of the Parliamentary Government require a "dignified and detached figure" at the head of the State. That is the President of India. The provisions of the Constitution and debates of the Constituent Assembly copiously authenticate it supported by the well-understood conventions. Prime Minister Jawaharlal Nehru had times out of number reiterated it and so have other Ministers. At a Press Conference on July 7, 1959 Nehru, once again, reminded the correspondents that the system of Government in India was not a Presidential but a Cabinet system. "I saw some kind of discussion," he said, "about the constitutional aspect and powers, etc. I do not think there is any room for discussion on the subject, that is quite clear according to our Constitution. Our Constitution makes the President constitutionally rather like the King or Queen of England. If this were not so, you can see the whole question of responsibility of the Cabinet and of Parliament would suffer. Parliament is supreme." Replying to the debate in the Lok Sabha on the non-official Bill restricting the tenure of office of the President to two terms, Ashoka Sen, the Law Minister, said that members should remember that "the President acted only on the advice of the Cabinet and to be more specific on the advice of the Prime Minister."

#### 204. Rau B.N., *India's Constitution in the Making*, p. 382.

"... *Report of K.C. Mukherjee's Committee on the President of India*, pp. 17." A. Shanker, a former Secretary of the Government of India, states, "There is one other important power which the President has, one which goes beyond the scope of the powers of the Ministers and the Council of Ministers. It is the Supreme Command of the Defence Forces of the Union. Under Article 53 this power rests on a general level on Parliament but it does not appear that there is any specific legislation on the subject. This power is particularly relevant in the context of the extra-constitutional use of Martial Law in respect of which there is no specific constitutional provision but there is only an indirect reference in Article 34 of the Constitution. The Article empowers Parliament to pass an Act of Indemnity after the Martial Law regime has come to an end. It is true that the Article refers to 'any time in connection with the maintenance or restoration of order in any area within the territory of India' and as such it might be construed that a declaration of Martial Law can only refer to a situation of general disorder, which a civil administration is unable to deal with even with the aid of Armed Forces of the Union. It has been conceded, however, that the Article does contemplate the proclamation of Martial Law without any prior legislative sanction." *The President's Powers. The Hindustan Times, Weekly Review*, August 17, 1969.

206. *The Hindustan Times*, New Delhi, July 8, 1959.

207. *The Tribune*, Ambala Cantt., April 18, 1957.

The Law Minister, therefore, disagreed with the mover's contention that a third term for the President for the same person might lead to dictatorship. The Law Minister, P. Govinda Menon, maintained, in the "Meet-The-Press" National Programme of the All-India Radio,<sup>208</sup> that the President could not carry on the administration without the advice of a Council of Ministers and that the Constitution does not envisage any take over of the Union administration by the President. The Law Minister told a questioner that the President's position as the Supreme Commander of the Armed Forces was "symbolic and notional" and it did not give him any special powers to govern the country with the help of the Armed Forces. Making further clarifications, he asserted that the convention, as obtainable in Britain, under which the Monarch could not function without the aid and advice of the Cabinet, would apply to the Centre but not the States. There was a definite provision for President's rule in the Constitution about States under certain circumstances. Sanjiva Reddy, a candidate for Presidency in the 1969 election, in his appeal to members of Parliament and State Legislatures to vote for him significantly assured them that the President of India "is the constitutional Head who has no policy and no programme of his own." It was the Government of the day which decided these within the framework of the Constitution.<sup>209</sup>

**President as Adviser.** It does not, however, mean that the President is just a mere figurehead or "a magnificent cipher." This according to K. Suba Rao, former Chief Justice of India, is a cynical view.<sup>210</sup> His office is of great dignity and he exercises great influence over the policies and administration of the government. Jagjiwan Ram, who has been a Minister for about two decades now, has said, "The President of India exercises his moderating influence and inspires or moulds policies and actions so silently and unabtrusively that many are prone to think that, unlike any other Head of a State, he neither reigns nor rules."<sup>211</sup> If the Parliamentary system of government divests the President of powers, it does not mean that he exercises no influence. There is a good deal of difference between power and influence. Jennings, while dealing with the power and position of the British King, says, "A function to be exercised on advice is not formal or automatic."<sup>212</sup> The King must be persuaded on many occasions and on occasions the King may do the persuading. Prime Minister Asquith wrote, in his Memorandum on the rights and obligations of the King: "he is entitled and bound to give his ministers all relevant information that comes to him; to point out objections which seem to him valid against the course which they advise; to suggest (if he thinks fit) an alternative policy. Such intimations are always received with utmost respect and considered with more respect and deference than if they proceeded from any other quarter."<sup>213</sup> To put it in the oft-quoted words of Bagchot, the Sovereign has "three rights—the right to be consulted, the right to encourage, the right to warn." And "a King of great sense and sagacity," he further adds, "would want no others." Ex-

208. *The Indian Express*, New Delhi, May 30, 1969.

209. *The Statesman*, New Delhi, August 5, 1969.

210. *The Tribune*, Chandigarh, August 15, 1969.

211. See *Ajatsatru*, edited by Valmiki Chowdhury.

212. *The Law and the Constitution*, p. 98.

213. Spender, J. A., *Life of Herbert and Asquith*, Vol. II, p. 29.

actly the same role the Constitution assigns to the President. B.N. Rau has aptly said that "acting on ministerial advice does not necessarily mean the immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he should accept their final advice."

Although the President does not attend and preside over the Cabinet meetings, yet he must keep himself abreast of what the Cabinet does and what the public feels. The President maintains his own Secretariat manned by two Secretaries, Secretary to the President and the Military Secretary to the President. Each Secretary has his separate establishment. The Secretary to the President is usually a very senior member of the Civil Service and he provides the liaison between the President and various Ministries of the Union Government. The Prime Minister is required to keep the President informed of all decisions of the Council of Ministers and the proposals for legislation, to furnish him all the information he may call for relating to the administration of the affairs of the Union and proposals for legislation, and to submit, if the President so requires, for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council. This he may do to enable the decisions of individual Ministers articulate through the channel of collective responsibility of the Ministry.

The President often writes to the Prime Minister and gives expression to his views on various important matters confronting the country. Prime Minister Nehru said at a Press Conference: "I see the President frequently and we discuss naturally current matters and developments and sometimes he writes to me, sometimes I write to him. It is a practice that has gone for years and years. . . . Sometimes when he writes to me I circulate the letters to members of the Cabinet. That is the normal practice." There was a question from a correspondent that "Will the President come in the way of the economic reforms now being proposed?" The Prime Minister replied, "Please do not bring the President into this. The President does not come in the way. He is a constitutional President. Naturally, as a senior veteran in the struggle we ourselves go to him for advice but the responsibility for decisions is that of the Cabinet; and nothing is going to be postponed in the way you suggest."<sup>1</sup> The whole issue related to the publication of the President's letter to the Prime Minister in the press wherein it was reported that the President in his letter expressed differences of opinion on the Government's policy on certain matters like co-operative farming and State trading.

Differences also arose between Dr. Rajendra Prasad and Prime Minister Nehru in 1950 on the Hindu Code Bill and the Government had to postpone the consideration of the Bill for sometime. In 1959, Dr. C.D. Deshmukh, former Finance Minister, had suggested in a speech in Madras the need for the appointment of a high-powered tribunal to examine the charges of corruption against Ministers and other influential persons. Dr. Deshmukh also maintained that he had concrete evidence with him to







into focus certain new dimensions of the Indian Presidency. The country has now passed into a new era of politics which has few of the features characteristic of the last two decades. The first three Presidents were the unanimous choice of the Indian National Congress. The fourth Presidential election has wrecked the Indian National Congress. There was an open revolt and, in spite of the Party Whip, the official candidate, N. Sanjiva Reddy, was defeated. Quite a sizeable number of Congress Members of Parliament and the State Legislatures pleaded to vote according to their "conscience" and they did. The split, thus, created in the Congress was averted by the latest decision of the Working Committee, but truce did not halt innuendoes. Leading figures of the two Congress factions continued to make harsh comments which were hardly conducive to amity and the Indian National Congress is finally divided into two working groups.

Besides this disquieting feature of the party politics of the Indian National Congress, there is the threat from the Communist Party of India (Marxist) leaders, of the destruction of the Constitution, "lock, stock and barrel" to use the language of A.K. Gopalan and Jyoti Basu, the Deputy Chief Minister of West Bengal. There are also persistent claims from several quarters for a fresh examination of Centre-State relations. There is, again, a demand for the assertion of Parliament's supreme right to modify or revise any part of the Constitution, including the Chapter on Fundamental Rights. The utility of the Second Chambers has been denied in more than one State and legislation has been undertaken by Parliament to abolish them in two States. Men like Jaya Prakash Narayan enthusiastically champion the creation of small States and keenly advocate a devolution of considerable authority and power to local bodies.

V.V. Giri, too, took an extraordinary step by announcing his decision to enter the Presidential contest on his own without being sponsored by any one of the political parties. Understandably, he was disappointed that the Indian National Congress did not observe the convention of supporting the Vice President for election as President, though he himself did not consider this convention important when he decided to contest the election. His contention was that the call to duty and the "dictates of his conscience" compelled him to seek election. But his statement was an election manifesto listing his sacrifices in the past and his various contributions to national causes which entitled him to seek public support. When, however, he sought to imply that the Congress Party's selection did not do justice to the country and was unfair to the Congress organization, that the candidate chosen did not enjoy the confidence of other groups and therefore the choice tended to lower the moral authority of the august office of the President, Giri entered the arena of party politics. Whether it is for the Acting President to say that the Congress Parliamentary Board had "failed to give a correct lead to the country" may be questioned, even if the statement is entirely well founded.

Hitherto a General Election has meant elections not only to the Lok Sabha (House of People) and to most if not all of the State Legislatures but also election to the office of President. There will be no such simultaneity in future. The Fourth President's tenure will, thus, extend well beyond the 1972 General Election. It is quite on the cards now that no Party will be able to command a majority in the Lok Sabha after the 1972

Election and be in a position to form the Government. Even if the Indian National Congress were to set its House in order, it is unlikely to obtain even a tenuous majority. There might, then, be a larger conglomeration of parties and groups with differing ideologies and loyalties and power hungry individuals, all inclined to align themselves to whichever combination holds out hopes of gaining political office and power. There might also be a spate of defections and counter defections reproducing conditions which brought parliamentary democracy in many States into disrepute.

It is this gloomy prospect that gives a magnitude of importance to the role of the President. It may give the President the leverage to make himself not merely the Head of the State but the virtual head of the Government, and to combine what Bagehot called the "efficient" with the "dignified" function of the Presidency. Gledhill's hypothetical situation might prove to be a matter of reality because it will be in accordance with the letter of the law. The President can destroy the Constitution with the instruments placed in his hands by the Constitution itself. It is, therefore, only the sagacity and judgment of the President that can save the Parliamentary democracy in India. As a safeguard against the uncertainty ahead, some well-meaning persons<sup>215</sup> have suggested that some of the proposals made by the Constitutional Adviser, B.N. Rau, in his original draft of the Constitution<sup>216</sup> should be reconsidered in order to avoid possible conflicts in future between the President and the Cabinet.

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215. Refer to B. Shiva Rao's "Changing Role of Presidency Calls for Advisory Body," *The Statesman*, New Delhi, August 1, 1969.

216. Memorandum on the Union Constitution and Draft Clauses prepared by the Constitutional Adviser, May 30, 1947. Clause 11, Chapter I, Part IV, provided, "There shall be a Council of State whose advice shall be available to the President in all matters in which he is required to act in his discretion," See *ante*.

## CHAPTER IV

# GOVERNMENT AT THE CENTRE (Contd.)

### THE COUNCIL OF MINISTERS

**The Council of Ministers.** If the President is the Constitutional Head of the State, the real executive is the Council of Ministers. Article 74 provides that there shall be a Council of Ministers with the Prime Minister at the Head to aid and advise the President in the exercise of his functions. The President appoints the Prime Minister and other Ministers are appointed by the President on the advice of the Prime Minister.<sup>1</sup> The Ministers hold office during the pleasure of the President while the Council of Ministers is collectively responsible to the Lok Sabha.<sup>2</sup> Before a Minister enters upon his office, the President shall administer to him the Oaths of Office and Secrecy according to the prescribed form in the third Schedule.<sup>3</sup> A Minister must be a member of either House of Parliament. If he is not, he ceases to be a Minister after the expiration of six months.<sup>4</sup> The salaries and allowances of Ministers are to be such as Parliament may from time to time by law determine.<sup>5</sup>

The question whether any, and if so what, advice was tendered by Ministers to the President cannot be enquired into in any court.<sup>6</sup> Article 361 further provides that the President shall not be answerable to any Court for any act done by him in the performance of the duties of his

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1. Article 75 (1).

2. Article 75 (2).

3. Article 75 (3).

4. Article 75 (4). The form of oath of the office reads:

"I, A.B., do swear in the name of God that I will bear  
solemnly affirm

true faith and allegiance to the Constitution of India as by law established that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill will."

#### II

The form of oath of Secrecy reads:

"I, A.B., do swear in the name of God that I will  
solemnly affirm

not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me for the Union except as may be required for the due discharge of my duties as such Minister."

5. Article 75 (5).

6. Article 75 (6).

7. Article 74 (2).



office. The question of ministerial advice, therefore, cannot be brought before Courts and personal immunity from legal action, whether during office or thereafter, is given to the President. It also establishes that the relations between the President and his Ministers are confidential. The principle involved in these provisions is similar to the doctrine of the British Constitution that "the King can do no wrong." In the literal sense, it means that the King is above law and he cannot be called to account for his private conduct in any Court of Law or by any legal process: not even, as Dicey humorously observed, if he were to shoot his own Prime Minister. The President of India, too, enjoys immunity from criminal proceedings during his term of office, though there is no bar to prosecute him after he has been removed from office by impeachment.<sup>8</sup>

But the real meaning of the phrase that "the King can do no wrong" is that the Sovereign may not perform any public act involving the exercise of discretionary powers except on advice of the Ministers. And for every act performed in the name of the Sovereign the Ministers are responsible to Parliament. To put all this in a matter of fact language, the King can do nothing, right or wrong, of a discretionary nature and having legal effect. His name cannot be referred to in connection with any public act anywhere in Courts or within or without Parliament. Nor can any Minister plead the orders of the King in defence of a wrongful act or for any error of omission and commission. The Constitution of India makes the setting up of a Council of Ministers obligatory and the President must govern with the aid and advice of the Ministers. The relations between the President and the Council of Ministers are confidential and are constitutionally safeguarded by the provision that the nature of advice tendered by Ministers cannot be enquired into the Courts. The advice given by the Ministers is binding on the President as the Constitution empowers them to make decisions.<sup>9</sup> It follows, then, that the President of India, like the King in Britain, cannot perform any public act involving the exercise of discretionary powers except on the advice of his Ministers. The Ministers must be members of Parliament and collectively responsible to the Lok Sabha. The Constitution also prescribes that the salaries and allowances of Ministers are to be such as Parliament may from time to time by law determine.<sup>10</sup> The logical conclusion is that for every act performed in the name of the President, the Ministers are, as in Britain, responsible to Parliament. As the relations between the President and the Ministers are confidential, the Ministers cannot plead the orders of the President to justify an illegal and unconstitutional act and thereby shield themselves behind the legal immunities of the occupant of the Presidential office.

The Constitution of India, therefore, incorporates the essentials of the Cabinet System of Government. In Britain the Cabinet is the child of chance and the system of Government which it establishes is the result of the exigencies of time. The whole machinery of the Cabinet System is, thus, based upon conventions, unwritten but always recognised and

8. Article 361 (2) (3).

9. Article 78 (c), See ante, Chap. IV.

10. Article 75 (6).

stated with almost as much precision as the rules of law. In the Dominions, too, the Cabinet system of Government is essentially, though their Constitutions are written, based upon usages and practices in force in Britain. The Constitution of France, under the Third Republic, recognised certain principles of responsible government and gave a constitutional sanction to certain functions of the Cabinet, though it left many matters vague. The Constitution of *Eire*, France,<sup>11</sup> under the Fourth Republic, and Italy give constitutional sanction to Cabinet Government and contain positive provisions regarding its functions. The Constitution of Ceylon, which draws inspiration direct from Sir Ivor Jennings, is the most realistic effort to reduce the "conventions of the Cabinet government into the terms of a written Constitution."<sup>12</sup>

✓ **The Council of Ministers and the Cabinet.** The final development of the Cabinet system in Britain has led to a distinction between the 'Ministry' and the 'Cabinet'. When a Prime Minister is commissioned to form a Ministry, he has to fill about hundred posts, major and minor, which together make up the Ministry. About twenty of the most important out of the Ministry are the members of the Cabinet. These members of the Cabinet meet collectively, decide upon policy and in general "head up" the Government. Then, there are certain Ministers who are designated as of "Cabinet rank."<sup>13</sup> The "ministers of the Cabinet rank" are the heads of the administrative departments, and although they are formally of Cabinet status yet they are not members of the Cabinet itself. They attend the meetings of the Cabinet when specially invited by the Prime Minister to deal with matters concerning their Departments. Finally, come Parliamentary Secretaries or "Junior Ministers" as they are sometimes called, and the five "Political" officials of the Royal Household. All these categories of Ministers, who make the Ministry, are the members of Parliament, belong to the majority party in the House of Commons

11. Article 14 (9) (ii) requires the President to act on the advice of ministers on all matters, except in the matter of refusing dissolution to a defeated Prime Minister. Here the President enjoys "absolute discretion." This is contrary to the practice followed in England. The President of Ireland is even freer in the exercise of his power of dissolution than the Dominion Governors-General.

12. Though the President presided over the Council of Ministers (Art. 32), but Article 38 definitely prescribed that "Every act of the President of the Republic must be countersigned by the President of the Council of Ministers and by a Minister." Under the Third Republic each act of the President was required to be countersigned by a Minister only.

13. Sec. 4 (2) of the Ceylon (Constitution) Order in Council, 1946, says, "All powers, authorities and functions vested in His Majesty or the Governor-General shall, subject to the provisions of this Order and of any other law for the time being in force, be exercised as far as may be in accordance with constitutional conventions applicable to the exercise of the similar powers, authorities and functions in the United Kingdom by His Majesty.

Provided that no act or omission on the part of the Governor-General shall be called in question in any Court of Law or otherwise on the ground that the foregoing provisions of this sub-section have not been complied with."

Section 46 (1), again, provides: "(1) There shall be a Cabinet of Ministers who shall be appointed by the Governor-General and who shall be charged with the general direction and control of the government of the Island...."

14. Attlee's Labour Government formed in 1949 had fifteen Ministers of Cabinet rank whereas Churchill's Ministry formed in 1951 had eighteen.

are individually and collectively responsible to it and continue to remain in office so long as they can retain its confidence. But the Ministry has no collective functions. It is the function of the Cabinet. The Cabinet Ministers meet in a body, deliberate, formulate policy and see that it is carried through. The Ministry as a whole never meets and it never deliberates on matters of policy.

Immediately after the transfer of power in August 1947, there was no distinction in line between the Cabinet and the Ministry. Both were used as synonymous to each other. All members of the Ministry or the Cabinet, except the Prime Minister, enjoyed the same status and powers. But the Prime Minister and the members of the Cabinet were seized of the confusion so caused and were keen to remedy the same. Gopalaswami Ayyangar, a senior member of the Cabinet, was entrusted with the task of studying the problem of Cabinet organisation and to make recommendations thereto. The Ayyangar Report was submitted in November 1949, which, *inter alia*, recommended the categorization of Ministers defining the powers and responsibilities of each category of Ministers.

The Constitution of India, inaugurated in January 1950, nowhere mentioned the word "Cabinet." It provided for a Council of Ministers headed by the Prime Minister. But the Council of Ministers formed by Prime Ministers ever since the inauguration of the Constitution, took due cognisance of the categorisation of Ministers and the powers and responsibilities attached to each category as recommended in the Ayyangar Report and similar to the prevailing British practice. The first Council of Ministers consisted of 14 Cabinet Minister and 5 Ministers of State. After the General Elections of 1952 Prime Minister Nehru named 14 Ministers besides himself as "Members of the Cabinet", 4 as "Ministers of Cabinet rank" and 2 as "Deputy Ministers". The composition of the Council of Ministers on June 15, 1962 was, 18 Ministers including the Prime Minister as Members of the Cabinet, 12 Ministers of State, who were not members of the Cabinet but held cabinet rank, 22 Deputy Ministers and 7 Parliamentary Secretaries. The Council of Ministers formed by Lal Bahadur Shastri consisted of sixteen Cabinet Ministers, 15 Ministers of State and 20 Deputy Ministers. Mrs. Indira Gandhi's first Council of Ministers in 1966 consisted of 16 Cabinet Ministers, 18 Ministers of State and 17 Deputy Ministers. Parliamentary Secretaries in Shastri's and Mrs. Gandhi's Council of Ministers being apart. The Council of Ministers, headed by Mrs. Indira Gandhi, as on March 4, 1968, consisted of 18 Cabinet Ministers, 17 Ministers of State and 20 Deputy Ministers.

There are, thus, three categories of Ministers besides Parliamentary Secretaries. The Ministers who are members of the Cabinet meet collectively in Cabinet meetings, decide upon policy and in general "head up" the government. Ministers of the Cabinet rank are, as in Britain, formally of Cabinet status and are paid the same salary as the Cabinet Ministers. They are heads of the administrative Departments or sub-Departments of the Government. But they do not attend meetings of the Cabinet unless.

15. Asoka Mehta resigned on April 27, 1968 and M. Chenna Reddy on August 22, 1968. With the split in the Congress Party in November 1969, three Cabinet Ministers, Jaisukhlal Hathi, C.M. Poonacha and Ram Subhag Singh resigned. The Deputy Prime Minister, Morarji R. Desai had resigned earlier. There had been no replacements.

specially invited to attend when something concerning their particular Departments has to be decided by the Cabinet. Next in rank are the Deputy Ministers. They receive lesser salary than the Ministers of the Cabinet rank and have no separate charge of a Department. Their task is to assist the Ministers with whom they are associated in their administrative and parliamentary duties. The Deputy Ministers in India may be compared to the Parliamentary Secretaries or Under-Secretaries ("Junior Ministers") in Britain who are the young members of the party in power and whose ability is being tested in preparation for higher posts. The Parliamentary Secretaries are neither ministers nor do they exercise any powers. They assist Ministers in the discharge of their parliamentary functions. Not all the Ministries have Parliamentary Secretaries. Only a number of them have. On June 15, 1962, two of them were attached to the External Affairs Ministry, one each to the Ministries of Food and Agriculture, Irrigation and Power, Mines and Fuel, Education, and Labour and Employment; 7 in all.

The Cabinet is, thus, an extra-constitutional growth. As in Britain the Ministers of the Crown Act, 1937, and the Ministerial salaries and Members' Pensions Act, 1965 provide for the salaries of the Cabinet Ministers so does the Salaries and Allowances of Ministers Act, 1952, provide in India. But neither the Ministers of the Crown Act and the 1965 Act in Britain nor the Salaries and Allowances of Ministers Act in India validate or legalise the conventional nature of the Cabinet in both the countries. What both the Acts do is that they recognise the existence of the Cabinet Ministers and other categories of Ministers. It is, however, important to note that once the existence of conventions is recognised by legislation they do not really remain different from laws.

Though the Cabinet is not known to the Constitution, yet it is the core of the Indian constitutional system. It is the supreme directing authority, the magnet of policy, which co-ordinates and controls the whole of the executive government, and integrates and guides the work of Parliament. The Cabinet Ministers meet in a body, deliberate, formulate policy and it is their business to see that it is properly executed. The Council of Ministers, like the Ministry in Britain, has no collective functions. It never meets as a whole and it never deliberates on matters of policy. It is the function of the Cabinet.

**Size of the Council of Ministers.** The Constitution does not fix the size of the Council of Ministers. It is for the Prime Minister to determine its size and he does so as the requirements of the occasion may demand. During the past ten years the number of Cabinet Ministers has varied between 12 and 16. The number increased to 19 in 1963. It is in accordance with the practice now established in Britain. Between the two World Wars the membership of the British Cabinet was seldom less than twenty-two and there were constant complaints against the ever-increasing size of the Cabinet. It was rightly maintained that a Cabinet of twenty-one or two members was too large for an effective deliberative body. Attlee in 1949 reduced the number of Cabinet Ministers to 17 and created a separate category of 15 "Ministers not in the Cabinet." Churchill in 1951, reduced the number of Cabinet Ministers to 16 and had 18 Ministers of the Cabinet rank. Anthony Eden and Macmillan con-



lined with the same number in both the categories. Prime Minister Nehru having followed the British precedent for the division of Ministers into those with and those without membership of the Cabinet also adhered to the practice of limiting the maximum number of Cabinet Ministers to less than twenty and his successors have followed the same. The Administrative Reforms Commission in its Report on the 'Machinery of the Government of India and its procedure of work', has recommended that the strength of the Central Council of Ministers should be normally 40, but under special circumstances could go up to 45 but, in any case, not more than this number. It is proposed that the three tier system in the Ministerial set up, comprising Cabinet Ministers, Ministers of State and Deputy Ministers be continued. It is recommended that a compact Union Cabinet consisting of not more than 16 Cabinet Ministers "to ensure homogeneity, speed and purposeful functioning," should constitute the norm.

### PRINCIPLES OF THE CABINET GOVERNMENT

**Cabinet, the driving and the steering force.** The Cabinet is, thus, a "wheel within the wheel". Its outside ring consists of a party that has a majority in the Lok Sabha, the next ring being the Council of Ministers which contains the men who are most active within the party, and the smallest of all being the Cabinet containing the real leaders and chiefs. By this means is secured that "unity of party action which depends upon placing the directing power in the hands of a body small enough to agree and influential enough to control." The Cabinet is, in brief, the driving and the steering force.

The Cabinet system of Government as obtainable in Britain hinges upon some well established customs, traditions and precedents. The principles involved therein have now received universal recognition and have been, as stated before, incorporated in the Constitutions of many democratic countries. Articles 74-75 of the Constitution of India cover the principles of responsible government. But the provisions in the Constitution are neither full nor positive and many important points have been left to be determined by conventions and usages. There is one supreme virtue in it. The conventional element in the working of Cabinet system of Government in India will make the whole system flexible and, thus, easily adjustable to meet emergencies or any other special circumstances as recent Cabinet developments in Britain disclose. It is instructive to examine the principles which govern the working of the Cabinet system of Government in relation to the provisions of the Indian Constitution.

**A Constitutional Executive head of the State.** In the first place, Cabinet Government means that the executive Head of the State, King or President, should not be the directing and deciding factor responsible before the nation of the measures taken. The whole executive power is exercised in the name of the Head of the State by political men who belong to the majority party in the Legislature and are responsible to it for all their public acts individually as well as collectively. As the Head of the State takes no part in the politics of the country, he does not participate in the confidential discussions in which his Ministers decide the advice they will give him.



The object of the framers of the Indian Constitution was to make the President, like the Monarch in Britain, a constitutional executive Head of the State and that he should act on the advice of his Council of Ministers. The Constitution, no doubt, uses the traditional language of the Canadian and South African Constitutions that the Council of Ministers will "aid and advise" the President in the exercise of his functions, but the advice so given by the Ministers is binding on the President. In explaining the form of government under the Constitution, Dr. Ambedkar clearly stated in the Constituent Assembly, that the "President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice."<sup>16</sup> Even the language of the Constitution determines so. The mere fact that the Constitution makes no specific provision that the President must act as advised by the Council of Ministers does not nullify the basic principle of the Parliamentary Government that the President must act on the advice of his Ministers. The Constitution nowhere vests him with any "discretionary or individual" judgment powers. The expression "aid and advice", as principal C.L. Anand observes, "is a stereotyped phrase of English constitutional law and practice. It is not used in the ordinary dictionary sense but is a term of art which has historically acquired a special meaning well understood by constitutional lawyers. According to that meaning it is implied in the use of these expressions, in relation to cabinet system of government of the British model, that the constitutional head of the State can only act on the advice of his responsible ministers."<sup>17</sup> The function of the Council of Ministers is, accordingly, under the Constitution not purely advisory. It is, in fact, just the reverse and the legal duty of the President is to **advise** and it is for the **Ministers** to decide.

In the Republic Day Supplement to the **Times of India**, January 26, 1963, Dr. K.M. Munshi, in his article under the caption: Powers and Functions of President under India's Constitution, maintained, "Judged by the well-accepted canons of interpretations a person on whom duty is cast or in whom a trust is vested, is bound to exercise his own discretion in relation to the duty or the trust and cannot be deemed to have been deprived of it by implication." He further says that the "plea that like the British Crown the President is bound by the Cabinet's advice is irrelevant being based on a false major premise." The syllogism runs as follows: "The President's status is the same as the Crown's (Major Premise). The Crown is bound; therefore, the President is bound."<sup>18</sup> Dr. Munshi contradicts himself when he concludes as such. As a member of the Drafting Committee he had stoutly defended the Parliamentary system of Government which the Draft Constitution had envisaged. He unequivocally maintained in the Constituent Assembly that "Most of us have looked up to the British model as the best... Our constitutional traditions have become parliamentary and we have now all our Provinces functioning more or less on the British model."<sup>19</sup> The British model is

16. *Constituent Assembly Debates*, Vol. VIII, p. 53.

17. *Government of India*, p. 172.

18. P. VII.

19. *Constituent Assembly Debates*, Vol. VII, p. 984.

a Parliamentary system of Government wherein 'The King can do no wrong.' The real functionaries are his responsible Ministers on whose advice he always acts. The practices of such a system of Government leave no discretion to him. If India has deliberately adopted 'The Cabinet system on the British model as it provided a continual assessment and control of the activities of the Government by the Parliament and thereby eliminated friction between the Executive and Legislative organs, making for a more effective government,' there can be no deviation from its well-accepted principles. Even a slight deviation therefrom will unhinge its entire existence.<sup>20</sup> What happened in France is likely to happen in India, if even the architects of the Constitution repudiate the result of their own labours.

There are some provisions in the Indian Constitution which go against the British principles of responsible Government. Article 77(2) provides that the President shall make rules as to the mode in which his orders and instruments shall be authenticated. As under the Government of India Act, 1935, the orders of the President, under the Constitution, are authenticated by the Secretary of a Department of the Government. In Britain it is done by a Minister. The Constitution of France, under the Fourth Republic, provided that "Every act of the President of the Republic must be countersigned by the President of the Council of Ministers." Secondly, the Prime Minister in Britain selects his colleagues and assigns work to them. He reviews from time to time the allocation of offices among his various colleagues and considers whether that allocation still remains the best that can be effected. Article 77(3) of the Constitution of India provides that the President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. But this provision does not, in any way, take away the right of the Prime Minister to the distribution of portfolios amongst his colleagues once the principles of responsible Government are accepted.

**Ministers chosen from Parliamentary majority.** Secondly, under the Cabinet system of Government Ministers must be members of the Legislature and they must be chosen from that party which has a majority in the representative House. These two facts taken together are of fundamental importance. The membership of the Legislature gives to Ministers a representative and responsible character. It also binds the executive and legislative authorities together and there can be, as such, no working at cross purposes between these two organs of government. The harmonious collaboration so brought about ensures a stable and responsive government. Moreover, it gives an effective opportunity to the executive to present, to advocate, and to defend its views and proposals to the Legislature.

In Britain, it is now a well-settled convention that Ministers should either be peers or members of the House of Commons though there had been exceptional occasions when Ministers held office out of Parliament. But Ministers remain out of Parliament only when they are trying to

20. *Republic Day Supplement*, op. cit., p. VII.

21. See ante Chapter XXIII.

first seats. If they cannot get in, and are unwilling to be created peers, they resign from their offices. In Canada there is no statutory prohibition against a non-member becoming a Minister. But by convention he must, within a reasonable time, become a member of either House of Parliament or resign. The Constitution of Australia provides that " . . . no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives." The Constitution of South Africa makes a provision exactly similar to that in the Australian Constitution. The Ceylon (Constitution) Order in Council says: "A Minister . . . who for any period of four consecutive months is not a member of either Chamber shall, at the expiration of the period, cease to be a Minister . . . as the case may be."<sup>1</sup>

In India there is no bar to a person who is not a member of Parliament to become a Minister, and there are many instances when Ministers were appointed without having seats in Parliament, for example, Dr. John Mathai, C. Rajagopalachari, Sri Prakasa, C.D. Deshmukh, S. Swaran Singh, Pandit Govind Ballabh Pant, Y.B. Chavan and Sanjiva Reddy. But Article 75 (5) provides that a Minister shall cease to hold office if for any period of six consecutive months he is not a member of either House of Parliament. This means that every Minister must become member, if he is already not, within a period of six months of either House of Parliament.

Cabinet Government means party government and the virtue of the party government in Britain had been to provide a stable government under a unified command of the homogeneous and disciplined leaders. Britain does not love coalition governments, because "it contradicts the fundamental principle that a Cabinet represents a party united in principle." It is only in times of emergencies and grave crises, like the two World Wars, and the Economic Depression of 1931, that there were Coalition Ministries. The Constitution of India does not provide that the Prime Minister must necessarily be the leader of the majority party in Parliament. Nor does it prescribe how the Prime Minister is to select

22. Section 64.

23. Section 14 (1).

24. Section 40 (2).

25. But it so happened that between 1918 and 1945 only six years were occupied by governments of normal type when there was one single party government, with party working majority. The May 1955 elections had once again given to the Conservatives a comfortable majority. In 1921 and 1929 there were Minority Governments under Ramsay MacDonald.

26. The Union Constitution Committee decided that, as suggested by Alladi Krishnaswami Aiyar and N. Gopalaswami Ayyangar, a provision on the following lines be made in the Constitution on the manner of appointment of Ministers:

The President shall appoint the Prime Minister from among the members of the Federal House of Representatives (the lower chamber of the Central Legislature) and in doing so will ordinarily invite the person who in his judgment is likely to command the largest following in that House to accept the office. The other Ministers of the Cabinet will be appointed by the President on the advice of the Prime Minister.

his team of Ministers. But as the Constitution prescribes collective responsibility of the Council of Ministers to the Lok Sabha, it is important that the Ministers constituting the Council of Ministers must belong to the same party with avowed faith in the same policy. The Cabinet is by nature a unity and collective responsibility is the method by which this unity is secured. There is no other conceivable way in which that teamwork which is the *sine qua non* of Cabinet system of government can be ensured. Prime Minister Nehru included in his Cabinet formed in January 1950, Ministers belonging to other parties in Parliament, including the Independents. The first Cabinet was a national Government for all intents and purposes. Here, again Nehru followed the British practice. India at that stage of her career needed a united effort of all parties and groups to tide over her difficulties immediately after her independence and partition of the country and to devise means for national reconstruction. Since 1952, the Council of Ministers has been homogeneous in a one party Government. Even during the critical days of Chinese aggression in October-November 1962, the Prime Minister did not consider feasible the suggestion for broad-based Ministry.

But one unhealthy practice has developed in India. Frequently Union Ministers are appointed Governors and from the Raj Bhavan they are again commanded to adorn the ministerial chairs. Radhakrishnan became the Union Home Minister after his retirement as Governor of West Bengal. Sri Prakasa, Karashnath Katju and Harkishan Mehra are other familiar names who had moved from one end to the other. Even retiring Speakers are not spared. Ananthasayanam Ayyangar was appointed Governor of Bihar although he had been re-elected to the Lok Sabha in the General Elections of 1962. Hukam Singh succeeded Sampurnanand as the Governor of Rajasthan.

**Leadership of the Prime Minister.** The Cabinet is a team which plays the game of politics under the captaincy of the Prime Minister. "The Prime Minister", according to Morley, "is the keystone of the arch." Although in the Cabinet all its members stand on an equal footing, speak with equal voice and act in unison, yet the Chairman of the Cabinet is the first among equals and occupies a position of exceptional and peculiar authority. He is the leader of the parliamentary majority and ministers work under his accepted leadership. The ministers are, no doubt, appointed by the Head of the State, but in actual practice they are the nominees of the Prime Minister and the head of the State simply endorses the list prepared and presented to him by the Premier. If the

(Continued from previous page)

*The Framing of India's Constitution*, 8th Dec. 1958, Vol. II, pp. 556-57. This is in consonance with the Report of the Union Constitution Committee. The Report simply reproduced the paragraph from the Constitutional Adviser's Memorandum except the words relating to the exercise of functions by the President. *Ibid.*, p. 580. The Constitutional Adviser's Memorandum, May 30, 1957, had provided, "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions except in so far as he is required by this Constitution to act in his discretion." *Ibid.*, p. 476.

27. They were: Dr. B.R. Ambedkar, Dr. Shyam Prasad Mukherjee, Mr. Balraj Singh, Mr. Gopalaswami Ayyangar, and Mr. Sharmachand Chetty.

Prime Minister has the power to make his ministers, it is also his constitutional right to unmake them. The identity of the ministers under a Cabinet system of Government is unknown without the Prime Minister. A party, in brief, lives on party spirit and as an instrument of government it preserves its continuous corporate identity on the leadership of the Prime Minister. All this secures unity and close association between ministers on the one side, and the Cabinet and the parliamentary majority on the other.

The Constitution of India recognises the pre-eminent position of the Prime Minister when it says that "there shall be a Council of Ministers with the Prime Minister at the head."<sup>28</sup> The Constitution further provides that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. In Britain, it is from the time of Walpole that the Prime Minister selects his own ministers. This convention finds expression in the Indian Constitution. Though the Constitution provides that the President appoints Ministers on the advice of the Prime Minister, but his advice is binding and the President, like the British King, simply endorses the selection of the Prime Minister. When the Draft Article relating to the Council of Ministers came up for the consideration of the Constituent Assembly Prof. K.T. Shah moved a number of amendments, *inter alia*, suggesting that there should be no formal creation of the office of the Prime Minister, that every minister on his appointment should seek the confidence of the House of the People, and that not less than two-thirds of the members of the Council of Ministers should be the members of the House of People. The Law Minister did not accept any of these amendments. Referring to the amendment that there should be no formal office of the Prime Minister, Dr. Ambedkar maintained that the only sanction through which collective responsibility could be enforced was through the Prime Minister. The Prime Minister, he said, was really the key-stone of the Cabinet arch and "unless and until we create that office and endow that office with statutory authority to nominate and dismiss Ministers there can be no collective responsibility."<sup>29</sup>

**Ministerial Responsibility.** Ministerial responsibility is the essence of the Cabinet system of government and collective responsibility is "Britain's principal contribution to modern political practice." Ministerial responsibility means two things. First, a Cabinet Minister presides over an administrative Department of the Government and for that Department he is individually responsible. In addition to this responsibility, each minister largely shares a collective responsibility with other members of the government for anything of high importance that is done in every branch of public business besides his own. The Ministry is a unit. It comes into office as a unit and it must go out of office as a unit. All Ministers belong to the same party under the leadership of a person

28. Article 74 (1).

29. Article 75 (1).

30. Article 61.

31. December 30, 1948.

32. *Constituent Assembly Debates*, Vol. VII, pp. 1141-60.



whom the party acclaims and, as such, they swim and sink together. The essence of the Cabinet is its solidarity, a "common front." It is, accordingly, binding on every member of the Cabinet, and on every political officer outside the Cabinet, no matter what his rank is, to pursue an agreed policy for which all accept responsibility and on which they stand or fall together. A minister who is not prepared to defend a Cabinet decision must resign. V.V. Giri resigned because he did not agree to modification of the award given by Labour Appellate Tribunal. C.D. Deshmukh resigned as he did not agree with the decision of the Government to make Bombay city a separate city state. Asoka Mehta resigned on the issue of the Government of India's disinclination to take a firm line against U.S.S.R's aggression against Czechoslovakia. If a Minister does not resign, then, the decision of the Cabinet is as much his decision as that of his colleagues even if he might have protested against such a decision in the Cabinet. The duty of a minister is, therefore, not merely to support the Government in the Legislature, but also to refrain from making any speech or reference outside the Legislature which is contrary to the Cabinet policy or make a declaration of a policy in a speech upon which there is no Cabinet decision.

The Indian Constitution expressly provides for the collective responsibility of the Council of Ministers to the Lok Sabha. This provision gives a constitutional expression to Britain's principal contribution to modern political practice. The Constitution of France, under the Fourth Republic, provided that "the Ministers shall be collectively responsible to the National Assembly for the general policy of the Cabinet and individually responsible for their personal actions. They shall not be responsible to the Council of the Republic." The Constitution of Eire provides that "(1) the Government shall be responsible to Dail Eireann. (2) The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government."<sup>33</sup> The Constitution of Ceylon says that, "There shall be a Cabinet of Ministers...who shall be collectively responsible to Parliament." The framers of the Indian Constitution adopted the recent practice of incorporating in the Constitution the British convention of collective responsibility of ministers to the Chamber representative of the people. It means that the Council of Ministers remains in office so long as they can retain the confidence of the Lok Sabha (House of the People) and the confidence of the Lok Sabha remains as long as the Government retains the majority in the Lok Sabha to support its policy and administration.

There is no provision for individual responsibility to Lok Sabha under the Indian Constitution. The Constitution does not provide for it. On the other hand, it provides that Ministers hold office during the pleasure of the President.<sup>34</sup> It means that the President can dismiss the Ministers, although he has no right to dismiss the Council of Ministers as a body.

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33. Article 48.

34. Article 28 (4).

35. Section 46 (1).

36. Article 75 (2).

The Rules of Procedure and Conduct of Business in Parliament, 1950, also, provide for motion of no confidence in the Council of Ministers and not in an individual Minister. Rule 127 says, *inter alia*, "(1) A motion expressing want of confidence in the Council of Ministers may be made subject to the following restrictions. . . ." Dr Ambedkar, while dealing with this issue, said in the Constituent Assembly, "All members of the House are very keen that the Cabinet should work on the basis of collective responsibility and all agree that this is a very sound principle. But I do not know how many members of the House realise what exactly is the machinery by which collective responsibility is enforced. Obviously, there cannot be statutory authority. Supposing a Minister differed from other Members of the Cabinet and gave expression of his views which were opposed to the views of the Cabinet, it would be hardly possible for the law to come in and to prosecute him for having committed a breach of what might be called collective responsibility. Obviously, there cannot be legal sanction for collective responsibility. The only sanction through which collective responsibility can be enforced is through the Prime Minister. In my judgment collective responsibility is enforced by the enforcement of two principles. One principle is that no person shall be nominated to the Cabinet except on the advice of the Prime Minister. Secondly, no person shall be retained as a member of the Cabinet if the Prime Minister says that he shall be dismissed. It is only when members of the Cabinet both in the matter of their appointment as well as in the matter of their dismissal are placed under the Prime Minister, that it would be possible to realise our ideal of collective responsibility. I do not see any other means or any other way of giving effect to that principle."<sup>37</sup>

But will the Prime Minister advise the dismissal of a colleague who does not agree with the policy of the Cabinet or does anything else which compromises the solidarity of the Cabinet or its integrity? It is doubtful if ever a Prime Minister would advise dismissal except in very extreme cases, and it is hoped that even such a crisis would never come. In Britain "there is a tradition—a kind of public school fiction—that no minister desires office, but that he is prepared to carry on for the public good."<sup>38</sup> This tradition implies a duty to resign when a hint is given by the Prime Minister. It is hoped that this tradition in India, too, will be scrupulously adhered to and the spirit of public good will impregnate public life. A hint from the Prime Minister will be sufficient for a Minister to resign or he will do so on his own initiative as did Shanmukham Chetty, John Mathai, Shyama Prasad Mukerjee, K.C. Neyogi, H.C. Bhabha, Mohan Lal Saxena, V.V. Giri, Ajit Prasad Jain, Krishna Menon, and Asoka Mehta.

**Secrecy.** If collective responsibility is to be really effective, it is necessary that the Cabinet should deliberate in secret and its proceedings should remain highly confidential. "There must be," as Lord Salisbury said, "irresponsible licence in discussion,"<sup>39</sup> if mature, rational and inde-

37. *Constituent Assembly Debates*, Vol. VII, pp. 1159-60.

38. Jennings, *Cabinet Government*, p. 97.

39. Cecil Cwendolen, *Life of Lord Salisbury*, Vol. II, p. 233.

pendent contribution to the process of policy making is desired from men who are engaged in a common cause and who come together for the purpose of reaching an agreement. Publicity reduces the independence of mind of ministers in relation to each other and harmony of views becomes impossible. The practical utility of secrecy of Cabinet proceedings, therefore, is "the necessity of securing free discussion by which a compromise can be reached, without the risk of publicity for every statement made and every point given away." Moreover, a knowledge of difference of opinion among the ministers makes difficult the unflinching support of the whole party to the policy finally adopted. It also offers vulnerable points to the attacks of the Opposition which is ever vigilant to plague the government.

Secrecy is, thus, an essential part of the parliamentary system. Secrecy helps to produce political unanimity and political unanimity is a very important condition of secrecy. In Britain the secrecy of Cabinet proceedings is safeguarded by law and convention. The only exception is that a Minister who resigns as a result of serious Cabinet division is allowed to make a personal explanation to the House without raising a debate. But it is necessary that the resigning Minister must secure the permission of the King through the Prime Minister,<sup>40</sup> and it is always given. The Minister's right to explain is, however, confined to that occasion only and does not give him licence to make further disclosures.

The Cabinet in India, too, is a secret body collectively responsible for its decisions. The Oath of Secrecy which every Minister is required to take before entering upon his office imposes a constitutional obligation not to disclose any Cabinet secret.<sup>41</sup> Moreover, a Cabinet decision is an advice to the President and the President's sanction is, accordingly, necessary before publicity may be given to any advice given as such. When a Minister resigns as a result of difference of opinion, Rules of Procedure and Conduct of Business in Parliament permit him to make a personal explanation to the House without raising a debate.<sup>42</sup> The British convention is, thus, embodied in the Rules of Parliament in India.

There are other means, too, by which more or less reliable information regarding views expressed and decisions taken often get out. "There are few Cabinet meetings," observes Professor Laski, "in which the modern press is not a semi-participant." In every country either the Prime Minister or some other Minister, on his behalf, gives to the press a guard-

40. Keith, *The British Cabinet*, 8<sup>th</sup> ed., p. 248.

41. Lord Melbourne objected in 1834 to the King's giving consent without consultation with the Prime Minister. He maintained that for the King to act direct would be "subversive of all the principles upon which the government of this country has hitherto been conducted."

42. Article 75 (1).

43. Rule 218. It says, "(1) A member who has resigned the office of Minister may with consent of the Speaker, make a personal statement in explanation of his resignation. (2) Such statement shall be made after questions and before the list of business for the day is entered upon. (3) There shall be no debate on such statement, but after it has been made, a Minister may make a statement pertinent thereto."

44. *Parliamentary Government in England*, p. 255.

ed statement on the Cabinet decisions in order to promote opinion about the policy the government intends to pursue. Referring to the alleged leakages of Cabinet decisions, Professor Laski made a bold statement when he said, "and there have been fewer Cabinets still in which some member has not been in fairly confidential relations with one eminent journalist or another." In India, too, sometimes important Cabinet decisions leak out to the Press. Inder Malhotra, Political Correspondent of the *Statesman*, New Delhi, reported in his paper on December 25, 1964 "During seventeen years of freedom, the Cabinet has found time to devote thought to external publicity precisely twice: first in 1948 and then exactly ten years later in 1958."

Prime Minister Lal Bahadur Shastri established the system of public relations and Cabinet decisions, which were not of a confidential nature, were released to the press by the Cabinet Secretary at the end of every meeting. The advisability of such public relations was proposed to Jawaharlal Nehru on several occasions, but he did not favour it. Mrs. Indira Gandhi has continued with the change introduced by Lal Bahadur Shastri.

India has adopted the British example of setting up a Cabinet Secretariat. The Viceroy's Executive Council had set up a sort of Secretariat and since 1935, the Private Secretary to the Viceroy was also designated as the Secretary to the Executive Council. In August 1947, he was designated as Cabinet Secretary and since then the Cabinet Secretariat is headed by the seniormost member of the Civil Service. The Secretariat organization now comprises of the Main Secretariat, the Organisation and Management Division (created in 1954), the Military Wing and the Economic Wing. The main functions of the Cabinet Secretariat are to co-ordinate the work of all its wings, to prepare the agenda under the direction of the Prime Minister for the Cabinet meetings, to record its decisions and that of Cabinet Committees and to communicate them to the Departments concerned, and to collect the relevant material necessary for the deliberations of the Cabinet. Cabinet proceedings and its minutes are secret and due care is taken to ensure their secrecy. In Britain the Secretary to the Cabinet has instructions that while drafting minutes he should avoid references to opinions expressed by any individual member and "to limit the minutes as narrowly as possible to the actual decision agreed." N.V. Gadgil, who was a Cabinet Minister from 1947-1952, detailed the working of the government from inside. While dealing with the secrecy of the Cabinet proceedings, he writes, "After gauging the opinion of all his colleagues, he (the Prime Minister) sums up the consensus of the meeting. Individual Ministers are free to add to the summation or suggest amendments. The Cabinet Secretary records all this, but a verbatim report of the discussions is never recorded. Only the most salient points are noted and the decision of the cabinet recorded on each item. A copy of the proceedings of the cabinet is sent to each Minister within twenty-four hours. Any corrections and amendments have to be conveyed within twenty-four hours of the receipt of the report. The Prime Minister is the final authority as to whether the suggested corrections are to be accepted

or not.<sup>46</sup> On occasions when the matter was so secret, the notes given to the Minister for discussion were 'taken back after the meeting'. Even the scribbles on note papers are taken away by the Cabinet Secretary.<sup>47</sup>

**How the Cabinet works.** Cabinet, as said earlier, is an extra-constitutional growth. The Constitution only provides for the Council of Ministers and all its members do not participate in the deliberations of the Cabinet. Ministers in the Cabinet alone meet together, discuss and decide all political actions. They 'form a steering body for the ship of the State, steering its course and determining its speed'.<sup>48</sup> The Cabinet meets regularly once in a week at **Rashtrapati Bhavan** where the office of the Cabinet Secretariat is also situated. But when Parliament is in session or when a matter urgently requiring discussion should arise, it may hold more than one meeting. Lal Bahadur Shastri introduced the innovation of holding informal Cabinet meetings at the residence of each Cabinet Minister by rotation, the Prime Minister presiding. This was, however, abandoned by **Mrs. Indira Gandhi**.

The Prime Minister presides over the meetings of the Cabinet and in his/her absence the Deputy Prime Minister. When the Prime Minister and the Deputy Prime Minister both are absent, or there is no Deputy Prime Minister, the practice is for the seniormost Minister to preside. The office of the Deputy Prime Minister was abolished in 1950, after the death of Sardar Vallabhbhai Patel. Mrs. Indira Gandhi revived the office in 1967 and Morarji Desai became the second Deputy Prime Minister of India. On the resignation of Morarji Desai in July 1969,<sup>49</sup> no substitute was appointed. When asked by the press correspondents if she contemplated to elevate Jagjivan Ram to that position Mrs. Gandhi declared that the Constitution does not provide for that office. The Administrative Reforms Commission has suggested that the office of the Deputy Prime Minister should be regularised as the Prime Minister needs institutional support for ensuring efficient and effective functioning of the governmental machinery.

Ministers of State do not attend Cabinet meetings, but they may be asked to attend when subjects concerning their Departments, if they happens to hold independent charge of such Departments, or a Cabinet Minister is unable to attend and his Department has a Minister of State, are discussed and their presence is deemed necessary. A peculiar practice of inviting Chief Ministers, when problems concerning their States come up for discussion, has also existed. P.C. Sen, Chief Minister West Bengal, and Biju Patnaik, Chief Minister Orissa, attended the Cabinet meeting on June 6, 1963, to help the Cabinet solve the food problem in the Eastern region. The Orissa Chief Minister B. Patnaik was also consulted on defence problems immediately after the Chinese aggression in October 1962,

46. Gadgil, N.V., *Government from Inside*, p. 141.

47. *Ibid.*, p. 161.

48. Sri Ram Sharma, *Parliamentary Government in India*, p. 50.

49. Morarji Desai was unceremoniously deprived of the Finance portfolio. He simply remained the Deputy Prime Minister and thereupon resigned.



and was given a room in the Ministry of External Affairs.<sup>50</sup> Experts on matters of technical nature may also be invited to explain personally the issues involved in such matters. The Deputy Chairman of the Planning Commission and its other members attend when problems relating to their respective charge are on the agenda.

The agenda is prepared by the Cabinet Secretariat in consultation with the Prime Minister. There are no definite rules determining the subjects for discussion in the Cabinet. Matters of routine nature are decided by the Departments themselves. Sometimes even important matters may be decided by the relevant Minister in consultation with the Prime Minister or these may be referred to the appropriate Cabinet Committee and subsequently confirmed by the Prime Minister. The Prime Minister himself may take the decision and later inform the Cabinet. H.M. Patel, who had been the Cabinet Secretary, says that Prime Minister Jawaharlal Nehru himself had repeatedly taken decision on his own in respect of matters relating to the External Affairs Ministry without the Committee of the Cabinet for Foreign Affairs being aware of them. He further says that the Cabinet itself had been ignored by the Prime Minister even more frequently and that "several senior ministers have also tended to take a leaf out of the Prime Minister's book and to by-pass the Cabinet. They do not do so on their own. They obtain the Prime Minister's concurrence to a line of policy which they advocate and then without waiting for the approval of the Cabinet, go forward, treating the Prime Minister's approval as the approval of the Cabinet."<sup>51</sup> This is supported by N.V. Gadgil, who had been Cabinet Minister from 1947 to 1952.<sup>52</sup>

Every matter that comes for Cabinet discussion is accompanied by an explanatory memorandum. If the matter concerns more than one Department, all the concerned Departments submit their own explanatory memoranda, which are circulated amongst all Cabinet Ministers well in advance of the scheduled meeting. Discussion ensues on each item on the agenda and it is frank and often blunt. Differences are resolved by mutual discussion and discussion continues until agreement is reached. Votes are not taken.<sup>53</sup> An item not on the agenda can be raised with the permission of the Prime Minister, provided the matter is of urgent importance. The decisions taken are forwarded to the Ministries for necessary administrative action.

**Cabinet Committees.** The burden of the Cabinet is "titanic". It

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50. Association of Patnaik with defence problems was both unconstitutional and politically improper. He was debated by the Prime Minister in March, 1962, with the approval of the Emergency Committee of the Cabinet, to hold exploratory talks with the Government of the United States of America on certain aspects of defence. There he made certain statements, detailing India's military preparations and her requirements, to the Press which caused considerable embarrassment to the Prime Minister and the Defence Minister.

51. Patel, H.M., "Cabinet Government in India," Aiyar, S.P., and Srinivasan, R., (Ed.), *Studies in Indian Democracy*, pp. 205-06.

52. Gadgil, N.V., *Government from Inside*, Chap. VI.

53. According to Krishna Menon, "the Cabinet never takes votes." "The Cabinet at work," *The Times of India*, New Delhi, October 22, 1968. Excerpt from Michael Brecher's *India and World Politics*. Also refer to N.V. Gadgil's *Government from Inside*, Chap. VI.

cannot adequately meet its huge task when it usually meets once a week and that, too, for a short duration. Its longest session ever held was on October 14, 1964, when the Cabinet is reported to have sat for four hours without a break. Then it has too many members for effective discussion and all of them, except for the Minister without Portfolio, if there is one, are heads of Departments of the Government and they are too pre-occupied in their departmental duties. The Cabinet neither desires nor is able to tackle all the numerous details of Government. The result is the emergence of Cabinet Committees. These Committees help the Cabinet to discharge its responsibilities. Some of the Cabinet Committees are continuous and, thus, permanent; others are *ad hoc*, that is, created for single time-limited-matter. *Ad hoc* Committees are set up to deal with a special problem or critical situation and are composed of the Ministers primarily concerned with the problems at issue. They deliberate, report and disband. For instance, a special Committee of the Cabinet was constituted in November 1964, to examine the charges of corruption against the Chief Minister of Orissa and some other members of his Council of Ministers. Recently a Cabinet Committee was appointed to report on the re-organisation of Assam. In 1962, the Emergency Committee, consisting of Jawaharlal Nehru, Krishna Menon, Morarji Desai, Krishnamachari, and Lal Bahadur Shastri, was set up soon after the Chinese invasion.

The Standing or permanent Committees of the Cabinet are: Foreign Affairs Committee, Economic Affairs Committee, Internal Affairs Committee, Defence Committee, and Parliamentary Affairs Committee. The number and composition of Standing Committees are largely determined by the Prime Minister. Cabinet Committees provide a means whereby certain problems and issues can be studied and discussed by Ministers most concerned and some kind of compromise reached before they are brought before the whole Cabinet. It makes the work of the Cabinet easy if the principal issues involved have been identified and thrashed out by a small ministerial group and agreed recommendations submitted. Cabinet Committees are also useful to co-ordinate policy and administration. Moreover, Committees can be employed to keep a critical problem under continuous review. Finally, by including non-Cabinet Ministers, whenever deemed appropriate, the Committee System can extend the Cabinet's co-ordinating activity to wider areas of governmental affairs. It is also possible for the senior members of the permanent services to attend Cabinet Committee meetings as advisers to their Ministers.

The Cabinet Committees, thus, combine two functions: co-ordinating the various Ministries and decentralising the policy. The Committees report to the whole Cabinet and seek to submit agreed reports and recommendations. But a Minister who is not satisfied with the recommendations of a Committee can appeal to the Cabinet, where under the Chairmanship of the Prime Minister, differences are tried to be resolved. If the Minister does not reconcile to the decision of the Cabinet, the only course left for him is to resign.

### FUNCTIONS OF THE CABINET

The Cabinet in Britain, according to the Report of the Machinery of Government Committee (1918), has three main functions:

- (a) the final determination of policy to be submitted to Parliament;
- (b) the supreme control of the national executive in accordance with the policy prescribed by Parliament; and
- (c) the continuous co-ordination and delimitation of the interests of several Departments."

This is the most authoritative statement hitherto made about the functions of the Cabinet. Since Parliamentary system of Government on the British model is operative in India, the functions of the Cabinet here may also be examined in the context of the functions stated by the Machinery of Government Committee. But it must be noted that the Cabinet in India performs certain functions "which the British Cabinet dare not assume". For instance, Article 123 of the Constitution empowers the President to promulgate ordinances when Parliament is not in session and these ordinances have the same force as an Act of Parliament. Such ordinances are really issued and promulgated on the advice of the Cabinet but under the authority of the President. Similarly, Fundamental Rights can be suspended by declaring the state of emergency. Decisions relating to the re-organization of States and alterations in their boundaries are taken by the Cabinet. All this is subject to the approval of Parliament, but the decision is that of the Cabinet and approval of Parliament is *ipso facto* so long as it commands majority.

**Policy determining functions.** The Cabinet, as said before, is a deliberative and policy formulating body. It discusses and decides all sorts of national and international problems confronting the country and thereby an attempt is made to reach unanimous agreements embodying Government's policy. It must present to Parliament and to the world a unified policy of action if collective responsibility, which the Constitution ordains, is to be fully realised. If an individual Minister finds it impossible to agree with the policy determined by the Cabinet, the only course for him is to resign. As a policy determining body, the Cabinet meets regularly once a week and takes decisions on all vital matters and other matters emerging from various Ministries and earmarked for Cabinet discussion. The Cabinet, thus, supplies leadership, initiative and resourcefulness.

When the Cabinet has determined on a policy, the appropriate Department carries it out either by administrative action within the framework of the existing law or by submitting a new Bill to Parliament. Legislation is the handmaid of administration and Cabinet is the instrument which links the executive department of government to the legislative. In this way, the Cabinet directs Parliament for action and so long as it can command a majority in Parliament it gets the approval of its policy.

These are essentially the legislative functions of the Cabinet. But in the modern State, as Jennings says, "most legislation is directed towards the creation or modification of administrative powers", and no vivid distinction can, therefore, be made between legislation and administration. The Cabinet plans the legislative programme at the beginning of each session of Parliament and Government measures are introduced either by a Cabinet Minister or by some other Minister acting on Cabinet's approval.

No Minister can introduce a Bill on his own initiative. It is for the Cabinet to determine what Bill shall be presented in a session. In legislation, therefore, the control of the Cabinet over the Council of Ministers is complete. While summing up the policy determining functions of the Cabinet in Britain, Ogg has aptly said that the Cabinet Ministers "formulate policies, make decisions, and draft bills on all significant matters which in their judgment require legislative attention, asking of Parliament only that it gives sanction to such decisions and policies by considering them and taking the necessary votes." It will be no exaggeration to say that the Cabinet really legislates with the advice and consent of Parliament. The time of summoning and prorogation of Parliament are decided in the Cabinet. Dissolution of Parliament is really the decision of the Cabinet in Britain, though the Prime Minister now exercises that power as a matter of right. In India, Britain has stood the model and the right of the Prime Minister to ask for dissolution is well recognised.

**Supreme Control of the National Executive.** The Cabinet in India is not an executive instrument in the sense that it possesses any legal powers. The Constitution vests the executive authority in the President exercisable by him either directly or through officers subordinate to him. The real functionaries are the Ministers. The Ministers preside over the Departments (Ministries) of Government, and carry out the policy determined by the Cabinet and approved by Parliament. In carrying out the work of their Ministries, the Ministers, whether in the Cabinet or not, must faithfully follow the directions of the Cabinet in enforcing its decisions and policies. Any deviation therefrom is against the rigid discipline of party government and consequently may lead to the removal of a Minister who defies the principle of party unity. The Cabinet is, thus, the supreme national executive. It superintends, supervises and directs the work that Civil Servants do all over the Union. All questions and problems which are likely to focus attention of Parliament are considered in the Cabinet and decisions taken thereupon to prevent multiplicity of voices in important debates.

The power of delegated legislation has still more enhanced the executive authority of the Cabinet and the Ministers. Legislation during recent times has become more voluminous and more technical and Parliament very often passes laws in skeleton form leaving it to the Council of Ministers or Ministers incharge of the appropriate Departments to fill in the details and make Rules and Regulations in order to give effect to such laws.

**The Cabinet as a Co-ordinator.** The essential function of the Cabinet is to co-ordinate and guide the functions of the several Ministries or Departments of Government. Administration cannot be rigidly divided into twenty-two or more departments. The actions of one Ministry may effect the work of another Ministry. In fact, every important problem cuts across departmental boundaries, and the Cabinet does the vital task of co-ordinating policy. On purely inter-departmental matters endeavour is made by the Ministries to resolve their differences and reach agreement. If no agreement can be reached, then, the Prime Minister acts as arbitrator and co-ordinator. In the last resort the appeal is to the Cabinet. The Minister who does not agree to the Cabinet decision must resign. This



means not only the linking of specific administrative decisions by reference to a general policy, but the expression of the same general policy in legislation.

The emergence of the Cabinet Committees and the increased problem of co-ordination in the context of the Welfare State and implementation of Five-Year Plans have brought about a significant expansion in the work of the Cabinet Secretariat. The Cabinet Secretariat takes down and circulates the decisions of the Cabinet, its committees and sub-committees. It circulates the agenda and the background papers to Cabinet Ministers. The Prime Minister and the Chairmen of the Cabinet Committees now primarily rely upon the corps of their expert assistants in the Cabinet Secretariat to supply them with the requisite information and advice in integrating the work of the different Ministries.

**Control over Finance.** Two more functions may be added to those enumerated above. The first is that the Cabinet is responsible for the whole expenditure of the State and for raising necessary revenues to meet it. In Britain the annual Budget statement is excluded from the scope of the Cabinet decisions. But being a matter of political importance, it is always brought before the Cabinet and the Chancellor of the Exchequer makes an oral statement about it a few days before his Budget speech. On the estimates the control of the Cabinet is complete. If there are new proposals of taxation involving any major change in the taxation policy, they must be considered at length by the Cabinet before the Budget is produced. In India, too, the Cabinet does not discuss the Budget. But the Finance Ministers generally keep their colleagues in the picture so far as a proposal of theirs was likely to affect matters which came within their purview.<sup>54</sup> The final decision, however, is that of the Finance Minister and the Prime Minister. The proposals are divulged to the Cabinet only on the day when the Finance Minister is scheduled to make his Budget speech in Parliament. Although the Cabinet does not discuss the Budget before presentation to Parliament, it does examine it after it has been presented and can always insist on modifications. It can also overthrow it altogether in deference to parliamentary or public opinion, but this may be done only at the risk of the resignation of the Finance Minister. If secrecy of the Budget is to be ensured, then, the Finance Minister, as Anthony Eden said, "is wise if he shares his burdens to some extent with the Prime Minister," but, "clearly he cannot share them with the whole Cabinet."

**Control over appointments.** Appointments do not normally come before the Cabinet for discussion. But all major appointments, as those of Governors and Ambassadors, and other appointments to key positions must be mentioned in the Cabinet before they are made public. This is tantamount to seeking the approval of the Cabinet and consequently its control on appointments ranking major.

## THE PRIME MINISTER

✓ **Prime Minister: a creation of the Constitution.** The office of the Prime Minister in Britain is the result of accident of circumstances and

54. Gadgil, N.V., *Government from Inside*, pp. 161-62. Also refer to H.M. Patel's "Cabinet Government in India," *op cit.*, p. 209.



growth whereas in India it has been created by the Constitution. The Prime Minister heads the Council of Ministers which he forms. The Ministers are technically appointed by the President,<sup>55</sup> but in actual practice and consistent with the principle of Cabinet system of Government, they are the nominees of the Prime Minister and the President simply endorses his or her choice. The Council of Ministers, as a body, are responsible to the House of the People (Lok Sabha) but individual Ministers are liable to dismissal by the President.<sup>57</sup> Theory, however, is not practice. Under a Cabinet system of Government the right of dismissing an individual Minister really belongs to the Prime Minister. "The only sanction," observed Dr. Ambedkar, "through which collective responsibility can be enforced is through the Prime Minister." He further said, "no person shall be retained as a member of the Cabinet if the Prime Minister says that he shall be dismissed. It is only when members of the Cabinet both in the matter of their appointment as well as in the matter of their dismissal are placed under the Prime Minister, that it would be possible to realise our ideal of collective responsibility." The Prime Minister of India like his prototype in Britain is, as Laski has said with regard to the latter, "central to the formation of the Government, central to its life and central to its death." The Prime Minister forms it, he can alter it or destroy it." There is no positive provision in the Indian Constitution which may vest the Prime Minister with such a power. But the Prime Minister is the pivot on which the entire mechanism of the Cabinet system of Government revolves. If the Constitution does not specifically provide for such a pivotal position of the Prime Minister, the spirit of the Constitution is as cogent a source of authority as a specific provision in the Constitution.

**The appointment of the Prime Minister.** It is the fundamental principle of the Cabinet Government that the Cabinet must have the support of the majority in the representative Chamber of the Legislature. The choice of the Prime Minister is consequently automatic and the Chief Executive Head of the State summons the leader of the majority party and commands him to form the Ministry. In Britain, the Monarch has no personal choice when a party secures a clear majority and it has a leader. But the King has a choice when the party has a majority and no leader or when no single party has a majority. The King may, again, have a really effective choice when a Prime Minister in office offers a personal resignation or dies and there is no accepted second in command to step into his shoes. The King has always, under such circumstances, exercised his choice of selecting a Prime Minister in a most impartial manner. When a Ministry is defeated and it resigns as a consequence thereof, the practice is to summon the Leader of the Opposition and he is commissioned to form the Ministry.

The Constitution of India is silent how the President shall choose the Prime Minister. It does not, also, say whether he must necessarily belong to the Lok Sabha or may be a member of either House of Parliament. If the letter of law is to be strictly adhered to, then, a Prime

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55. Article 75 (1).

56. Article 75 (3).

57. Article 75 (2).

Minister may be appointed without his being a member of Parliament for a period of six months. But this is not the practice of the Cabinet system of Government. The accepted convention is that the Head of the State summons the leader of the parliamentary majority, if there is one, or a person capable of commanding a majority in the Legislature, if there is not one single party with clear majority, appoint him as a Prime Minister and commission him to form the Ministry. A person who is not a member of the Legislature may be appointed a Minister, but it cannot be possible in the case of a Prime Minister. This is the position in Britain and it is precisely applicable in India. Moreover, the constitutional provision of collective responsibility and that, too, expressly to the House of the People (Lok Sabha), leaves no margin for speculation that the Prime Minister may be appointed without his being a member of Parliament for a period of six months. The President must, therefore, summon a leader of the majority party in Parliament or a combination of parties agreeing to work in a coalition. He has no choice and if the President summons any one else other than the leader of the majority party or a combination of parties to form the Government, he violates the Constitution which establishes the Parliamentary form of Government.

But the President will be able to exercise effective discretion if there is not one single party to command a clear majority. The possibilities of such a contingency are there and it may even become a matter of frequent occurrence. Besides the Congress there are at present twelve distinct political parties and groups in the Lok Sabha and the apprehension is that the number may still increase and reach the limits of France. Such a development is really alarming, but it is hoped that when there is not one single party commanding a majority in the Lok Sabha and the President is confronted with the most difficult task of exercising his discretion in the selection of the Prime Minister, he will always act impartially in his choice.<sup>58</sup> The main anxiety of the President under such circumstances should be to select a person who must be able to secure colleagues, and with his colleagues he must be able to secure the collaboration of the Lok Sabha. The President stands above party considera-

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58. Madhu Limaye, M.P., has recently expressed the view that there are two contingencies in which the President should be able to exercise an independent discretion. If no party emerges with an absolute majority in the Lok Sabha in 1972, whom should the President call upon first to form a new Government? Mr. Limaye's own view is that the leader of a potential united front or coalition should receive the President's favour in preference to what would be a rejected Congress Party. According to Madhu Limaye the Congress Party has no *locus standi* to form the Government in coalition with others even if it is the largest single Party in the Lok Sabha. *The Hindustan Times*, New Delhi, June 1, 1969. K. Suba Rao, Former Chief Justice of India, suggests that the discretion of the President on the question who commands the majority or whom he can call upon to take upon responsibility shall not be exercised arbitrarily. He shall not allow himself to become an instrument of party manoeuvring. "He shall call upon the leader of the majority party to form the Government. If there is no majority party he shall call upon the leader of a coalition party, if there is such a party. If there is no such party, he shall give a chance to the leader of the largest group in Parliament to take responsibility. If the leader of the largest group is not able to form the Ministry, he shall give an opportunity to any other leader who undertakes the responsibility to form the Ministry. He can only dissolve Parliament if no leader is able to form a Ministry." *The Tribune*, Chandigarh, August 15, 1969.

tions. As Head of the State, he must act for all the people and not for the benefit of a single party or any class of people. The President is under the constitutional obligation to faithfully discharge the functions of the President and preserve, protect and defend the Constitution and the law to the best of his ability. It should not matter for him which party or parties form the Government. The President may have his prejudices, and even Monarchs have, as Queen Victoria had against Gladstone, but he must not be a partisan and an active politician. Particularly, after the election of the Fourth President, the utmost caution is called for to prevent the rise of any suspicion that the President is favouring any group or groups.

**Functions of the Prime Minister.** The Prime Minister is the keystone of the Cabinet arch. In his hand is the key of the Government. His duties are onerous and his authority enormous. The Prime Minister of Britain is sometimes likened to a dictator. His formal powers at least, as Greaves says, "resemble closely those of an autocrat." This may be an exaggeration, yet the statement is indicative of the extent of the Prime Minister's powers under a Cabinet system of Government and the Prime Minister of India is no exception to it. Professor K.T. Shah expressed apprehension in the Constituent Assembly about the concentration of power in the hands of the Prime Minister. He maintained that "the power which this Constitution seeks to center on the Prime Minister makes it inevitable that a degree of power will concentrate in his hands, which may very likely militate against the working of a real responsible and democratic government." Not in identical terms, but Dr. Ambedkar also said, "if any functionary under our Constitution is to be compared with the United States President he is the Prime Minister and not the President of the Union." The comparison is not apt. The Cabinet in the United States is the "President's family". He makes and unmakes his Cabinet at his will. The President can, and very often he does, override the decisions of his 'ministers' or he may not seek their advice or even if he seeks, it, it is for him to decide whether to consult them individually or collectively. The use of the Cabinet depends upon the President's desire. But such is not the case in a Cabinet system of Government. The Prime Minister of India, like his counterpart in Britain, is nothing without a united Cabinet, a united Parliament and a united people behind the occupant of that office. Whatever be the position of the Prime Minister otherwise, the Constitution places him at par with his other colleagues so far as tendering of advice is concerned. The President can refer the advice tendered by the Prime Minister singly for the decision of the Council of Ministers. Yet, the Prime Minister commands a unique position of superiority. Nehru and Shastri raised the stature of their office to unprecedented heights. The Prime Minister in India in a way enjoys more power as compared with the British Prime Minister. The former appoints, subject to the formal approval of the President, Governors of States, and if the same Party is in power in the States as well as at the Centre, the Prime Minister has an effective hand in the selection of Chief Ministers and their Cabinets.

59. *Constituent Assembly Debates*, Vol. VII, pp. 1144-46.

60. *Ibid.*, p. 998.

(1) The Prime Minister makes the Government. With the appointment of the Prime Minister the essential task of the President is completed, for it rests with the former to select his colleagues and present his list of Ministers to the President for his assent. Technically, the last word in the appointment of Ministers rests with the President because it is he who appoints them. But, in practice, the decision belongs to the Prime Minister and the Presidential assent is more or less a formality.

In the selection of his colleagues and in the assignment of departments, the Prime Minister has a very free hand. It is for him to decide on the size of the Cabinet and the Ministers to be included in it. He may even select colleagues outside the ranks of his party, as was done by Nehru while forming the first Union Cabinet, or even outside Parliament, if in his judgment a particular person is specially fitted for a particular job. But the choice of the Prime Minister of India is not so unrestricted as it is of the British Prime Minister. Amery, while summing up the power of appointing his colleagues says, "few dictators, indeed, enjoy such a measure of autocratic power as is enjoyed by a British Prime Minister while in process of making the Cabinet". The power of the Indian Prime Minister, on the other hand, is limited by party necessities, geographical considerations, and representation of the different communities.<sup>61</sup> There is nothing in the Constitution which may bind the Prime Minister in his choice, but practical requirements do demand the representation of all the diverse elements.

In the allocation of offices as well, the Prime Minister offers posts at his discretion, although politicians of standing may safely decline what is given if the assignment is deemed derogatory to their political stature. Sardar Patel would have accepted nothing short of Home Affairs, States, and Broadcasting. T.T. Krishnamachari declined to rejoin the Cabinet after the 1962 General Elections unless he was given the Finance portfolio, though he joined in 1962 as Minister for Economic Co-ordination. Later, in August 1963, he succeeded in getting the Finance. In July 1963, S.K. Patil resisted the Prime Minister to shift him from Food to Railways. In August 1963, Patil resigned under the Kamraj Plan and Nehru accepted his resignation. In July 1969, Mrs. Indira Gandhi deprived Morarji Desai of the Finance Department and left him to continue as Deputy Prime Minister alone. He resigned and his resignation was accepted. The Prime Minister insisted that it was her unfettered right to allocate portfolios.

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61. Campion and Others, *Parliament: A Survey*, p. 63.

62. When Draft Article 61 came before the Constituent Assembly for consideration, Mahbub Ali Jig again moved an amendment, which had already been negatived, that the Council of Ministers should consist of fifteen members elected by the elected members of both Houses of Parliament from among themselves in accordance with the system of proportional representation. Dealing with it Dr. Ambedkar said that he presumed that the purpose of the amendment was possibly to enable the minorities to secure representation in the Cabinet. The Law Minister pointed out that this purpose could be better achieved by the Instrument of Instructions suggested by the Drafting Committee which directed the President to include in the Cabinet members of the minority communities as far as practicable. *Constituent Assembly Debates*, Vol. VII, pp. 1141-60.

(2) If the machinery of Government is to work efficiently and effectively, then, it is the undisputed right of the Prime Minister to appoint, reshuffle, or dismiss his colleagues. He is free in the exercise of his impartial judgment to make what appointments may seem good to him. It is also his untettered right to review, from time to time, the allocation of office among his various colleagues and determine whether that allocation still remains the best that can be effected. He may, thus, shuffle his pack as he likes and whenever he likes. Both as captain of the team and head of the administration, it is the duty of the Prime Minister to request any of his colleagues, whose presence in the Ministry he deems prejudicial to the efficiency, integrity, or policy of the Government, to resign. Therefore, the Prime Minister," as Dr. Ambedkar observed, "is really the keystone of the arch of the Cabinet and unless and until we create that office and endow that office with statutory authority to nominate and dismiss Ministers there can be no collective responsibility."

The Prime Minister can also advise the President to dismiss a Minister. According to law a Minister holds office at the pleasure of the President and is liable to dismissal whenever it pleases the President. But it is now the well-established practice of the Cabinet system of Government that the power of dismissal by the Head of the State is exercised solely on the advice of the Prime Minister. While dealing with this aspect of the problem Dr. Ambedkar maintained, in the Constituent Assembly, "In my judgment collective responsibility is enforced by the enforcement of two principles. One principle is that no person shall be nominated to the Cabinet except on the advice of the Prime Minister. Secondly, no person shall be retained as a Member of the Cabinet if the Prime Minister says that he shall be dismissed. It is only when members of the Cabinet both in the matter of their appointment as well as in the matter of their dismissal are placed under the Prime Minister, that it would be possible to realise our ideal of collective responsibility. I do not see any other means or any other way of giving effect to that principle." It is, however, doubtful, if ever a Prime Minister would advise dismissal as he has other means in the armoury of his powers. The Prime Minister may tender his resignation and reconstitute the Government excluding the undesired Minister. And to remain still more dignified, the Prime Minister may elevate him to a Governorship or ambassadorship. All the same, the right of the Prime Minister to dismiss a Minister is there.

(3) The general election is in reality the election of the Prime Minister. The slogan in the 1952, 1957 and 1962 General Elections was "to vote for the Congress and strengthen the hands of Nehru." The Congress and Nehru had, in fact, become synonymous. He had no visible grips on the party machine, but his sway over the people was greater and more absolute than that of any other democratic statesman elsewhere. Writing about Prime Minister Nehru, Hiren Mukerjee, the Communist M.P., said, "If to a public figure nothing is more rewarding than the love of his people, Jawaharlal Nehru has been one of the most fortunate persons in creation. Apart from Gandhiji, no one in India has been the

63. *Constatuent Assembly Debates*, Vol. VII, p. 1159.

64. *Ibid.*, p. 1159.



recipient, in recent decades, of such abounding love—and, while the Mahatma commanded a sort of reverence, Nehru has evoked the people's affection. Even Subhas Chandra Bose, in some ways a more dynamic person, lacked the secret of Jawaharlal's personal fascination for all varieties of people.<sup>65</sup> K.R. Srinivasa Iyengar, writing under the caption: **The Prime Minister**, observed "when he enters an assembly, be it a Select Committee or a mass rally, the effect is invariably the same. All eyes converge towards him, all hands clasp in eager affectionate welcome as if to a pre-ordained tune, and a hushed expectancy watches his intrepid movements and strains to catch his words and whispers. The men are a little out of breath, the women are almost overwhelmed."<sup>66</sup> Prime Minister Nehru was, thus, the virtual leader of his party and he towered above all in national stature. In fact, he had acquired world stature and even his bitter political adversaries acclaimed him as such. "May this gentle colossus", prayed Hiren Mukerjee, "stride the Indian scene for as long as we care to foresee in the future."<sup>67</sup>

The Prime Minister moulds and guides public opinion by receiving deputations and discusses issues, by public speeches at party conferences, and on other important occasions which demand proper attention. The role which a Prime Minister plays in assuming leadership of the party depends upon his personality, his prestige and even his strategy. Jennings says, "since his personality and prestige play a considerable part in moulding public opinion he ought to have something of the popular appeal of a film actor and he must take some care over his make up—like Mr. Gladstone with his collars, Mr. Lloyd George with his hair, Mr. Baldwin with his pipes and Mr. Churchill with his cigars."<sup>68</sup> Nehru had his baton and a rose in the buttonhole of his *achkan*. In the exuberance of their enthusiasm the old and the young, the ladies and the little tots raced to offer him, wherever he went, the choicest rose flowers. Nehru and the nation were personified. Mrs. Indira Gandhi's assets are her youth, her strong sense of duty and her unquestioned dedication to the country's interests and good. She has a hold on the people's imagination. After the nationalisation of 14 major Banks in July 1969, Mrs. Gandhi's popularity is running at a peak according to a Gallup Poll report by E.P.W. da Costa.<sup>69</sup> The survey conducted by him disclosed that in August 1969, her peak popularity rose to 71 as compared to 45 in October 1966 and 41 in August-September 1967. "This is high," says da Costa, "but short of the Indian peak of 97 which Lal Bahadur Shastri reached after the 22-day hostilities in 1965. Nevertheless, the ascent from 41 to her peak figure of 71 is a clear indication that the Prime Minister has emerged in the area of India's most popular leaders which includes her father and Lal Bahadur Shastri."<sup>70</sup>

65. "Symposium on Nehru," *Illustrated Weekly of India*, Bombay, August 16, 1959.

66. *The Hindustan Times*, Sunday Magazine, November 13, 1953, p. 1.

67. *Ibid.*

68. *Cabinet Government*, p. 163.

69. *The Hindustan Times*, New Delhi, August 28, 1969.

70. *Ibid.*

(4) Then, the Prime Minister is the Chairman of the Cabinet and generally "the chairman of any committee attracts a special kind of loyalty, engendered by the vague feeling that business is expedited and improved by order and that one must be prepared to suffer the chairman's ruling for the sake of the collective enterprise."<sup>71</sup> The Ministers may differ behind closed doors, but they must finally agree, if party solidarity is to be maintained. The possibilities of disagreement are, in fact, rare. A difference between two Ministers or two Departments can be settled by private consultation or by arbitration by the Prime Minister. If differences emerge out of cabinet discussions, then, as chairman of the Cabinet, the Prime Minister occupies a position of pre-eminence which enables him or her to impose a decision. Moreover, the Prime Minister is the leader of the Party and his fifteen or more colleagues owe him a personal as well as a party allegiance. Finally, he controls the agenda. It is for him to accept or reject proposals for Cabinet discussion. In Britain the practice is that the Prime Minister is always consulted by every Minister before an important proposal is put forward and his support elicited. But such a solidarity can only be obtained when one single party enjoys a clear majority in Parliament. In case of a Coalition Government, and more particularly when it is a combination of five or six parties or groups, the possibilities of such a solidarity are rare, and consequently personal as well as party allegiance to the Prime Minister becomes an exception. Chances of such conditions are there, because India, too, is heading towards a multiple party system. If it actually happens, it will be reminiscent of France where every Minister is a prospective Prime Minister.

(5) The Prime Minister is the Manager-in-Chief of the Government's business. He co-ordinates the policies of the several Ministers and the Ministries. He must see the Government as a whole and bring the variety of governmental activities into reasonable relationship with one another. It is, however, not possible for a Prime Minister in any part of the democratic world to exercise his control and supervision over all the Departments of Government. The sphere of the State has become so extensive and its functions so varied and complex that even if any Prime Minister were to venture it the result would be equally disastrous to him and to the country. The responsibilities of the Prime Minister have, therefore, been shared by his colleagues who constitute the inner Cabinet and the work of co-ordination is done by various Committees of the Cabinet. Still the Prime Minister is supposed to exercise a general supervision over all Departments and he or she has a right to be consulted on all matters, important or minor, controversial or otherwise. B.N. Kaul, Principal Private Secretary to the Prime Minister, in his examination before the Public Accounts Committee, on a question about the supervisory functions of the Prime Minister, observed: "The Minister-in-charge of each Ministry is responsible for the affairs of that Ministry. Under the Cabinet system of the Government, the Minister is the highest person-in-charge of a Ministry. He is directly responsible to the Prime Minister." When asked, "Cannot the Prime Minister sit in judgment over other Ministers?",

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71. Finer, H., *The Theory and Practice of Modern Government* (1954), p. 592.

Kaul replied, "He can. Ultimately the Prime Minister is responsible."<sup>72</sup>

(6) The Prime Minister is the leader of the House of the People, Lok Sabha, if he is its member. Mrs. Indira Gandhi was not a member of the Lok Sabha in January 1966, when she became the Prime Minister. The Constitution does not specifically prevent a Prime Minister if he/she comes from the Upper Chamber.<sup>73</sup> In Britain, however, no peer has been Prime Minister since 1902 and he has no access to the House of Lords. But Ministers in India have the right to speak in, and otherwise to take part in the proceedings, of either House of Parliament.<sup>74</sup> All principal announcement of policy and business are made by the Prime Minister and all questions on non-departmental affairs and critical issues are addressed to him or her. The Prime Minister initiates or intervenes in debates of general importance. The Prime Minister also possesses an immediate authority to correct what he may consider the errors of omission and commission of his colleagues. Prime Minister Nehru appeased an angry Lok Sabha by promising an immediate inquiry when the Food Minister vainly tried to assure the House that it need not feel concerned over the fertilizers. When the Law Minister introduced the Representation of the People's Bill at the fag end of the session of Parliament and hinted at further legislation by the President during the recess it angered the Lok Sabha. The Prime Minister intervened and promised that it would only be done by Parliament and if necessary the session of Parliament might be lengthened.

(7) The Prime Minister is the only channel of communication with the Head of the State on matters of public concern. According to Article 78 of the Constitution, it is the legal duty of the Prime Minister:

- "(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of affairs of the Union and proposals for legislation;
- (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
- (c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a minister but which has not been considered by the Council."

It is a breach of Cabinet etiquette for any other Minister to revise the account given by the Prime Minister or to reveal to the President the substance of Cabinet discussions. The Prime Minister is the Chief Adviser of the President and in emergencies he will first consult him.

72. Public Accounts Committee, 1952-53, Seventh Report on Appropriation Accounts (Civil) 1949-50, Vol. II, Evidence, pp. 21-22. Gadgil wrote, "Two brass pots cannot touch each other without making some sound. Once a Minister assumes a position of power, he begins to think of himself as infallible and his opinions as if divinely inspired. In the circumstances, when a dispute arises between two Ministries, they go to the Prime Minister whose word is final." Gadgil, N.V., *Government from Inside*, pp. 163-64.

73. Mrs. Indira Gandhi stood for the Lok Sabha seat in the 1967 General Elections and was elected.

74. Article 88.

(8) The patronage exercised by the Prime Minister is enormous. All major appointments are really made by him. In the course of making such appointments he, no doubt, receives the advice of his colleagues, but the ultimate choice belongs to him.

**The Prime Minister's position.** The Prime Ministership of India entails one of the heaviest burdens in the world. As in Britain so in India, the Prime Minister is not merely *primum inter pares*, first among equals. He is rather "a sun around which planets revolve." While refuting the charge of C.D. Deshmukh that the two crucial decisions on Bombay, which caused Deshmukh's resignation, were not Cabinet decisions but that of the Prime Minister, Nehru declared in the Lok Sabha on July 30, 1956, "I am the Prime Minister of India. I know something of democratic procedure, about the Prime Minister's duties, the Constitution of India and the Constitution of Britain. The Prime Minister is the linchpin of the Government and he can make any statement on behalf of the Government."

The Prime Minister is, indeed, "a sun around which planets revolve". His authority is great if he is keen to assert to the full position which he occupies. The office of the Prime Minister in India is created by the Constitution and his authority carries with it the constitutional sanction. He heads the Council of Ministers and Ministers are appointed by the President on the advice of the Prime Minister. The Ministers hold office during the pleasure of the President, but the President exercises this power on the advice of the Prime Minister. Dr. Ambedkar characterised the Prime Minister's power to appoint and dismiss Ministers as the only means by which the principle of collective responsibility ordained by the Constitution<sup>75</sup> could be realized.<sup>76</sup> To defy the authority of the Prime Minister and to challenge his position is suicidal to the political ambitions of a Minister unless the Prime Minister "has handled his job so badly that there is a widespread feeling of his unfitness for it." Nehru even thought of dismissing Sardar Patel. It is reported that he told the Deputy Prime Minister that the Prime Minister had the right to select his colleagues and he could dismiss him if his views differed from the policy of the Cabinet.<sup>77</sup> Winston Churchill had aptly said, "In any sphere of action there can be no comparison between the positions of number one and number two,

75. See ante, *Constituent Assembly Debates*, Vol. VII, p. 1159.

76. Article 75 (2).

77. Gadgil writes, "As I have said above, although the differences amongst the Cabinet members were not brought up forcefully, the schism between the viewpoint of Vallabhbhai (Patel) and Nehru began to come to surface gradually. Nehru was displeased with a speech made by Vallabhbhai in Varanasi. The speech did not contradict the Cabinet policy as such, but nor did it show any overmuch indulgence for the Muslims. Vallabhbhai believed in justice for all and was stoutly opposed to injustice or truculence. The differences between them became sharper as time went on. Nehru was not pleased by the action taken in Junagadh by Vallabhbhai. He was equally displeased at the firmness displayed by Vallabhbhai in the Hyderabad affair. It was rumoured then that Nehru had given a hint to Vallabhbhai through one of his confidants that he might have to go if he did not behave. I do not believe there could have been any such hint. But I know for certain that Nehru's favourites and sycophants were quite capable of creating such mischief." Gadgil, *N.V., Government from Inside*, p. 145.



three, or four. The duties and problems of all persons other than the number one are quite different and in many ways more difficult. It is always a misfortune when number two or three has to initiate a dominant plan or policy. He has to consider not only the merits of the policy, but the mind of his chief; not only what to advise, but what it is proper for him in his station to advise; not only what to do, but how to get it agreed; and how to get it done. Moreover, number two or three will have to reckon with numbers four, five and six, or may be some bright outsider, number twenty...." Dr. Ambedkar resigned from the Cabinet and complained in the statement of his resignation that "Many Ministers have been given three or four portfolios so that they have been overburdened. Others like me have been wanting more work. I have not been considered even for holding a portfolio temporarily when a minister-in-charge has gone abroad for a few days." Nehru accepted the resignations of Morarji Desai, S.K. Patil, Lal Bahadur Shastri, Jagjivan Ram, Shrimali and Gopala Reddy under the Kamraj Plan because it provided him an opportunity to get rid of incompetent or inconvenient colleagues whom he was hesitant to remove in the normal way. Lal Bahadur Shastri and Jagjivan Ram were dropped from the Cabinet in order to keep up an appearance of impartiality in accepting these resignations. Morarji Desai had to quit unceremoniously as Mrs. Indira Gandhi thought that he might not be able to properly implement the policy of nationalisation of banks.

But the office of the Prime Minister, as Jennings says, "is necessarily what the holder chooses to make of it." The mighty power behind Nehru was his dynamic personality. He, in fact, became an institution and reigned supreme over his Party and Government. "Many of his colleagues and/or party high-ups", wrote Radhakrishnan, "receive the shock of their lives when Nehru asks them to explain, obscure reports published in the papers, with the relevant cutting pasted faithfully on the note paper."<sup>78</sup> The cross-country trips Nehru made during the first and second General Elections are said to have surpassed all records of any Prime Minister in any part of the world. The Prime Minister's prestige is one of the elements that make for the success of the Party and his personality is responsible for Party cohesion. The position of the Congress Prime Minister, wrote N.V. Gadgil, former Union Minister (1947-52) and Governor of Punjab, "is a peculiar one. In the Cabinet, he naturally claims to be the mouthpiece of the Working Committee, and he naturally claims that it is his responsibility that the decisions of the Government are in conformity with the broad principles and policies laid down by the Congress. In the Working Committee, where he cannot escape dominating, he represents the Government and is in a stronger position to necessarily press his views, backed up as they are by administrative experience."<sup>79</sup> Many merits are claimed for such a position of the Prime Minister as he constitutes an effective connecting link between the Government and the Party organization as represented by the Working Committee. "But disadvantage which is inherent in a situation of this kind," Gadgil remarked, "is equally overwhelming, viz., that the Prime Minister is invested with formidable

78. *The Tribune*, Magazine Section, Ambala Cantt., November 13, 1955, p. 1.

79. "The Government and the Party", *The Indian Journal of Public Administration*, New Delhi, October-December 1957, p. 354.



power and influence and unless he be a genuine democrat by nature he is very likely to become a dictator.” Mrs. Indira Gandhi clarified the position and role of the Prime Minister vis-a-vis of the Congress President and his Working Committee. Mrs. Gandhi, who was addressing the general body of the Congress Parliamentary Party on August 29, 1969, is reported to have said<sup>80</sup> that the sphere of the Congress President was the Party which laid down broad policies. But the implementation of policies and programmes was in the hands of Parliament and the State Legislatures. The leader of the Congress Parliamentary Party, as the Prime Minister, had responsibility not only to the Congress but to the State Governments and to nations of the world. Therefore, it would not be proper to fetter the discretion of the Prime Minister.

The Congress President, S. Nijalingappa, has warned the Congress of the evil of “personality cult” which according to him was reflected in the Prime Minister’s desire for freedom of vote in the Fourth Presidential election. The Congress President is of the opinion that Congressmen and other voters rallied behind Mrs. Indira Gandhi because some sort of worship had developed around her personality and voters and supporters of V.V. Giri were swayed by it. Whatever be the merit of this accusation, it is undisputedly true that Mrs. Indira Gandhi has acquired a new political stature after the Bangalore session of the All-India Congress Committee in July 1969. “Any leader”, writes K.D. Malaviya, “who develops a healthy political perspective and responds intelligently to the needs of society is entitled to adoration and support, which can by no means be attributed to personal factors, although individual charm and political demeanour must be considered essential attributes of a leader.”<sup>81</sup> Prime Minister Indira Gandhi’s performance in nationalising the top 14 Banks and her utterances promising economic and social justice have inspired confidence among the people in a manner unparalleled in the history of the Indian National Congress.

But the Prime Minister’s position is bound up with his Party. Without his Party he is nothing. Whatever he is and whatever he can claim to be is due to what the Party has made him. As long as he retains the hold on his Party, he is able within limits to dictate his policy and impose his decisions. Even Nehru had to bow to the demand of the Congress Parliamentary Party on Krishna Menon’s resignation in 1962, when China attacked India and the Indian army suffered a series of reverses. Nehru defended Menon in the meeting of the Congress Parliamentary Party and vaguely threatened to resign. It is reported that one of the leaders in the Party said. “If you continue to follow Menon’s policies, we are prepared to contemplate that possibility.” Nehru yielded and Menon had to resign. Indira Gandhi’s conflict with the Party has resulted in splitting the Indian National Congress.

80. *Ibid.*, p. 355.

81. *The Sunday Standard*, New Delhi, August 31, 1969.

82. *The Patriot*, New Delhi, August 30, 1969.

## CHAPTER V

# GOVERNMENT AT THE CENTRE (Contd.)

## PARLIAMENT

**Constitution of Parliament.** Parliament is the name given by the Constitution to the Union Legislature, and it consists of the President and two Houses known respectively as the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The President is, thus, a constituent part of Parliament just as the Monarch is in Britain. But the American President is not a constituent part of Congress. The Constitution of the United States provides, "All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives."<sup>1</sup>

Though the Constitution of India adopts the language of Britain in describing its Legislature at the Centre, and makes the President, like the Monarch of that country, a constituent part of Parliament, yet the Indian Parliament is not a sovereign Legislature like the British Parliament. "The Sovereignty of Parliament," says Dicey, "is from a legal point of view the dominant characteristic of our political institutions." It means that Parliament can legislate what it pleases, as it pleases, and that what it enacts is Law. What Parliament has enacted, the courts interpret and apply unless Parliament has otherwise provided. Parliament is, in brief, both a legislative body and a Constituent Assembly, and an Act of Parliament cannot be called into question in any court of law.

But the legislative competence of the Indian Parliament is limited, during normal times, to the subjects enumerated in the Union List and in the Concurrent List in the Seventh Schedule of the Constitution. Besides, its supremacy within its own sphere of jurisdiction is limited by the Fundamental Rights guaranteed to the citizens in Part III of the Constitution. Article 13 Clause (2) prohibits the State from making any law which would take away or abridge any of the Fundamental Rights. Where the State makes a law in contravention of the Fundamental Rights, that law shall, to the extent of contravention, be void.

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1. Article 79.

2. *Ibid.*

3. Article 1, Sec. 1.

4. The Union Constitution Committee in their Report presented to the Constituent Assembly suggested the name "National Assembly" as a composite designation for the Parliament of the Union. *The Framing of the Constitution, Select Documents, op. cit.*, Vol. II, pp. 581-83. But the Constituent Assembly agreed, on the suggestion of K. Santhanam and Gopalaswami Ayyangar, to the omission of the name "National Assembly." *Constituent Assembly Debates*, Vol. IV, p. 928.

In Britain no formal distinction is made between constitutional and other laws and the same body, Parliament, can change or abrogate any law whatsoever and by the same procedure. The Constitution of India, on the other hand, makes a distinction between statutory law and constitutional law and provides a special procedure for amending the latter. The Constitution also empowers the Courts to decide whether a piece of legislation is void or not.

In spite of these limitations on the authority of Parliament it is the pivot on which revolve the whole mechanism of government. Its legislative competence embraces a huge field and its functions are vast. Its sanction is also necessary for declaration of war and for peace. Parliament in fact controls the government and is responsible to the Centre and is in the last resort responsible for the good government of the entire country. During times of Emergency, in addition to its legislative and financial authority, disaster Relief, etc., Parliament, together with the President and the Council of Ministers, performs sovereign powers so long as the Proclamation of Emergency remains in operation.

**Parliament is bicameral.** The Ministry recommended by the Constitutional Adviser envisaged a Parliament consisting of the President and two Houses, the Senate and the House of Representatives. The Union Constitution Committee accepted the principle of bicameralism but suggested that the two Chambers should be named the Council of States and the House of the People, the former representing the States of the Federation and the latter population. When these proposals came for consideration before the Constituent Assembly, certain members of the Chamber expressed opinion against establishing a bicameral system. Some thought that a Second Chamber might prove to be a check on the "speed of progress", and unnecessary, even a nuisance, as he felt. Referring to the criticism Gopalaswami Ayyangar pointed out that bicameralism was indispensable for a federal state and it was a necessary feature of all the federal countries. Dealing with the role of the Second Chamber, he said "After all, the question for us to consider is whether it better or a useful function. The most that we expect the second Chamber to do is perhaps to hold dignified debates on important issues and to check legislation which might be the outcome of passions of the moment and passions have subsided and calm consideration could be brought on the measures which will be before the Legislature, and we shall take care to provide in the Constitution that whenever on any important matter, particularly matters relating to finance, there is a conflict between the House of the People and the Council of States, it is the view of the House of the People that shall prevail. Therefore, what we really achieve by the existence of this second Chamber is only an instrument by which we delay action which might be hastily conceived, and we also give an opportunity, perhaps to seasoned people who may not be in the thickest of the political fray, but who might be willing to participate in the debate with an amount of learning and importance which we do not ordinarily associate with a House of the

5. Article 368.

6. July 28, 1947.

7. *Constituent Assembly Debates*, Vol. IV, p. 923.

People. That is all that is proposed in regard to this second Chamber. I think, on the whole, the balance of consideration is in favour of having such a Chamber and taking care to see that it does not prove a clog on the legislation or administration." The Constituent Assembly agreed that there should be two Chambers of the Legislature at the Centre, the Council of States and the House of the People.

**Composition of the two Houses.** As regards the composition of the Council of States, the Union Constitution Committee decided that it should have a membership of 250 and that the members were to be elected by the Lower House of the Legislatures of the units of the Federation, except for ten members to be nominated by the President in consultation with universities and scientific bodies. Gopalaswami Ayyangar moved an amendment and proposed that the strength of the Council of States should be so fixed as not to exceed one-half of the membership of the House of the People, out of which twenty-five members were to be returned by functional constituencies or panels on the lines of the Irish Constitution (1937). He thought that the original proposal of nomination of ten members was too narrow in its scope. He contended that it was desirable to get into the Council of States persons, who, though not belonging to universities and scientific bodies, deserved, on account of their association with important aspects of the nation's activities, to be members of that Chamber. The remaining members would be returned by units more or less on a territorial basis. The strength of the House of the People was to be so fixed as not to exceed 500. The units of the Federation were to be divided into territorial constituencies in such a manner that there would not be less than one representative for every 750,000 of the population and not more than one for every 500,000.

The first Draft Constitution incorporated the decisions of the Constituent Assembly and the Drafting Committee considered all these provisions as also the provisions regarding the legislative procedure, procedure in financial matters and general procedure for the conduct of business between November 1947 and January 1948. In the meantime the Constitutional Adviser visited the United States of America, Britain and Ireland in order to study the working of the Constitutions of these countries on the spot. He had discussions with eminent persons, including President Truman and President de Valera, and leading jurists. President de Valera suggested that the term of the House of the People should not be less than five years and that the proposal for functional representation in the Council of States should be revised as this kind of representation in the Senate of Ireland had given them sufficient trouble.

The Drafting Committee considered these suggestions and, accordingly, fixed the membership of the Council of States at 250 and instead of representation by functional panels included an Article empowering the President to nominate fifteen members with experience or knowledge of (a) literature, art, science and education; (b) agriculture, fisheries and allied subjects; (c) engineering and architecture; and (d) public administration and social services. The House of the People was to consist of 500 members and the term of office was fixed at five years.

The special committee appointed by the President of the Constituent Assembly to examine the Draft Constitution and the various comments and suggestions received by the Constituent Assembly and the recommendations of the Drafting Committee thereon decided that instead of large groups of person from amongst whom the President was to make nominations, a simpler terminology should be adopted and that the nominated members should be persons with knowledge or experience in letters, art, science or social services. An amendment was moved by Dr. Ambedkar to this effect in the Constituent Assembly and it was adopted. Consequently on the integration and merger of the Indian States with the Union of India the Drafting Committee made relevant changes at the revision stage. The provisions for election to the Council of States were modified. It was provided that its elected members would be elected by the Legislative Assemblies of Part A and Part B States and Parliament by law would provide for the representation of Part C States. The number of representatives to be returned from each of these States was also included in the Fourth Schedule.

The Constitution (Seventh Amendment) Act, 1956 made some amendments to Article 80 consequent on the description of the units comprising the Indian Union as "States" and "Union Territories." The Fourth Schedule was also amended from time to time as a consequence of the formation of new States and Union Territories. There was also an increase in the elected membership of the Council of States from 205, when the Constitution was adopted in 1949, to 226. The Union Territories of Andaman and Nicobar Islands, the Laccadive, Minicoy and Amindivi Islands, Dadra and Nagar Haveli, and Goa, Daman and Diu, and Chandigarh are not represented in the Council of States.

Article 81 of the Constitution originally prescribed a maximum membership of 500 for the House of the People and also that the scale of representation should be not less than one member for every 750,000 of the population and not more than one member for every 500,000. The Constitution (Second Amendment) Act, 1952, deleted the requirement that there should be not less than one member for every 750,000 of the population. The Constitution (Seventh Amendment) Act, 1956 amended Articles 81 and 82 to provide that the House of the People should have not more

9. The Draft Constitution was submitted to the President of the Constituent Assembly on February 21, 1948. It was published on February 22 and was given wide publicity in order to enable the people and organisations to express their views and copies of the Draft were sent to every member of the Constituent Assembly, Provincial Legislatures, Provincial Governments, Ministers of the Government of India, the Federal Court and the High Courts receiving criticisms and suggestions. The Drafting Committee considered and summarised suggestions and comments and decided to recommend certain amendments to the Draft Constitution. Subsequently, the President of the Constituent Assembly constituted a special Committee consisting mostly of the members of the Union Constitution Committee, the Provincial Committee and the Union Powers Committee to examine the Draft Constitution and the various comments and suggestions received, with the recommendations of the Drafting Committee thereon.

10. Comments and suggestions on the Draft Constitution, *The Framing of India's Constitution, Select Documents*, Vol. IV, p. 97.

11. *Constituent Assembly Debates*, Vol. VII, p. 1211.



than 520 members out of which not more than 20 would represent the Union Territories. The method of their election was to be determined by law of Parliament. The Constitution (Fourteenth Amendment) Act, 1962, increased to 25 the number of seats to be assigned to Union Territories.

### COUNCIL OF STATES (RAJYA SABHA)

**Composition.** The Constitution fixes the maximum strength of the Council of States (Rajya Sabha) at 250; 12 nominated by the President to represent literature, science, art and social service, and not more than 238 other members representing the States and the Union Territories. The representatives of the States are elected by the elected members of their Legislative Assemblies in accordance with the system of proportional representation by means of the single transferable vote. The method of election is, accordingly, indirect. In the case of the Union Territories members are chosen in such manner as Parliament may by law determine. The allocation of seats to each State or the Union Territory is<sup>12</sup>:

Andhra Pradesh	..	..	18
Assam	..	..	7
Bihar	..	..	22
Gujarat	..	..	11
Haryana	..	..	5
Jammu and Kashmir	..	..	4
Kerala	..	..	9
Madhya Pradesh	..	..	16
Maharashtra	..	..	19
Mysore	..	..	12
Nagaland	..	..	1
Orissa	..	..	10
Punjab	..	..	7
Rajasthan	..	..	10
Tamil Nadu (Formerly Madras)	..	..	18
Uttar Pradesh	..	..	34
West Bengal	..	..	16
Delhi	..	..	3
Himachal Pradesh	..	..	3
Goa, Daman and Diu	..	..	—
Manipur	..	..	1
Tripura	..	..	1
Andaman and Niobar Islands	..	..	—
Chandigarh	..	..	—
Dadra and Nagar Haveli	..	..	—
Laccadive, Minicoy and Amindivi Islands	..	..	—
Pondicherry	..	..	1

The total number of members in the Rajya Sabha as constituted on April 20, 1968, is 240, of whom 228 are the elected representatives of the States and the Union Territories and twelve are nominated by the President. The principle of nomination was the subject of a good deal of criti-

cism in the Constituent Assembly. Some members characterised it as undemocratic and reactionary element of membership in a democratic Republic. Representation of the States on the basis of population and inclusion of nominated members, it was contended, violated the federal principle. During the early Constitution-making debates even an amendment to establish a single Chamber was moved, although it was defeated. When in the later debate on the Draft Constitution an attempt was again made for a single chamber Legislature, Ananthasayanam Ayyangar defended the Upper House as a way to utilise the services of persons of intellectual capacity and experience of affairs without imperilling the administration. But all such arguments were in favour of bicameralism, and not in defence of the composition of an Upper House in a federation. Nor could it be claimed that the Rajya Sabha so constituted would serve as defence for smaller States. The Rajya Sabha is a continuous body and is not subject to dissolution. Its life is for six years, one-third members retiring after every two years.

**Qualifications for Members:** To be qualified, a candidate for election to the Rajya Sabha must be:

- (a) a citizen of India;
- (b) not less than thirty years of age; and
- (c) possesses such other qualifications as may be prescribed by Parliament. By the Representation of the People Act, 1951, a candidate for election to the Rajya Sabha must be a Parliamentary elector in the State from which he seeks election.

The qualifications required for eligibility to the Rajya Sabha are the same as those required for the House of the People (Lok Sabha) except that the age in the case of the latter must not be less than twenty-five years. The framers of the Constitution thought that higher qualifications would tend to give greater dignity to the House and, at the same time, higher average ability. The functions, observed Dr. Ambedkar, that a member "is required to discharge in the House require experience, certain amount of knowledge and practical experience in the affairs of the world, and I think if these additional qualifications are accepted, we shall be able to secure the proper sort of candidates who would be able to serve the House better than a mere ordinary voter might do." A Senator in the United States must not be less than thirty years old, an inhabitant of the State from which he is elected, and a citizen of the United States for nine years.

**The Presiding Officer.** The Vice-President of India is the *ex-officio* Chairman of the Rajya Sabha and finds a close parallel in the Vice-President of the United States who is the President of the Senate. The Vice-President of India, like his American counterpart, is not a member of the Rajya Sabha and both have no right to vote except in the event of a tie. But the President of the Senate is just a moderator. He cannot control debate through the power of recognition; he must recognise the members in the order in which they rise. The Chairman of the Rajya

Sabha, on the other hand, enjoys an exalted position. He recognises members to the floor, decides points of order, maintains order and relevancy in debates, puts questions and announces results. The American Vice-President permanently relinquishes the office of the President of the Senate on his succession to Presidency, but the Vice-President of India fills only a casual vacancy and reverts to his original office as soon as the contingency of his acting as President is over.

The Rajya Sabha elects a Deputy Chairman from among its own members<sup>14</sup> and he presides in the absence of the Chairman or during any period when the Vice-President is acting as, or discharging the functions of the President.<sup>15</sup> In the absence of both the Chairman and the Deputy Chairman from any sitting of the Rajya Sabha such person, as may be determined by the Rules of Procedure of the House, acts as Chairman. And if no such person is present, then, such other person as the Rajya Sabha determines acts as Chairman.<sup>16</sup>

The Vice-President may be removed by a resolution of the Rajya Sabha, agreed to by the Lok Sabha.<sup>17</sup> But while the resolution for his removal is under consideration of the House, the Vice-President neither presides nor is he entitled to vote on such resolution or on any other matter during such proceedings, although he has the right to speak in and otherwise to take part in the proceedings. The Deputy Chairman is also subject to removal by a resolution of the House supported by an absolute majority of the total membership. The Deputy Chairman, like the Chairman, does not preside while a resolution for his removal from office is under consideration.

The salaries and allowances of the Chairman and the Deputy Chairman are determined by Parliament and are charged on the Consolidated Fund. G.S. Pathak is the Vice-President of India and, as such, the Chairman of the Rajya Sabha.

## FUNCTIONS OF THE RAJYA SABHA

The functions of the Rajya Sabha are considered under five heads: legislative, financial, administrative, constituent, and miscellaneous.

**Legislative functions.** The process of making laws is the business of Parliament as a whole, the President, the Rajya Sabha and the Lok Sabha. The Lok Sabha by itself can do nothing, although the actual powers of the President and the Rajya Sabha are subject to specific limitations. All Bills other than Money Bills, may originate in either House of Parliament,<sup>18</sup> and no Bill can become a law unless agreed to by both the Houses.<sup>19</sup> It means that the power of initiating legislation on any subject, except Money Bills and other financial Bills, equally belongs to the Rajya Sabha and the Lok Sabha and a Bill in order to become a law must be

14. Article 89 (2).

15. Article 91 (1).

16. Article 91 (2).

17. *Ibid.*

18. Article 107 (1).

19. Article 107 (2).

agreed to by both the Chambers. When a Bill is amended in either House, such amendments must be agreed to by both the Houses. In case of disagreement between the two Houses, either on the Bill as a whole or on amendments made in the Bill, the President is empowered to summon both the Rajya Sabha and the Lok Sabha in a joint meeting for the purpose of deliberating and voting on the Bill.<sup>20</sup> At the joint sitting questions are decided by a majority of the members of both Houses present and voting. A Bill thus agreed and passed is deemed to have been passed by both Houses. The method of joint sitting also applies when a Bill is passed by one House and sent to the other and it is not passed within six months after its reception by the other House, excluding any period of prorogation or adjournment over four days.<sup>21</sup>

The Rajya Sabha has, thus, co-ordinate legislative powers with the Lok Sabha. The powers of the Rajya Sabha, with regard to ordinary legislation, are in no way limited as the Parliament Act, 1911 as amended in 1949, limits the powers of the House of Lords. It stands on a footing of equality with the Lok Sabha and can press the issue to the extent of summoning a joint sitting for the resolution of disagreement. But at a joint sitting, the position of the Rajya Sabha becomes weaker. The Rajya Sabha has a membership of 240 against 523 of the Lok Sabha, and it means a minority of 1 to 2. It is, accordingly, not difficult for the Lok Sabha to defeat the opposition of the Rajya Sabha. The Rajya Sabha, at the most, can delay the passage of the legislation passed by the Lok Sabha for a period not exceeding six months. It cannot permanently kill it.

**Financial functions.** The position of the Rajya Sabha in respect of Money Bills is definitely inferior to that of the Lok Sabha. The Constitution defines a Money Bill<sup>22</sup> and it is expressly provided that the decision of the Speaker of the Lok Sabha whether a Bill is a Money Bill or not shall be final.<sup>23</sup> The Constitution clearly prescribes that a Money Bill shall not be introduced in the Rajya Sabha<sup>24</sup> and it need not be assented to by the Rajya Sabha at all. After a Money Bill has been passed by the Lok Sabha, it is transmitted to the Rajya Sabha "for its recommendations"<sup>25</sup> within a period of fourteen days. The Lok Sabha is not bound to accept the recommendations made by the Rajya Sabha. In case, it rejects the recommendations of the Rajya Sabha the Bill is deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha.<sup>26</sup> If the Rajya Sabha does not return to the Lok Sabha within fourteen days a Money Bill with or without its recommendations, it is deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha. The right to vote supplies is perhaps the greatest privilege of a legislative body. Under the Constitution of India

20. Article 108.

21. Article 108 (c) and 108 (2).

22. Article 110.

23. Article 110 (3).

24. Article 109 (1).

25. Article 109 (2).

26. Article 109 (4).

this right is the exclusive privilege of the Lok Sabha. Demands for grants are not submitted to the Rajya Sabha.<sup>27</sup>

**Administrative functions.** The Rajya Sabha does not control the Executive as the Constitution makes the Council of Ministers responsible to the Lok Sabha.<sup>28</sup> In fact, control and responsibility go together. But the Rajya Sabha can influence the Executive in two ways. First, by eliciting information about the actions of Government, and, secondly, by criticism aimed at the Government. The most effective instrument by which the Rajya Sabha seeks information from the Government is through the instrument of oral or written questions together with supplementaries. The normal occasion for criticism of the Executive is a debate on a motion of adjournment and the Rajya Sabha, like the Lok Sabha, possesses this privilege. It can also move resolutions impressing on the Government the desirability of pursuing a particular line of policy. The policy of the Government is really under review when laws are made and Rajya Sabha is an equal participant with the Lok Sabha in the making of laws. In order to defend the policy of the Government, Ministers are there and some of them are appointed from among its members. The Constitution permits a Minister, who is not a member of the Rajya Sabha, to speak in, and otherwise to take part in its proceedings, though he has no right to vote.<sup>29</sup> The Rajya Sabha, however, cannot bring about the downfall of the Government.

**Constituent functions.** The Rajya Sabha exercises constituent functions along with the Lok Sabha. A Bill to amend the Constitution may originate in either House of Parliament.<sup>30</sup> And the Bill amending the Constitution is required to be passed in each House by a majority of its total membership and by a majority of two-thirds of its members present and voting.

The Constitution does not prescribe any procedure for settling differences between the two Houses in case of disagreement on a Bill amending the Constitution. The Supreme Court held in **Shankari Prasad vs. Union of India**, that the procedure required for amending the Constitution is a legislative procedure and that the rules framed by Parliament under Article 118 relating to its ordinary legislative business shall be followed so far as applicable, in the matter of an amendment Bill under the provisions of Article 368. In view of this decision, it is now definite that the differences between the two Houses of Parliament in case of disagreement on an amendment Bill must be settled in the same way as in the case of ordinary legislation under Article 108 of the Constitution. It means a joint sitting of the two Houses. The constituent power of Rajya Sabha, thus, becomes ineffective like the ordinary legislation as at a joint sitting it is always in a minority of 1 to 2.

**Miscellaneous functions.** The miscellaneous functions of the Rajya Sabha are:

27. Article 113 (2).

28. Article 75 (3).

29. Article 88.

30. Article 368.



- (1) The elected members of the Rajya Sabha participate in the election of the President of India. The President is elected by an Electoral College consisting of the elected members of both Houses of Parliament and the elected members of the Legislative Assemblies of the States.<sup>31</sup>
- (2) The President is liable to be impeached and a resolution to impeach the President may be moved in any House of Parliament and such a resolution must be passed by two-thirds majority of the total membership of that House. When this has been done, the charge is investigated by the other House or by a Court or Tribunal to which that House may refer the impeachment charge to be investigated. A vote by two-thirds of the total membership of the House which investigates it is necessary for the impeachment to succeed. It means that if the Rajya Sabha initiates proceedings of impeachment the Lok Sabha investigates the charge, and if it is initiated by the Lok Sabha the Rajya Sabha investigates and the impeachment succeeds if the investigating House passes a resolution by a two-thirds majority of its membership. The Rajya Sabha thus enjoys co-equal powers with the Lok Sabha in the process of impeachment of the President.
- (3) The Vice President of India is elected by members of both Houses of Parliament assembled at a joint sitting<sup>32</sup> and he may be removed from office by a resolution of the Rajya Sabha and agreed to by the Lok Sabha.<sup>33</sup>
- (4) A judge of the Supreme Court<sup>34</sup> or a High Court<sup>35</sup> may be removed for misbehaviour or incapacity on the address passed by both Houses of Parliament supported by a majority of the total membership of, and a two-thirds majority of the members present and voting in each House. Here, too the powers of the Rajya Sabha are identical to those of the Lok Sabha. Agreement of the Rajya Sabha is also necessary if action is to be taken against the Chief Election Commissioner, Comptroller-General, and the members of the Union Public Service Commission.
- (5) The report of the Union Public Service Commission, the Comptroller-General, the Scheduled Castes and Tribes Commission and the Finance Commission are considered both by the Rajya Sabha and the Lok Sabha.
- (6) If the Government makes a proposal to take an appointment from the purview of the Union Public Service Commission,

31. Article 55 (2) (e).

32. Article 54.

33. Article 61.

34. Article 66 (1).

35. Article 67 (b).

36. Article 124 (4).

37. Article 217.

the Rajya Sabha and the Lok Sabha both must agree to its exclusion.

- (7) The Rajya Sabha may declare by resolution, passed by two thirds majority of its members present and voting, that it is necessary or expedient in the national interests that Parliament should make laws with respect to any matter enumerated in the State List.<sup>38</sup> Such a resolution passed by the Rajya Sabha remains in force for a period not exceeding one year.
- (8) The Rajya Sabha is also empowered under Article 312 to create one or more All-India Services, if the House declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so.
- (9) The approval of the Rajya Sabha and the Lok Sabha, both, is necessary for the continuance of the Proclamation of Emergency, financial<sup>39</sup> or otherwise<sup>40</sup> and the failure of constitutional machinery in a State,<sup>41</sup> beyond a period of two months. If the Lok Sabha stands dissolved, the Rajya Sabha alone is to judge the necessity of the continuance of the Proclamation of Emergency beyond two months. If it does not approve the Emergency stands revoked and normal methods of Government are restored.
- (10) Every order made by the President suspending the enforcement of Fundamental Rights is required to be laid before each House of Parliament.<sup>42</sup>
- (11) The delegated legislation made and rules framed thereunder by the various Ministries must be approved by both Houses.

**Appraisal of the Rajya Sabha.** The Rajya Sabha was intended to be less powerful and influential than the Lok Sabha and it is obviously so because the Parliamentary system of Government demands it. The Constitution does not give to the Rajya Sabha specific powers to control the Executive. It, no doubt, has the right to seek information from the Government through the instrument of questions and supplementaries, and discuss and criticize its policy through debate or on motions of adjournment, but the Rajya Sabha cannot plague the Ministry. A defeat of the Government in the Rajya Sabha does not involve the resignation of the Council of Ministers. The Constitution recognizes and ordains the collective responsibility of the Council of Ministers to the Lok Sabha.

The Rajya Sabha has co-ordinate powers with the Lok Sabha in ordinary legislation only in theory. It cannot veto legislation; it only delays. If it rejects a Bill, or does not pass it within six months, or the Lok Sabha does not agree to the amendments made by it in the Bill, the President

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38. Article 249.

39. Article 360 (2).

40. Article 352 (2) (c).

41. Article 356 (e).

42. Article 359 (2).

may summon both the Houses to meet in a joint sitting for the purpose of deliberating and voting on the Bill. The Lok Sabha thus can have its way because of its superior numerical strength. In financial matters, the Rajya Sabha is absolutely powerless. Money Bills can only originate in the Lok Sabha. The Constitution not only defines a Money Bill, but it also empowers the Speaker of the Lok Sabha to decide, if a question arises whether a Bill is a Money Bill or not, and the decision of the Speaker is final. Nor has the Rajya Sabha any effective financial powers. The Lok Sabha simply transmits a Money Bill to the Rajya Sabha for its recommendations and it is required to return such a Bill within fourteen days. If it does not return the Bill within fourteen days or returns it with recommendations which are not acceptable to the Lok Sabha, the will of the Lok Sabha prevails. Then, demands for grants are not submitted to the Rajya Sabha, sanctioning of public expenditure is the exclusive right of the Lok Sabha.

The Rajya Sabha does not even serve the purpose of a federal second Chamber. The well-accepted practice of a federal polity is to make the Upper Chamber representative of the constituent States and its constitution should be based upon the principle of equality of representation irrespective of the size and population of the federating units. The Rajya Sabha does not accord equal representation to the States. It is not, at the same time, the voice of the States and has no power to safeguard their interests. The justification for the Rajya Sabha as Morris-Jones has rightly said, "has always been in terms of 'second thought' rather than 'states rights'."

It does not, however, mean that the Rajya Sabha occupies the same pitiable position as the French Council of Republic in the Fourth Republic. Nor is it like the Canadian Senate which is neither an effective brake to the hasty and ill-considered legislation nor it properly serves the purpose of a revisory chamber. The intention of the framers of the Constitution in creating an Upper Chamber was, as Gopalaswami Ayyangar said, "to hold dignified debates on important issues and to delay legislation which might be the outcome of passions of the moment." The Rajya Sabha has succeeded both ways. It significantly performs the function of influencing the Government and the people through its debates. Since it is smaller and less worried by the pressure of work, its debates are less frequently subject to strict control through time-limits. The House, accordingly, provides a calmer atmosphere in which speakers can debate controversial questions in a well-informed and objective manner. The debates are often outspoken and free because of the impossibility of overthrowing the Government by the adverse vote of the House. No Government, as Laski says, which is obliged to submit to criticism and to the need of explaining its actions and views can ignore the opinion expressed by men of matured judgment, experience and ability.

Then, the Rajya Sabha enjoys two exclusive functions. In the first place, it is empowered, under Article 249, to declare by resolution, passed by two-thirds majority of its members present and voting, that Parliament should make laws, in the national interest, with respect to a matter that is

included in the State List. Secondly, by the same procedure, the Rajya Sabha is given power to create an All India Service whenever it is deemed necessary or expedient in the national interest.

Thirdly, the co-equal power of the Rajya Sabha on constitutional amendment is of great importance. The Lok Sabha by itself cannot amend the Constitution unless the Rajya Sabha, as a representative Chamber of the States, agrees to such a change.

Finally, if the Lok Sabha stands dissolved when the Proclamation of Emergency is issued, the Rajya Sabha alone determines whether Emergency should continue or not after the expiration of two months. Normal Government is restored, if it does not approve.

These specific provisions in the Constitution make the Rajya Sabha an integral part of the governmental machinery. It was not the intention of the framers of the Constitution that the Council should "play the humble role of an unimportant adviser, nor of an occasional check on hasty legislation," although it was not designed to vie with the representative Chamber of the people.

**Relations between the two Houses.** "It is the habit of institutions", writes Morris-Jones, "to give birth to loyalties, and when two institutions are placed side by side it is easy for clashes to occur and feelings to run high." Independent India began with the working of a bicameral legislature only since the General Elections of 1952. "Nevertheless this short time has proved long enough", adds Morris-Jones, "to enable the development of almost bitter rivalry between the two Houses. That this happened so quickly and in spite of the dominating position of one party in both the Houses bears striking witness to the power of institutions to inspire fresh attachments of sympathy and devotion." The Rajya Sabha is an indirectly elected Chamber with powers similar to the Lok Sabha, except in financial matters. The party composition and the social composition of both the Houses are also similar. The procedure, too, is not appreciably distinguishable. The Rajya Sabha has a regular Question Hour and the same Half-an-Hour Discussion procedure as in the Lok Sabha. The Government, too, had made an effort to introduce first in the Rajya Sabha an increasing number of Public Bills. The Rajya Sabha, thus, started its career on the same lines as the Lok Sabha. But being a Chamber primarily intended for reflection, it had the psychological realization of its inferiority and consequently it felt frustrated. It tried to get rid of its inferiority by claiming an equal status with the other House thereby provoking "the most violent reaction among some members of the Lower House."

The first major clash between the two Houses occurred during the Budget Session of 1953, when the Rajya Sabha refused to accept the position of subordination by not permitting the Law Minister, a member Minister of the Upper House, to appear before the Lok Sabha, on its call, to clear some misunderstanding that had arisen on the Income-Tax (Amendment) Bill, 1952. The Rajya Sabha passed a resolution "that this

44. *Parliament in India*, op. cit., p. 262.

45. *Ibid.*, p. 256.

Council is of the opinion that the Leader of the Council (the Law Minister, Mr. Biswas) be directed not to present himself in any capacity whatsoever in the House of the People." Members of the Lok Sabha "angrily asserted that Ministers were responsible to the House and doubted the propriety of the Council's resolution. There would have been an open rupture if the tactful intervention of the Prime Minister had not saved the situation.

Soon there was another occasion for conflict. In January 1953 the Rules Committee of the Rajya Sabha sent its proposals with regard to the Public Accounts Committee to the Lok Sabha. It had suggested that the Rajya Sabha should have either a Public Accounts Committee of its own or 7 of its members might be added to the Public Accounts Committee of the Lok Sabha in order to make it a Joint Committee of the two Houses. The Public Accounts Committee passed a resolution stating that a joint committee of the two Houses or a separate Committee of the Rajya Sabha "would be against the principles underlying the Constitution" and consequently unacceptable. The Rules Committee of the Lok Sabha when considered the proposals agreed with the views of the Public Accounts Committee. The matter would have ended there but the reaction of the Prime Minister in the Lok Sabha led to a recommendation to the Council of the States that they nominate seven members to associate with the Public Accounts Committee of this House "provided the same is not object". The reaction of the Prime Minister did not call for a Joint Public Accounts Committee of the two Houses, yet it caused a good deal of resentment and criticism in the Lok Sabha. It was on the instructions of the Prime Minister to the effect that the Committee would be a Committee of the Lok Sabha, under the control of the Speaker and that the financial powers of the Lower House were in no way threatened that the motion was finally passed in December 1953, and the seven members of the Rajya Sabha joined the Public Accounts Committee in May 1954. Similar differences arose with regard to the Joint Committees and "somehow subtly" the Lok Sabha agreed to the proposal of the Rajya Sabha.

Chatterjee's incident engendered still more excitement and resentment. In a public speech N.C. Chatterjee, a member of the Lok Sabha, was reported to have said that 'the Upper House, which is supposed to be a body of elders, seems to be behaving irresponsibly like a pack of urchins.' The question of privileges was raised in the Rajya Sabha and the Chairman directed the Secretary to ascertain the facts. The Members of the Lok Sabha objected to the letter of the Secretary enquiring from Chatterjee whether the report was correct. The Speaker held that the letter was more "in the nature of a writ" and suggested that the reference of this particular issue, and the general problem of procedure in such cases be made to a joint meeting of the Privileges Committees of the two Houses. The Rajya Sabha agreed to it and the two Privileges Committees worked out an acceptable procedure for cases where a member of one House commits a breach of the privileges of the other.

**Utility of the Rajya Sabha.** These disputes brought into prominence the question of the utility of the Rajya Sabha. A Private Members Resolution was moved in the Lok Sabha in April 1954, demanding the early



abolition of the Upper House. Some members of the Congress and the Leftists advanced the same familiar arguments characterising the Rajya Sabha as "a stronghold of reactionary elements" and "a device to flout the voice of the people." Some argued for its retention, but pleaded that its members should be chosen differently. The Government view was that the Rajya Sabha had not been given a fair trial and it was too early to pronounce judgment on its utility. Commenting on the relations of the two Houses of Parliament, Morris-Jones says, "What is certain is that peaceful co-existence is difficult if the two Houses continue to desire to perform the same functions. Moreover, if their roles are not soon distinguished, the tradition of rivalry will become established and the Council will continue to attract a large number of persons who would have even more readily found themselves in the House of the People. The practice of rivalry is a most wasteful exercise of political energies and one without even by-products of value. It can only serve to lower Parliament as a whole in public esteem."<sup>46</sup>

Unless it is acceptably proved that democracy does not need a second Chamber, and more so a federation, it is not democratic to urge for its abolition. Institutions are always reluctant to vanish and it does not seem likely that public opinion could be made to agree to the liquidation of the Rajya Sabha. But enjoyment of identical powers by both the Houses means a sheer duplication and the advantages of such a system of legislature are questionable. Democracy has decidedly made the Lower House a predominant partner, and the Upper House is created to exercise a moderating influence and, as such, it may serve as a brake. But not too tight a brake which may lead to an open rupture between the two Houses. The intention of the framers of the Constitution was definitely clear and the Constitution itself is specific about it. Once this role is realized by the Rajya Sabha the causes of conflict are bound to disappear and each House will shine within its own allotted sphere of functions.

But there is one aspect against which the Rajya Sabha must guard itself. While welcoming the sixty-four new members of the Rajya Sabha on April 6, 1960, Vice-President Dr. Radhakrishnan called upon them to fight "inertia, obscurantism, reaction and superstition." These are the evils from which the Upper Chambers suffer in general and invite widespread criticism for their abolition. The Rajya Sabha, like the Canadian Senate, should not be allowed to become a political pensioner's home. Law-making is a specialised job; and a modicum of technical knowledge and a certain intellectual ability are essential even to understand the problems that confront Legislatures in our times. Perhaps, the criterion laid down in the Constitution for the President's nominations is a partial indication of what is expected of the Second Chamber. It is evident from the nominations so far made that to a great extent the intentions of the framers of the Constitution have not been realised. The ruling Party has not always consciously tried to fill the nominations with a corpus of special knowledge such as cannot be ensured in the Lower House.<sup>47</sup> Nor have the indirect

46. *Parliament in India, op. cit.*, p. 262.

47. C.C. Joshi (Santatntra) moved in the Lok Sabha a non-official Constitution Amendment Bill seeking to abolish nominations to the Rajya Sabha

elections of the remaining members produced a body of "seasoned people", who may import in the debates "an amount of learning and importance", as the late Gopalaswamy Ayyangar argued in the Constituent Assembly. The political parties of India can do much to help the Rajya Sabha admirably play its role as a Second Chamber by sending to it members "whose party grading may be low but I. Q. is high." Morris-Jones points out three outstanding merits of the Council of States. He says, "it supplies additional political positions for which there is a demand, it provides some additional debating opportunities for which there is occasionally need, and it assists in the solution of the legislative timetable problems."<sup>48</sup>

### THE HOUSE OF THE PEOPLE (LOK SABHA)

**The Lok Sabha.** The Lok Sabha (House of the People) is the Lower House of Parliament and it resembles in many respects to the British House of Commons. Parliament in India, as in Britain, is not an institution. The British Parliament consists of the Monarch, the House of Lords and the House of Commons. All the three functionaries join together to complete the actions of Parliament. In India, Parliament consists of the President, the Rajya Sabha and the Lok Sabha. The Head of the State, in both the countries, plays just a formal part in the process of legislation and that is the correct position under a Parliamentary system of Government, though the Indian Constitution invests the President with certain specific legislative powers. The legislative competence of the House of Lords with the passage of the Parliament Act of 1911 as amended by the Act of 1949, has become limited. The Rajya Sabha, too, has an insignificant role to play. The Lok Sabha, like the House of Commons, is the real centre of gravity, though it is the joint action of the President, the Rajya Sabha and the Lok Sabha which law requires to make legislation possible.

The Lok Sabha has a maximum membership of 525: not more than 500 members from the States directly elected on adult franchise and not more than 25 members from the Union territories chosen in such manner as Parliament by law provides. The President may, if he is of the opinion that the Anglo-Indian community is not adequately represented, nominate two members of that community. Originally, such nominations were provided for ten years, but the Constitution (Eighth Amendment) Act extended the period to another ten years and it has once again been extended for

*(Continued from previous page)*

and the Legislative Councils. Desai sought the amendment on the ground that these provisions (Articles 80 and 171, had been misused and had come in handy for the ruling parties to extend political patronage. P. Govinda Menon, Law Minister, who intervened in the debate, said that it would be prudent to leave these provisions alone so long as they did not prove injurious to the country's interests. He further said that any human institution was prone to lapses. It could even be said that an element of patronage was inherent in any system of nominations. But it was undeniable that many of the nominated members of the Upper Houses had made significant contributions to debate through the specialised knowledge.

another ten years, expiring in 1980. The actual number of members to each State is so allocated that the ratio between the number and population of the State, as determined in the last census, is, as far as practicable, the same for all States. The present strength, of the House' is 523, consisting of 496 members directly elected from the seventeen States and 24 members directly elected from the Union Territories besides one member nominated by the President to represent the North-East Frontier Agency and two members nominated by the President to represent Anglo-Indians. Th State-wise allocation of seats is:

Andhra Pradesh	..	..	41
Assam	..	..	14
Bihar	..	..	53
Gujarat	..	..	24
Haryana	..	..	9
Jammu and Kashmir	..	..	6
Kerala	..	..	19
Madhya Pradesh	..	..	37
Maharashtra	..	..	45
Mysore	..	..	27
Nagaland	..	..	1
Orissa	..	..	20
Punjab	..	..	13
Rajasthan	..	..	23
Tamil Nadu (formerly Madras)	..	..	39
Uttar Pradesh	..	..	85
West Bengal	..	..	40
Delhi	..	..	7
Himachal Pradesh	..	..	6
Goa, Daman and Diu	..	..	2
Manipur	..	..	2
Tripura	..	..	2
Andaman and Nicobar Islands	..	..	1
Chandigarh	..	..	1
Dadra and Nagar Haveli	..	..	1
Laccadive, Minicoy and Amindivi Islands	..	..	1
Pondicherry	..	..	1

A candidate for membership of the House of the People (Lok Sabha) must be a citizen of India, not less than twenty-five years of age, and should possess such other qualifications as may be prescribed by Parliament by law.<sup>49</sup> No person can be a member of both Houses of Parliament simultaneously, nor may any person be simultaneously a member of Parliament and a member of the State Legislature.<sup>51</sup> The Constitution (Sixteenth Amendment) Act, 1963, provides that any one, in order to qualify for election to Parliament, should make and subscribe an oath or affirmation that he would bear true faith and allegiance to the Constitution of India and uphold the sovereignty and integrity of India.

49. April 20, 1968.

50. Article 84.

51. Article 101 (1) (2).

A person is disqualified to be chosen as, or remaining a member of either House (1) if he holds any office of profit under the Union or the State other than an office declared by Parliament or the State Legislature not to disqualify its holder, (2) if he is declared of unsound mind by a competent court, (3) if he is an undischarged insolvent, (4) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under acknowledgment of allegiance or adherence to a foreign State, and (5) if he is so disqualified by or under any law made by Parliament.

A member who has been absent without permission for sixty days may be disqualified to remain a member of the House and his seat declared vacant.<sup>52</sup>

In pursuance of the powers granted under Article 327, to regulate matters of election, the Representation of the People's Act 1951 also lays down certain conditions for disqualification and these are applicable to members of State Legislatures too. The disqualifications are:

- (1) A member should not have been found guilty by a court or an Election Tribunal of Certain election offences or corrupt practices in election;
- (2) He should not have been convicted by a Court in India of any offence and sentenced to imprisonment for a period not less than two years;
- (3) He should not have failed to lodge an account of his election expenses within the time and in the manner prescribed;
- (4) He should not have been dismissed for corruption or disloyalty from Government service;
- (5) He should not be a Director or Managing Agent or hold an office of profit under any Corporation in which the Government has any financial interest; and
- (6) He should not have any interest in government contracts, execution of government work or service.

These disqualifications must not exist on the date fixed for filing the nomination papers of a candidate seeking election and on the date when the results are declared.

**Duration of the House.** The Lok Sabha has a life of five years unless sooner dissolved. But while a Proclamation of Emergency is in operation the life of the House may be extended by law of Parliament for a

52. Article 102 (2) declares that Ministers of the Union Government and State Governments are not subject to disqualification. Parliament (Prevention of Disqualification) Act, 1950 declared that the office of a Minister of State, or a Deputy Minister or a Parliamentary Secretary or a Parliamentary Under-Secretary did not constitute disqualification. The immunity from disqualification was extended in 1951 to members of Commissions, Enquiry Committees, Boards or Corporations receiving payments or honoraria, provided all such payments did not exceed allowances and travelling expenses paid to them as members of Parliament. In 1954 the office of the Vice-Chancellors of Universities, Deputy Chief Whips of Parliament, offices held by officers in the National Cadet Corps and the Territorial Army were exempted from disqualification.

53. Article 161 (4).

period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.<sup>54</sup>

The Union Constitution Committee had recommended a term of four years for the House. The Drafting Committee, as already said, accepted the opinion of de Valera, and changed it into five years. The Draft Constitution in a footnote explained the justification for this change.<sup>55</sup> It said, "The Committee has inserted 'five years' instead of 'four years' as the life of the House of the People as it considers that under parliamentary system of government the first year of a Minister's term of office would generally be taken up in gaining knowledge of the work of administration and the last year would be taken up in preparing for the next general election, and there would thus be only two years for effective work which should be too short a period for planned administration."<sup>56</sup>

**The Speaker.** The Lok Sabha elects its own Speaker from among its members to preside over its sittings and conduct the proceedings.<sup>57</sup> The Speaker vacates his office if he ceases to be a member of the House. He may at any time resign, or may be removed on a resolution passed by a majority of all the then members of the Lok Sabha. Fourteen days' notice for moving such a resolution is required to be given. The Speaker does not vacate his office on the dissolution of the Lok Sabha; he continues in office until immediately before the first meeting of the House after the dissolution. The Constitution also provides for the office of the Deputy Speaker and he performs the duties of the Speaker when the latter is absent or while the office of the Speaker is vacant. In Britain the Speaker is indispensable and without him the House cannot meet. On the death of Speaker Fitz Roy in 1943, for instance, the House of Commons rose at once and could not function until the election of his successor, although the country was in the midst of the Second World War. In India, on the other hand, the Constitution definitely provides that while the office of the Speaker is vacant the duties of the office shall be performed by the Deputy Speaker. And if the office of the Deputy Speaker, too, happens to be vacant, then, the duties of the office of the Speaker shall be performed by such member of the Lok Sabha, as the President may appoint for the purpose. When both the Speaker and the Deputy Speaker are absent from any sitting of the House such persons as may be determined by the Rules of Procedure of the House acts as Speaker. The Rules of Procedure and Conduct of Business in Parliament, 1950, provide that "at the commencement of the Parliament or from time to time as the case may be, the Speaker nominates from amongst the members of Parliament a panel of not more than six Chairmen any one of whom may preside in the absence of the Speaker and the Deputy Speaker when so required by the Speaker or in his absence the Deputy Speaker." If none of the Chairmen of the panel be available, the House may choose one of its members to act as Speaker. Neither the Speaker nor the Deputy Speaker is to preside at any sitting of the House while a resolution of his own removal is under

54. Article 83 (2).

55. *Ibid.*, p. 30.

56. Article 93.



consideration although he is entitled to be present, speak and defend himself.

The Constitution gives to the Speaker only a casting vote to be exercised in the case of equality of votes. This provision accords with the British convention that the Speaker of the House of Commons casts no vote except in case of a tie. But the British Speaker usually endeavours to give the casting vote in such a way that it does not make the decision final thereby extending to the House another opportunity to consider the question.

The Constitution of India further provides that the Speaker and the Deputy Speaker shall receive such salaries and allowances as may be determined by Parliament. The salaries and allowances of the Speaker and the Deputy Speaker are charged on the Consolidated Fund of India. The Speaker receives a salary of Rs. 3,000 a month and the Deputy Speaker Rs. 1,500 a month for the periods connected with the business of Parliament. There was a move to reduce the salary of the Speaker to Rs. 2,250 a month.

**Position of the Speaker.** The office of the Speaker is of much dignity, honour and authority. In the Order of Precedence he is placed seventh and is bracketed with the Chief Justice of India. Like the Speaker of the House of Commons in Britain the Speaker of the Lok Sabha interprets the will of the House and speaks for it as well as to it. He is the custodian of the dignity of the House and an impartial arbiter in its proceedings. Speaking in the Constituent Assembly of India (Legislative), on March 8, 1948, on the occasion of the unveiling of the portrait of the late V. J. Patel the Prime Minister observed, "Now Sir, specially on behalf of the Government, may I say that we would like the distinguished occupant of this Chair now and always to guard the freedom and liberties of the House from every possible danger, even from the danger of executive intrusion. There is always that danger even from a National Government that it may choose to ride roughshod over others, that there is always a danger from a majority that it may choose to ride roughshod over the opinions of a minority, and it is there that the Speaker comes in to protect each single member, or each single group or a dominant Government.... Vithalbhai Patel... laid the foundations of those traditions which have already grown up round the Chair.... I hope that those traditions will continue, because the position of the Speaker is not an individual's position or an honour done to an individual. The Speaker represents the House. He represents the dignity of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the nation's liberty and freedom. Therefore, it is right that that should be an honoured position, a free position and should be occupied always by men of outstanding ability and impartiality."

In Britain it has come to be understood since the time of Shaw Lefevre that the Speakership is a strictly judicial office and wholly divorced

57. Article 100 (2).

58. Article 97.

59. Article 112 (3) (b).

ed from politics. Immediately after his election to the Chair the Speaker becomes a no-party man and abstains from any kind of political activity. The convention, therefore, is to elect him unanimously at the opening of each Parliament.<sup>60</sup> and he remains in office till the life of Parliament. If the Speaker of the preceding Parliament is still the member of the House, the convention is to elect him. It was another convention that the retiring Speaker was re-elected unopposed at the General Elections.<sup>61</sup>

Vithalbhai Patel may be regarded the first Speaker in India, though his official designation was the President of the Legislative Assembly, who laid the foundations of the office by following the British traditions. Immediately after his election to the Chair in 1925, he declared himself a no-party man and rigidly abstained from any kind of political activity. He had established such a firm reputation as a Speaker and his position was so unchallenged that "in spite of the many remarkable rulings he gave which were not to the liking of the Government of the day he was unanimously elected to the Chair both by the official and non-official members of the Assembly of that day."<sup>62</sup> And when the urge to participate in the Civil Disobedience Movement of 1930 came, Patel resigned from his office. But the Congress was the first to violate the conventions associated with the office of the Speaker in Britain and so scrupulously observed by Vithalbhai Patel. Mohammed Yakub succeeded Patel, but he was there only for a session. Ibrahim Rahimtoola, who succeeded Yakub soon after his election to the Chair, resigned for reasons of health. Then, came Shanmukham Chetty. But at the next general elections Shanmukham Chetty was opposed and defeated by a Congress candidate. Since, then, the retiring Speakers have always been opposed in the General Elections and the Speakers themselves, till the election of Hukam Singh, retained their active party affiliations. N. Sanjiva Reddy, although had resigned from the Indian National Congress Party immediately after his election to Speakership in 1967, but he was nominated a Congress candidate for the Fourth Presidential election.

The Congress Working Committee in a resolution determined that the Speakers, both in the States as well as at the Centre, should keep back from Congress elections. But this decision of the Working Committee does not imply that they cannot remain members of the Congress Party. Babu Purshotamdas Tandon, when Speaker of the U.P. Legislative Assembly, unequivocally declared that India might not follow the example of Britain. Within the House, Tandon contended, the Speaker must remain a no-party man but outside the House he might maintain his party affilia-

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60. A contest for the Speakership is possible. The Labour Party in 1951 did not object to the Conservative candidate for the office, but at the same time proposed that the former Deputy Speaker was most suitable a candidate because of his greater experience. Votes were, accordingly, taken and a Conservative candidate was elected.

61. In 1935 and again in 1945 the Labour Party contested the re-election of Conservative Speakers, Fitz Roy and Clifton Brown, though without any success. In 1950 no official Labour candidate opposed the Speaker. But an independent Labour candidate who ran against him was overwhelmingly defeated. Now the retiring Speaker is invariably opposed.

62. Kaul, M.N., *Growth of the Position and Powers of the Speaker*, Hindustan Times, Sunday Magazine, January 24, 1954.

tions. This point was further made clear by G.V. Mavalankar, the Speaker of the Lok Sabha. Mavalankar maintained, "the Speaker in India is not today absolutely out of political arena as is the Speaker of the British House of Commons. . . . For the present, the Speaker must continue to be a politician though with very extensive limitations on his activities. He may continue to be a member of his party, but he should not take part in the affairs of the party, particularly in regard to matters which are likely to come before the House for discussion and decision. We have also considered it proper that he should not take sides in public controversies in respect of matters likely to come before the House. In short, he should not identify himself with any propaganda or express any opinions which are likely to embarrass his position as the presiding authority or are likely to create an impression that the Speaker is a partisan."

Mavalankar admitted that the logical corollary of the Speaker's position in Britain is that his seat is not contested in the general elections and he is elected Speaker so long as he wishes to be so elected, irrespective of his party affiliation.<sup>63</sup> But "with the present state of political consciousness of public life in India", Mavalankar added, "it is too much to expect that people with different ideologies will all respect the convention of not contesting the election of the Speaker, and it is this aspect which very seriously affects the adoption in toto of all British conventions in respect of the office of the Speaker."<sup>64</sup> Mavalankar considered the British precedent as an ideal to be reached in the course of time."

Mavalankar followed the middle course between the two schools of thought in India, the new school which urged that the impartiality in the Chair does not depend on the nature of the Speaker's outside activities and, accordingly, did not accept the British model of absolute severance from politics and the older orthodox school, which insisted on the adherence to the British model and emphasised that impartiality demanded sincere attempts to break previous political connections. With regard to Mavalankar's middle course, the Speaker may not be a partisan, yet

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63. The Labour Party in England violated the century-old tradition in 1935 and 1945 by contesting the re-election of the Conservative Speakers. But the Labour candidates were defeated both the times and it appears that the electorate feels alive to its duty of re-electing the Speaker unopposed.

64. More, S.S., *Practice and Procedure of Indian Parliament*, p. 79.

65. The Conference of the Presiding officers of Legislative bodies held at Trivandrum in July-August, 1951, passed the resolution: "The conference is of the opinion that it is desirable in the interests of the development of free democratic institutions in this country that following the practice of the British House of Commons a convention should be established to the effect that the seat from which the Speaker or the Chairman stands for election should not be contested. . . . The necessary corollary of the full establishment of this convention would be that the Speaker or Chairman would not take part in any party politics. The conference feels that such convention is a healthy one and its growth should be encouraged." *Journal of Parliamentary Information*, Vol. I, p. 141. The National Committee of the Samyukta Socialist Party decided on October 17, 1968 that the Party would not oppose, in any election, a Speaker who had immediately on an assumption of office renounced his party affiliation. It called on other political parties to follow suit. *The Tribune*, Amritsar, October 19, 1968. Speakers N. Sanjiva Reddy in 1967 and Gurdial Singh Dhillon in 1969, resigned from the membership of the Indian National Congress immediately after their assumption of office.

he still remains a party man and is the choice of his party. And every party man has his own prejudices and the prejudices of a promoted politician are, indeed, very strong. The Chair, under such circumstances cannot command that much reverence as it does in Britain for its impartiality. The result is the first motion of no-confidence moved against the Speaker on December 18, 1954. It was condemned by the Prime Minister as "vicious" and he described the Opposition responsible for it as "incompetent and frivolous." The motion was lost on a voice vote, but it had a lesson. It gave a setback to the dignity of the Chair and, as such, to the dignity of Parliament. Speaking in the Lok Sabha on the motion, the Prime Minister rightly observed that "it (motion of no-confidence) is a matter for this House, for each individual to consider regardless of party affiliations. Therefore, let us try to think of it not as a party issue but as members of this House, because this matter affects the Hon. Speaker, of course, but it affects the dignity of this House as Parliament, it affects the first citizen of the country, that is, the Speaker of this House."

There have, also, been instances, and now frequent, when the authority of the Chair has been questioned and his rulings contested. A typical case of flouting the Chair's direction happened on April 9, 1960, when the services of the Marshal of the House were requisitioned to bodily remove a Socialist member, Mr. Arjjun Singh Bhadauria. In August 1962, a Socialist Member flouted the authority of the Speaker and cast reflections on his impartiality. In December 1964, Dr. Ram Manohar Lohia was suspended from the House for disobeying the Chair. It has been repeated frequently since then. In fact, such ugly scenes, as disorderly defiance of Speaker's rulings, interruption by members by raising irrelevant points of order and staging a walk-out, have become now a common feature of the proceedings of Parliament and State Assemblies. Speaker Hukam Singh, addressing a conference of Presiding officers on October 29, 1966, stressed the need for finding a "permanent and lasting" solution to the problem of "**repeated disorders**" in Parliament and State Legislatures.<sup>66</sup> Satyanarayan Sinha, Union Minister for Parliamentary Affairs, called for a "pathological diagnosis" of the causes for disorderly scenes in India's Legislatures.<sup>67</sup>

**Powers and Functions of the Speaker.** The powers of the Speaker of the Lok Sabha are more or less the same as those of the Speaker of the House of Commons in Britain. He speaks for the House and to the House and is, accordingly, the principal spokesman of the Lok Sabha and represents its collective voice. Messages on behalf of the House and to the House are sent or received with the authority of the Speaker. All Bills passed by the Lok Sabha are authenticated by his signatures before they are sent to the Rajya Sabha for its consideration or to the President for his assent. He receives all petitions, appeals, messages and documents addressed to the House and all orders of the House are executed through him.

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66. *The Hindustan Times*, New Delhi, October 29, 1966.

67. Presidential Address delivered at the Fifth All-India Whips' Conference, Bangalore, January 3, 1966. *The Hindustan Times*, New Delhi, January 5, 1966.



The Speaker presides over the sittings of the House and conducts its proceedings. He decides who shall have the floor and in speeches and remarks are addressed to the Chair. He proposes and puts the necessary questions and announces the results. In consultation with the Leader of the House, the Speaker determines the order of the business, the time to be allotted for different kinds of business, and sees that it is taken up and finished according to the Time Allocation Orders. He is the final judge to decide on the admissibility of questions, resolutions and motions. He must also certify, under Article 110 of the Constitution whether a Bill is a Money Bill or not. The Speaker does not vote except in the event of a tie.

The Speaker exercises his powers and functions partly under the Constitution and partly under the Rules of the Procedure of the House. The Speaker maintains perfect order and proper decorum in the House and has wide powers to check disorder, irrelevance and unparliamentary language or behaviour. If a member does not obey the orders of the Speaker, he may be asked to withdraw from the House or he may be suspended from attending the House for the remainder of the session, or to adorn the House or suspend a sitting for a period. If the necessity arises, as it did on April 9, 1960, when Arjun Singh Bhadania shouted at the top of his voice, "You send for your Marshal. I am not going to withdraw," the Socialist member was thereupon bodily lifted by the Marshal and two members of the Watch and Ward staff. If the Speaker is of the opinion that a word or words used in the debate are defamatory or indecent, or unparliamentary or undignified, he may, in his discretion, order that such word or words be expunged from the proceedings of the House. He accepts the closure of debates and is the guardian of the privileges of the House and protects the interests of the minorities. He also protects the House against the encroachments of the Government. When Ministers tend to encroach upon the rights of the members, or refuse to answer questions, or circumvent the answers, or do not give sufficient information, it is, then, to Mr. Speaker that the members appeal to safeguard and enforce their rights against the executive.

But the chief function, and an arduous one too, of the Speaker relates to the judicious conduct of debates. He fixes time-limit for speeches, and selects amendments to a Bill or a resolution to be discussed by the House. The Speaker is, in fact, the "Lord of the Debate." He must see that the debate centres on the main issue before the House and members do not wander, accidentally or deliberately, in the realm of irrelevance. Then, there are constant appeals to him for his rulings on the points of procedure. Here the Speaker interprets the law of Parliament. His ruling is final which need not be contested.<sup>68</sup> He also advises the members and the House on points not covered by the Rules of Procedure. He warns disorderly members and if any member persists in disorder the Speaker may order him to withdraw from the House for a day or part of a day.

68. In Britain Speaker's ruling is final and it has force of a precedent. These precedents are followed by successive Speakers until the Rules of Standing Orders are changed. In Australia a member may contest the ruling of the Speaker and when he does so the issue is considered immediately. If the Motion of dissent is duly seconded, it is debated. Canada follows Australia.



In the event of grave disorder he may adjourn or suspend the business of the House. He may even suspend a member of the House for gross disorderly behaviour.

The Speaker appoints Chairmen of all Committees of the House. "The Speaker", writes S.L. Shakhder, "is the supreme head of all Parliamentary Committees set up by him or by the House. He issues directions to the Chairmen in all matters relating to their working and the procedure to be followed. He guides them holding periodical consultations with the Chairmen and the members. The Speaker reads all reports of the Committees and keeps in touch with their activities. All difficulties and matters of importance are referred to him for guidance and advice."<sup>69</sup> He sees that any notice issued by a Committee or a minute of dissent of a member does not contain any words, phrases or expressions which are argumentative, unparliamentary, irrelevant, verbose or otherwise inappropriate. He may, accordingly, amend it, if deemed necessary, before circulation. The Speaker himself is the *ex-officio* Chairman of some of the Committees of the House such as the Business Advisory Committee, Rules Committee and the General Purposes Committee.

All communications between Parliament and the President take place through the Speaker. The Speaker signs all Bills in token of their having been passed by the Lok Sabha before they are sent to the Rajya Sabha or to the President.

The Lok Sabha has its own Secretariat and the conditions of service of persons appointed to the secretarial staff of either House of Parliament are regulated by Law of Parliament. The secretarial staff of the Lok Sabha functions directly under the control of the Speaker and is responsible to no other authority. The Speaker also controls the premises of the House and his authority within and without the House is undisputed. He regulates admission of "strangers" and press correspondents to the galleries and other precincts of the House. Visitors and press correspondents after their admission to the galleries are subject to the discipline and orders of the Speaker. In the event of breach of his orders he may punish them by stopping their admission either for a definite or indefinite period or, in serious circumstances, involving contempt of the House or its members or the committees, censure them or, in extreme cases, commit them to prison. "Summons to offenders are issued under his authority and it is sufficient for the courts if his orders merely state that the person is required to appear before the House on a charge of contempt of the House or a breach of privilege."

All matters not specifically provided in the rules and all questions relating to the detailed working of the rules have to be regulated in such a manner as the Speaker may from time to time direct.

## FUNCTIONS OF THE LOK SABHA

**Legislative Functions.** The process of making laws is the business of Parliament as a whole, President, the Rajya Sabha and the Lok Sabha.

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69. "Officers of Parliament." Lal, A.B. (Ed.), *The Indian Parliament*, p. 34.

The Lok Sabha can by itself do nothing, although the actual powers of the President and the Rajya Sabha are subject to limitations. A non-Money Bill may originate in any of the two Houses and it must be passed by both Houses if it has to become law. The Lok Sabha, unlike the British House of Commons,<sup>70</sup> has no means to overrule the Rajya Sabha. In case of disagreement between the two Houses or if more than six months elapse from the date of the receipt of the Bill by the other House without the Bill being passed by it, the President may summon a joint sitting of both the Houses. If at the joint sitting the Bill is passed by the majority of the total number of members of both Houses present and voting, it shall be deemed to have been passed by both Houses of Parliament.<sup>71</sup> Here lies the supreme position of the Lok Sabha. The will of the Lok Sabha is bound to prevail at the joint sitting on account of its numerical strength.

**Financial Functions.** "Who holds the purse, holds the power," wrote Madison in the *Federalist*. It is through the control of the nation's purse that the Lok Sabha enjoys real supremacy over the Rajya Sabha. The Constitution provides that "A Money Bill shall not be introduced in the Council of States" (Rajya Sabha). It must originate in the Lok Sabha and when it is passed by the Lok Sabha it is transmitted to the Rajya Sabha for its **recommendations**. The Constitution further requires that the Rajya Sabha must return the Bill to the Lok Sabha with its **recommendations** within fourteen days from the date of the receipt of the Bill.<sup>72</sup> If the Lok Sabha accepts any of the recommendations of the Rajya Sabha the Bill is deemed to have been passed by both Houses of Parliament with those amendments.<sup>73</sup> If the Lok Sabha does not accept the recommendations of the Rajya Sabha, the Bill is deemed to have been passed by both Houses of Parliament in the original form with which it began its career in the Lok Sabha.<sup>74</sup> If a Bill passed by the Lok Sabha and transmitted to the Rajya Sabha is not returned to the Lok Sabha within fourteen days, it is deemed to have been passed by both Houses of Parliament after the expiry of fourteen days in the form in which it was passed by the Lok Sabha.<sup>75</sup> The Rajya Sabha can, thus, only delay the enactment of the Money Bill and that, too, for a period of fourteen days. It is, accordingly, as much powerless as the House of Lords, though the latter can withhold its assent to a Money Bill for a month.

Then, demands for grants are not submitted to the Rajya Sabha. The sanctioning of expenditure is the exclusive privilege of the Lok Sabha.

**Electoral Functions.** The elected members of both Houses of Parliament form a part of the Electoral College for the election of the President.<sup>76</sup> The Lok Sabha here enjoys co-equal power with the Rajya Sabha.

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70. Refer to Parliament Act of 1911 and the Amending Act of 1949.

71. Article 108.

72. Article 109 (2).

73. Article 109 (3).

74. Article 109 (4).

75. Article 109 (5).

76. Article 54.

The Vice-President of the Republic is also elected by the members of both Houses of Parliament assembled at a joint sitting.

**Controlling the Executive.** But the most important function of the Lok Sabha is that of controlling the Executive. The Constitution makes the Council of Ministers collectively responsible to the Lok Sabha and the responsibility of the Council of Ministers to the Lok Sabha involves a constant control of the House over the Government; control and responsibility go together. Responsibility of Government means its resignation from office whenever the policy of Government proves fundamentally unacceptable to the Lok Sabha. An obligation, therefore, rests on the Lok Sabha to exercise a day-to-day scrutiny over the activities of the Government in such a way that fundamental disagreement between the Executive and the representatives of the people will be clear and manifest. If the actual and possible mistakes of the Government were not apparent the Government might become irresponsible. Control by the Lok Sabha prevents irresponsibility since the Ministers are constantly conscious of the fact that they will be called to account.

The Lok Sabha maintains its control in two ways. The first is the constant demand in the House for information about the actions of Government. The second is the criticism that is constantly aimed at the Government in the House. These two methods are closely related to each other and take various forms. The most effective instrument by which the Lok Sabha seeks information from the executive is the oral or written questions. Any member of the Lok Sabha may by following prescribed regulations, direct questions at Ministers and the Ministers at the beginning of the sitting of the House devote almost an hour to answering questions that have been put to them. The institution of asking questions is as highly developed in India as it is in Britain and is prominently distinguished from some of the Dominion countries, like Australia.<sup>77</sup> It is generally the most interesting part of the proceedings of the Lok Sabha and it provides the time when a member can make his mark and when Ministers, too, can make or mar their reputations. A member may also move for obtaining returns for supplying information on matters of public importance.<sup>78</sup> Information may, again, be obtained by the House regarding the administration by appointing Parliamentary Committees.

The Lok Sabha is also a debating assembly. "A society," writes Laski, "that is able to discuss does not need to fight; and the greater the capacity to maintain interest in discussion, the less degree there is of an inability to effect the compromises that maintain social peace." The most important function of the Opposition is to discuss and criticize matters of

77. Article 66.

78. Article 75 (3).

79. Sir Anthony Eden, in his tour of Commonwealth, is said to have felt more at home in the Indian Parliament's Question Hour than he had been in the Australian Parliament. Morris-Jones says, "While the form of the initial question is firmly disciplined, the freedom given to the putting of supplementaries is fairly large and ministers cannot use escape routes on too many occasions." *The Government and Politics of India*, p. 197.

80. As in the Serajuddin and Co.

81. *Parliamentary Government in England*, p. 149.

administration and policy-making and, thus, to make the Government to extend its intentions and practices. The best opportunity for the Opposition to criticize the governmental policy is a whole is when it receives the reply on the Address of the President to Parliament. Another opportunity is when public finance, more especially proposals for expenditure, is under discussion. At this stage the action of every individual Minister and his Ministry is under review. Demands for supplementary estimates similarly offer opportunity for criticism. It must, however, be said that there is no well-organised strong Opposition to create an effective stir in Government by its criticism.

In addition to these regularly scheduled debates, any member of the Lok Sabha may, after due notice and subject to the rules governing it, move a resolution expressing lack of confidence in the Council of Ministers. Motion for a vote of no-confidence is really a critical occasion in the life of Government as it decides its fate. So long as a government can command a comfortable majority, it is not possible for such a motion to get through, still it creates embarrassments in the ranks of the Ministry and agitates public opinion. The most normal occasion for the criticism of the executive is debate on a motion of adjournment. A member may, during a sitting, move the adjournment of the House for discussing a definite matter of urgent public importance. If the Speaker admits the motion, then, a full debate on the issue is held.

There is another kind of adjournment motion and it may be called the emergency adjournment motion. It is intended to raise discussion on matters of urgent public importance for short duration and calling attention of the Government. No formal motion is allowed. What the Rules require is that a member wishing to raise a debate should give a notice to the Secretary of the Lok Sabha clearly and precisely specifying the matter to be discussed. The notice must be supported by at least two other members. If the Speaker admits the notice, he will fix a day, in consultation with the Leader of the House, for discussion. The duration of the debate does not exceed two and a half hours. What is important to note here is that even a Government which commands an overwhelming majority in the Lok Sabha cannot prevent the ventilation of an important grievance and the Constitution gives to every member freedom of speech in Parliament. The Half an Hour Discussions on matters arising out of questions, also, afford opportunities for ventilating grievances. Other opportunities for raising debates include moving the resolutions and 'No Day-Yet-Named' motions.

**Constituent Functions.** The Lok Sabha together with the Rajya Sabha has the power to amend the Constitution. A Bill to amend the Constitution may originate in either House and it must be passed by each

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82. Not infrequently the Opposition behaves irresponsibly as it happened on the motion of no confidence against the Government in November 1968. The liberty to oppose the Government was fully exercised by the Opposition Parties, but when the turn came for the leader of the Government (Prime Minister) to reply, she was ruthlessly shouted down. This is really tantamount to destroying the values of Parliamentary government.

83. Article 105.

[illegible]

**Miscellaneous Functions.** Parliament has the power to move for the removal of members of the Lok Sabha and of the High Courts on the grounds of misbehaviour and incapacity and the motion for removal requires a two-thirds majority in each House." Similar motions may be moved for the removal of the Chief Justice of India, the Chief Justice and a Judge of the Supreme Court, and a Judge of a High Court, and members of the Union Public Service Commission. Either of the two Houses can prefer a charge against the President of the Republic. If the charge is preferred by the Lok Sabha the Rajya Sabha investigates the charge or causes it to be investigated. If the Rajya Sabha prefers the charge then, the Lok Sabha must cause it or cause it to be investigated. The Government may, when the House is sitting, bring charges against a member on that the member has been guilty of a crime or has failed to pass a Bill by the Rajya Sabha, the removal of the Vice-President must be agreed to by the Lok Sabha." But no motion for the removal of the Vice-President can be moved in the Lok Sabha. The approval of the Lok Sabha along with that of the Rajya Sabha is necessary for the continuance of the various Proclamations of Emergency issued by the President. The Lok Sabha and the Rajya Sabha act in an Emergency in setting up Martial Law Courts for dealing with offences committed by civilians, indemnify officers for acts done in good faith and validate punishments awarded during the continuance of Emergency. Rules and Regulations framed by the various Departments of the Government under the power of delegated legislation are approved by both Houses. The reports of the Union Public Service Commission, the Comptroller and Auditor-General, the Scheduled Castes and Tribes Commission and the Finance Commission are presented to both Houses for their consideration. If the Government makes a proposal to take an appointment out from the purview of the Union Public Service Commission, both the Lok Sabha and the Rajya Sabha must agree to its exclusion.

## LEGISLATIVE PROCEDURE

**Legislative Procedure.** The Constitution does not prescribe any detailed procedure for Bills passed by the two Houses of Parliament. It

84. Article 124 (3) and Article 217 (1) (b).

85. Article 61.

86. Article 67.



1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678,

[illegible]

1. The  $\alpha$ -Gluconate Buffer (pH 6.0) (M. S. M. 1971) is adjusted to pH 6.0 by adding 10.0 ml. of 0.1 M NaOH to 100 ml. of the mixture. In the absence of  $\alpha$ -Gluconate Buffer the rate of the reaction for  $\text{Mg}^{2+}$  is 0.0001.

[illegible]

The decision to refer to introduce the Bill is a trivial matter. It is consistent with doing so in respect of the Bill on the National Curriculum. It puts the question to obtain the decision of the House. The House generally grants leave by voice.

Sometimes a motion for leave to introduce a Bill is opposed, as it happened in the case of Private Bill No. 1, *Amendment to the Rules of Procedure*, in such a case, no mean that it is then necessary to introduce a Bill is opposed, the Speaker, after permitting, if he thinks fit, a brief explanatory statement from the member who moves and from the

97. A member of the Council of Ministers of the Republic of Armenia, Deputy Minister of Parliamentary Security.

member who opposes the motion, may, without further debate, put the question: provided that where a motion is opposed on the ground that the Bill initiates legislation outside the legislative competence of the House, the Speaker may permit a full discussion thereon". If the motion for leave to introduce a Bill is opposed, the Speaker may allow the mover and the member opposing it to make explanatory statements. The question is, then, put. If the motion is opposed on the ground that the Bill initiates legislation outside the legislative competence of the House, the Speaker may permit a full discussion and obtain the decision of the House. The Attorney-General may also participate in the discussion and clarify the position.

After leave to introduce the Bill has been given, it is immediately published in the **Gazette of India** and ready for the second stage. The Speaker may allow the publication of the Bill in the **Gazette of India** upon request from a member initiating the Bill even before the motion for leave to introduce the Bill has been made. In such a case it does not remain necessary to ask for leave of the House to introduce the Bill and if the Bill is afterwards introduced it is not necessary to publish it again.

**Second Reading.** The second reading consists of consideration of the Bill which can be divided into two stages. After the Bill has been introduced and its copies have been made available to all the members for their use, the member-in-charge of the Bill may move that the Bill may be taken into consideration by the House at once or on some future date specified in the motion or that it be referred to a Select Committee of the House, or to a Joint Committee of the Houses, or that it be circulated for eliciting public opinion. Immediate consideration of the Bill is very rare unless it happens to be an urgent and a non-controversial measure. Reference to a Select Committee is the normal procedure. A motion for reference to a Joint Committee after being carried in the originating House is transmitted to the other House for its concurrence. Bills relating to social matters or any matter which is new in the life of the nation and is likely to arouse a good deal of controversy, are usually circulated for eliciting public opinion. After a motion for eliciting public opinion has been carried, the Secretariat of the House concerned addresses the State Governments asking them to publish the Bill in the State Gazette and give it a wide publicity in order to invite opinions from local bodies, recognised associations or other individuals or associations concerned with the provisions of the Bill. The State Governments collect all such material and transmit it to the Secretariat of the House. The Secretariat collects the various opinions, makes a precis and issues them as papers to the Bill which are circulated to the members of the House.

When one of the motions, referred to above, has been made, then, either on the same day or any other subsequent day the main principles underlying the Bill are discussed. The member-in-charge of the Bill explains, elaborates and elucidates what the proposed measure will do and how the necessity of such a measure is important and urgent. So will do other supporters of the Bill. The members opposing it criticize and attack the Bill. It should, however, be noted that this is not the time for detailed discussion or amendments and vote upon the clauses. It is the Bill as

a whole which is discussed and amendments are proposed not to the Bill but to the motion for its immediate consideration, or circulation for circulation, or reference to a Select Committee or to a Joint Committee. After a debate on the motion and an amendment is thereto, it is put to the vote of the House. If the motion is carried to refer the Bill to a Select Committee or a Joint Committee, it is ripe for its consideration.

**Reference to a Committee.** When the motion that the Bill be referred to a Select Committee of the House is moved, the member in charge of the Bill indicates the names of the members who would compose the Committee, as also the date by which the report of the Select Committee should be submitted to the House. The mover ascertains from the members in anticipation their willingness to serve on the Committee and includes only those who agree to be included. The Speaker appoints the Chairman of the Committee from amongst its members. Where a Deputy Speaker is one of the members of the Committee, he automatically becomes its Chairman. In case it is moved that the Bill be referred to a Joint Committee, the member-in-charge indicates the number and names of the members constituting the Committee from the House as also the number of the members from the other House. The proportion of members from the Lok Sabha and the Rajya Sabha is 2:1. The motion also indicates the quorum necessary for a meeting of the Joint Committee, the Rules of Procedure to be applied for the Conduct of its Business and a request to the other House to concur to the appointment of a Joint Committee and communicate the names of its members to be appointed to the Committee. In the case of a Select Committee, the quorum is one-third of the total number of its members. A member who is not a member of the Committee may attend its meetings, but may not take part in its deliberation. A Minister, however, who is not a member of the Select Committee may, with the permission of the Chairman, address the Committee on any point under its consideration. The Chairman of the Committee has a casting vote.

A Select Committee may appoint a Sub-Committee of its own for special consideration on a point or points involved in the Bill. The report of the Sub-Committee is considered by the whole Select Committee. The Committee may hold its meetings whenever it deems desirable no matter whether the House is sitting or not. The meetings are informal and are held in private. One of the officers of the Secretariat of the House nominated by the Secretary of the House, acts as Secretary of the Committee. The Minister concerned, with officers of his Ministry, is present at the meetings of the Committee to explain any point and to furnish any information which may be required.

The Committee examines the Bill thoroughly and in details; first there is a general discussion on the Bill, and, then, there is a clause by clause discussion. Members are required to give notices of amendments a day in advance unless the Chairman waives it out and allows an amendment to be moved. The Committee has the power to summon any person to appear and give evidence and produce any papers or documents relevant to the issues involved in the Bill. It may ask for the production of any paper or document or record which it deems essential for the dis-

charge of its duties. But the Rules permit Government to decline to the production of any paper, document or record if it thinks that its production is not in the interest of the State or is prejudicial to its safety. The Committee may also hear experts or the representatives of special interests likely to be affected by the proposed measure. After hearing all such persons and the examination of the information supplied to it, the Committee comes to its own conclusion "as to whether the clause as it stands is adequate or covers the intention clearly. If in its opinion the wording is defective or the intention is not clearly expressed or the language is ambiguous in some material respects, the Committee proposes amendments or a revision of the clause." But the Committee cannot propose any amendment or revision which defeats the purpose of the Bill. All amendments and revisions proposed by the Committee must be in conformity with the principles of the Bill to which the House has already agreed. The function of the Committee is to "see that the provisions of the Bill bring out the intention behind the principles clearly: that there is no procedural defect in its working, that it does not offend provisions of the existing law and the object proposed to be achieved is adequately brought out." Herein ends the first stage in the Second Reading of the Bill.

**Report of the Committee.** After the individual clauses have been examined and discussed and all the schedules, etc., thereto, the Select Committee prepares its reports. It consists of two parts: the first is explanatory and contains the points which the Committee considers should be incorporated in the Bill or the reasons for amending, modifying or recasting any of the clauses, and the second part consists of the Bill as amended by the Select Committee. The decisions are arrived at by the majority of the members present and voting. Members dissenting may append minutes of dissent with their explanations. The Committee usually submits its report to the House within the time laid down in the motion for reference of the Bill to the Committee. If it cannot complete its labours within the given time, a request is made to the House for extension. If no time is fixed in the original motion, the Rules provide that the Committee must report to the House within three months from the date on which the House adopted the motion for reference of the Bill to the Select Committee.

The Chairman of the Select Committee or any member authorized by the Select Committee presents the Report to the House. While presenting the Report, the Chairman or the member may make any remarks, but he must confine himself to a brief statement of facts. There can be no debate. After the Report has been presented and its copies circulated amongst the members, the member-in-charge of the Bill may move that the Bill as reported by the Select Committee may now be taken into consideration or that the Bill as reported may be recommitted to the Select Committee or to a different Committee with or without instructions or that the Bill as reported be circulated or recirculated for eliciting public opinion or further opinion thereon. If the House agrees to consider the Bill as reported by the Select Committee, it enters into the second stage of the Second Reading when the Bill is discussed clause by clause. Discussion takes place on each clause of the Bill and amendments to clauses are moved. Members are required to give notice of amendments one day before

the day on which a particular clause is to be taken up for consideration. The Speaker determines the admissibility of amendments and selects therefrom amendments to be discussed. Each amendment and each clause is put to the vote of the House. Sometimes for convenience and in order to save time clauses are put *en bloc*, unless any member desires to speak on any particular clause. The amendments form a part of the Bill if they are accepted by a majority of members present and voting. The consideration of the Preamble is postponed until after the clauses have been considered to enable its amendment in consequence of amendments in the clauses. Consideration of particular clauses also can be postponed if deemed convenient. After the clauses, schedules, enacting formula and Short Title of the Bill have been put to vote and disposed of, the Second Reading of the Bill is over.

**Third Reading.** Thereafter the member-in-charge of the Bill makes a motion that the Bill as settled in the House be passed. The debate on such a motion is known as the third reading, although no motion in terms that the Bill be read a third time is made. The debate on the third reading of a Bill is of restricted character. It is restricted to the matter contained in the Bill. The Rules provide that the discussion must be confined to submission of arguments either in support or rejection of the Bill. The details of the Bill cannot be referred to further than is necessary for the purpose of such arguments which should be of a general nature. No amendment may be moved which is not formal or verbal or consequential upon any amendment having been made to the Bill during the consideration stage. The motion is then put and voted upon. If majority of the members present and voting support it, the Bill is deemed to have been passed by the House of its origin.

**Bill becomes Law.** The Bill is, then, transmitted to the other House for its concurrence. A message from the originating House signed either by the Presiding Officer or the Secretary is sent to the other House. The message is read in the House and copies of the Bill are laid on the table. Thereafter, any Minister may give notice that the Bill be taken into consideration. The subsequent procedure of discussion and amendment is the same as in the originating House. After the Bill is passed by the receiving House it is sent back to the originating House with amendments, if any. If the receiving House passes the Bill in the same form in which it came from the House of its origin, it is presented to the President for his assent. The President may give his assent thereto, or withhold it, or return it for reconsideration of the Houses, with or without a message suggesting amendments. But if the Bill is passed again by both Houses of Parliament, with or without amendments, the President must give his assent thereto. A Bill, thus, becomes law.

**Disputed Bill and Joint Sitzings.** If a Bill passed by and transmitted from one House is amended by the other House, the Bill as amended is sent back to the originating House. If the originating House does not agree to the amendment or amendments or makes further amendments to which the other House does not agree, the President may summon a joint session of the two Houses. The Speaker of the Lok Sabha or in his absence the Deputy Speaker presides and the Rules of the Lok Sabha are made applicable at a joint sitting. Amendments can be moved at a joint



sitting, but only such amendments are admissible which have been made necessary by the delay in the passage of the Bill, or may arise out of amendments, if any, proposed by one House and rejected by the other. The decision of the Presiding Officer with regard to the admissibility of amendments is final. The Bill is deemed to have been passed by both the Houses if the majority of the members present and voting at a joint sitting agree to it.

A joint session may also be summoned if a Bill passed by one House is rejected by the other, or if more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it.

**Private Members' Bills.** Since 1953, the last two and a half hours of the Friday sittings are normally allotted for the transaction of Private Members' Business. Private Members' Business consists of Resolutions and Bills. The Speaker decides which of the two is to be dealt with on a particular Friday. In practice, it means that every alternate Friday is made available for Private Members' Bill, the other Friday being devoted to Private Members' Resolutions.

The procedure in the case of Private Members' Bills is the same as for Government Bills, except for some special features. The notice for leave to introduce a Bill must be accompanied with the statement of objects and reasons, the recommendation and sanction of the President required for the introduction or consideration of the Bill, memoranda showing the financial effect of the Bill, etc. A notice may be disallowed, if it is not complete in any respect or the Bill is otherwise defective. The Speaker has the inherent power to disallow notice of a Bill, if he thinks that it is not proper to include it in the List of Business. There is a Committee on Private Members' Bills and Resolutions consisting of not more than 15 members nominated by the Speaker for one year. The Chairman is appointed by the Speaker from amongst the members of the Committee. If the Deputy Speaker happens to be a member of the Committee, he is appointed Chairman automatically. The functions of the Committee are:

(1) To examine every Bill seeking to amend the Constitution before a motion for leave to introduce the Bill is included in the List of Business. The Committee since its inception has taken this matter very seriously and laid down certain principles. One of these states that "the Constitution should be considered as a sacred document—a document which should not be lightly interfered with and should be amended only when it is found absolutely necessary to do so....Such amendments should normally be brought by Government."

(2) To examine all Private Members' Bills after they have been introduced and before they are taken up for consideration in the House and to classify them according to their nature, urgency and importance into two categories, Category A and Category B. Bills in Category A have precedence over the Bills in Category B.

(3) To recommend the time that should be allocated for the discussion of the stage or stages of Private Members' Bill and also to indicate the different hours at which the various stages of the Bill in a day shall be completed.

(4) To examine every Private Member's Bill which is opposed in the House on the ground that the Bill initiates legislation not within the legislative competence of the House. The Speaker considers such objection *prima facie* tenable.

(5) To recommend time-limit for the discussion of Private Members' Resolutions and other ancillary matters.

## FINANCIAL LEGISLATION

**Financial Procedure.** The principles involved in the financial procedure of the Indian Parliament are essentially the same as those of the British Parliament. In the first place, financial initiative in both the countries is the exclusive right of the Government. Secondly, the Lok Sabha in India, like the British House of Commons, has the exclusive right to vote supplies and to sanction the levy of taxes and imports. Finally, in both the countries, taxation and appropriation and expenditure from public funds need legislative authorization.

**Money Bills.** The Constitution provides for a special procedure in regard to Money Bills. A Money Bill may not be introduced in the Rajya Sabha and it cannot be introduced without the recommendation of the President. When it is passed in the Lok Sabha, it is transmitted to the Rajya Sabha, with the Speaker's certificate that it is a Money Bill and the decision of the Speaker on this point is final. The Rajya Sabha cannot reject a Money Bill, but it may, within fourteen days of its receipt, return it to the Lok Sabha with its recommendations. The Lok Sabha may either accept or reject all or any of the recommendations of the Rajya Sabha. If the Lok Sabha accepts any of them, the Money Bill shall be deemed to have been passed by both Houses with those amendments. If the Lok Sabha does not accept any of the recommendations of the Rajya Sabha, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the Lok Sabha. If the Bill is not returned to the Lok Sabha within fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the stipulated period in the form in which it was passed by the Lok Sabha. When it is presented to the President for assent the provision by which the President may return the Bill to the Houses for reconsideration does not apply.

A Money Bill cannot be introduced or moved except on the recommendation of the President. According to Article 110 a Bill is deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters:

- (a) the imposition, abolition, remission, alteration or regulation of any tax;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the Law with respect to any financial obligations undertaken by the Government of India;

- the custody of the Consolidated Fund, or the Contingency Fund of India, the payment of money into or the withdrawal of money from any such fund;
- (d) the appropriation of moneys out of the Consolidated Fund of India;
- (e) the declaration of any expenditure to be expenditure charged on the Consolidated Fund of India or the raising of the amount of any such expenditure;
- (f) the receipt of money on account of the Consolidated Fund of India or the Public Accounts of India or the custody of the same or such money or the audit of the accounts of the Union or of a State; or
- (g) any matter incidental to any matter referred to above from (a) to (f)."

The use of the word "only" at the beginning of the definition of a Money Bill is significant. The Constitution prescribes two conditions for a Bill to be regarded as a Money Bill. Firstly, it must deal with all or any matters contained in Article 110. Secondly, the provisions of the Bill must only deal with such matters and not with any other matter. It is therefore, not possible to enact as a Money Bill anything which changes the law in other respects. It must be a Money Bill, pure and simple. A Bill which imposes fines, penalties, or licence fees, or deals with taxes imposed by the local authorities is neither a Money Bill nor a Financial Bill. A Money Bill when it is presented to the President of India for his assent must be accompanied by a certificate of the Speaker that it is a Money Bill. The President shall not withhold his assent from a Money Bill passed by Parliament. It is in pursuance of the supremacy of Parliament in the matter of finance.

It is necessary to distinguish Money Bills from Financial Bills. Money Bills are those which are defined in Article 110 as referred to above. Financial Bills are other Bills containing financial provisions but to which the provisions of Article 110 are not applicable. Financial Bills also cannot be introduced without the recommendation of the President, and must not be introduced in the Rajya Sabha. Whereas a Money Bill is transmitted to the Rajya Sabha for its consideration and recommendation alone and it has no right to amend it, a Financial Bill can be amended by the Rajya Sabha. It rests with the Speaker of the Lok Sabha to determine whether a Bill is a Money Bill or not. The Rajya Sabha has no right to question the certificate subscribed by the Speaker that the Bill is a Money Bill.

88. All funds received by the Government of India form the 'Consolidated Fund of India' from which alone the Government withdraws money for its expenditure and repayment of debts.

89. A reserve fund called the 'Contingency Fund of India' is placed at the disposal of the Government to meet the unforeseen requirements exceeding the authorized expenditure. The fund facilitates the Government in its prompt regularization. It is, in brief, grant in advance pending completion of the regular procedure.

90. Articles 110 (2) and 117.



High Court which exercises jurisdiction in relation to any area included in the territory of India or which at any time before the commencement of the present Constitution exercised jurisdiction in relation to any area included in a Province corresponding to a State specified in Part A of the first Schedule;

- (e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India;
- (f) any sums required to satisfy any judgment, decree or award of any Court or arbitration tribunal;
- (g) any other expenditure declared by the Constitution or by Parliament by law to be so charged.

The expenditure charged on the Consolidated Fund of India is not submitted to the vote of Parliament, but either House of Parliament can discuss it. It is non-votable. The other expenditure is submitted in the form of demand for grants to the Lok Sabha. The Lok Sabha may assent, or refuse to assent to any demand, or assent to any demand subject to a reduction of the amount specified therein. It is votable, but no demand for grant can be made except on the recommendation of the President."

**Stages in Financial Legislation.** The Annual Financial Statement or the Budget has to pass through five stages: (1) Introduction or presentation; (2) General discussion; (3) Voting of demands; (4) Consideration and passing of the Appropriation Bill, and (5) Consideration and passing of the taxation proposals; the Finance Bill.

- (1) **Introduction or Presentation of the Budget.** The Budget session of Parliament generally commences in mid-February when the Railway Minister introduces the Railway Budget and subsequently the Finance Minister introduces the Financial Statement in the Lok Sabha. It is accompanied by the Budget Speech made by the Finance Minister. It is an important event as it unfolds the fiscal and economic policy of the Government for the ensuing year. The copies of the Budget together with the Explanatory Memorandum are printed and circulated among members for their reference. The Budget contains the estimates of receipt and expenditure. The Explanatory Memorandum contains a comparative statement of such receipts and expenditure for the current year and the next year and reasons for any increase or decrease in the amounts. The Memorandum also furnishes other information relating to estimates.
- (2) **The general discussion.** After the Budget has been presented, money has to be asked for as Demands for Grants. Here the Budget is dealt within two stages—a general discussion, and the demand for specific grants. A general discussion of the Budget as a whole is spread over to three or four days. It is customary for the leaders of the Opposition to initiate the dis-



cussion. No discussion of details or cut motions are in order at this stage. It is a general discussion which covers all items of expenditure including those that are 'charged' and are excluded from vote. The discussion relates to policy of the Government involving a review and criticism of the administration of the various Departments and the general problems connected with the nation's finances and the principles involved in the Budget proposals. Following the British practice, the major part of the time for the Budget discussion is allowed to the Opposition to review the work of the Government for the year and ventilate grievances of the people. The discussion is political rather than financial. No vote is taken during the general discussion. But the Finance Minister has the right to reply at the end of the discussion.

- (3) **Voting of demands by the Lok Sabha.** With the general discussion the work of the Rajya Sabha is complete so far as the Annual Financial Statement is concerned. But the Lok Sabha, after general discussion is over, proceeds to the voting of demands not charged on the Consolidated Fund of India. The voting of demands is the exclusive privilege of the Lok Sabha and the Rajya Sabha has no share in it. Lok Sabha has the following powers in respect of each demand: (i) to assent to the demand; or (ii) to refuse it; or (iii) to reduce it. The House has no power to increase a demand, or to alter the destination of a grant, or to put any condition as to the appropriation of the grant.

The time for debates on the estimates is determined by the Speaker in consultation with the Leader of the House. Reports of the activities of the different Ministries during the preceding year are circulated among the members for their references. When the demand for grant of a Ministry is moved it comes under scrutiny and the debate, which usually extends to not more than two days, rivets round the working of the Ministry and its administrative policy. But the real debate takes place when amendments are proposed either for the reduction of the amount demanded or for the omission or reduction of any item in any grant.

The voting on the demands must conclude on the fixed day when closure is applied and all outstanding demands are put to vote and disposed of, no matter whether they have been discussed or not.

- (4) **The Appropriation Bill.** The next stage is the Annual Appropriation Bill which must be passed into a statute. All the demands voted by the Lok Sabha and the expenditure charged on the Consolidated Fund are put together and incorporated in a Bill called the Annual Appropriation Bill. The allotment of time for the different stages of the Bill is determined by the Speaker and debate on the second reading of the Bill is general. When the Bill is moved for consideration, debate is res-

stricted to those points only which have not been discussed during the debates on estimates. Amendments may be moved for reduction in the expenditure alone. No amendments to the grant as voted by the House previously, or altering its destination or varying the amount charged on the Consolidated Fund are admissible.

The Appropriation Bill having passed through all the stages is finally voted upon and if passed by the Lok Sabha, it is certified by the Speaker as Money Bill and transmitted to the Rajya Sabha. The Rajya Sabha must return it to the Lok Sabha with its recommendations, within fourteen days. It is for the Lok Sabha to accept or reject these recommendations, if any. The assent of the President to the Appropriation Bill is just a matter of formality. He cannot return a Money Bill for reconsideration.

An Appropriation Act embodies the authority given by the House, with the assent of the President, to Government to spend money as authorized in the Act. Without such an authority the Government cannot incur any expenditure. The Comptroller and Auditor-General of India would hold a payment illegal and unauthorized if it were made without authorization in the Appropriation Act. If the Government subsequently finds that the money granted under any head is insufficient for its needs, it again comes to the House for a supplementary grant. The supplementary grants are embodied in one or more Appropriation Bills which must be passed by the House before the end of the financial year.

- (5) **The Finance Bill.** The Finance Bill incorporates the financial proposals of the Government for the ensuing year and is presented to Parliament at the same time as the Budget. The procedure followed is that of a Money Bill. The discussion of the Finance Bill in the second reading is confined to general principles. It is only in the Select Committee that the Bill is considered in details and amendments are moved. Clause by clause consideration of the Bill follows after the presentation of the Committee Report. The scope of amendments is limited to proposals for the reduction or abolition of a tax. The financial proposals become operative immediately after the presentation of the Budget under the Provincial Collection of Taxes Act, 1931. The Finance Bill must be passed before the end of April.

## PARLIAMENTARY COMMITTEES

The principle of appointing committees is not a modern development. It is, indeed, as old as Parliament itself. The British Parliament soon after its organization realised that, as a deliberative body, it could not do its work effectively and efficiently. Although the business it transacted at that stage of its career was very light and simple. It, accordingly, started the practice of appointing its Committees and delegating to them the more

detailed consideration of work. With the growth of the parliamentary work and with a view to ensure its smooth, efficient and expeditious disposal the utility and the number of Committees increased rapidly and the House of Commons today relies more on Committees for general scrutiny and consideration of legislation and other matters which Parliament is to decide and determine.

The history of Committees in India goes back to 1854 when the first legislature was established. The Legislative Council appointed its own Committee to consider what should be its standing orders. Since then it had become a practice for the Council to appoint from time to time Committees to deal with varied matters. The existing Committees may be divided into: (1) Ad Hoc Committees, and (2) Non Ad Hoc Committees. In the former category come Select Committees and Joint Committees. Committees in the latter category may be classified according to their functions. The following classification borrowed from S.S. Mer's *Practice and Procedure of Indian Parliament* presents a matter of fact analysis.

(a) Committees to enquire:

- (1) Committee of Petitions.
- (2) Committee of Privileges.

(b) Committees to scrutinise:

- (1) Committee on Government Assurances.
- (2) Committee on Subordinate Legislation.

(c) Committees of an administrative character relating to the business of the House:

- (1) Committee on Absence of Members from the Sittings of the House.
- (2) Business Advisory Committee.
- (3) Committee on Private Members' Bills and Resolutions.
- (4) Rules Committee.

(d) Committees dealing with provision of facilities to Members:

- (1) General Purposes Committee.
- (2) House Committee.
- (3) Library Committee.
- (4) Joint Committee on Salaries and Allowances of Members of Parliament.

(e) Financial Committees:

- (1) Estimates Committees.
- (2) Public Accounts Committee.

A Committee on Public Undertakings has recently been constituted to investigate into the working of public undertakings.

**Select Committees.** Select Committees are appointed on individual Bills and for making some investigation, inquiry or compilation. The first Select Committee was appointed in 1854 and since then the succeeding Legislatures have invariably appointed numerous such Committees. Select Committees, whether for a Bill or making other investigation, have proved themselves to be convenient instrument for detailed examination of Bills and other problems under inquiry. The Speaker of the Lok Sabha remarked in 1955, "when we meet in the Committees, we do not represent parties, we function as a whole House and we do what, we think, the best in the interest of the House." The Parliamentary Committees help to save time for the House to discuss important matters and prevent Parliament from getting lost in details and thereby losing its hold on matters of policies and broad principles. Apart from this, the very complexity and technical nature of modern business makes it necessary, that it should be closely scrutinised in a businesslike manner, availing of outside technical or expert advice, wherever necessary. The Speaker of the Lok Sabha accordingly, aptly suggested that the House should appoint large Select Committees and leave the "matter to be thrashed out there than in a bigger House".

Members of a Select Committee are appointed or elected by the House itself or nominated by the Speaker. The willingness of the members desired to serve on the Committee is ascertained before a proposal for appointment or nomination is made. The Chairman is appointed by the Speaker from among its members, but if the Deputy Speaker happens to be a member of the Committee, he shall be appointed Chairman. One-third of the total membership constitutes the quorum and a majority vote determines the decision of a Committee. The Chairman is entitled to a casting vote in case of a tie. A Committee can appoint its own sub Committee. The meetings of a Committee are private and are normally held in the precincts of Parliament House. It may send for persons to give evidence, produce papers and records. The report is presented by the Chairman of the Committee or a member authorised by the Committee. Members dissenting from the majority report may submit minutes of dissent. The Speaker has the power to give directions to the Committee with a view to regulate its procedure and the organization of its work.

**Joint Committees.** In order to avoid duplication of proceedings a Bill may be referred to a Joint Committee composed of members of both Houses. Joint Committees also save time and help to bring about and develop good understanding, appreciative spirit and co-operation between the representatives of both the Houses. A motion for the appointment of a Joint Committee and reference of a Bill to such a Committee after being carried out in the originating House is transmitted to the other House for its concurrence. The member-in-charge of a Bill indicates the number and names of the members constituting the Committee from the House to which he belongs as also the number of the members from the other House. The proportion of members from the Lok Sabha and the Rajya Sabha is two to one.

**Committee on Petitions.** The Committee on Petitions is nominated by the Speaker at the commencement of the House and consists of fifteen members. No Minister can, however, be a member of this Committee.

People have an inherent right to address petitions to the Legislature for the redress of grievances or staged some request for redress. The Committee on Petitions examines the merits of all petitions presented to the House and makes recommendations to the House after taking such evidence as it deems necessary.

**Committee of Privileges.** This Committee, too, consists of 15 members, is nominated by the Speaker at the commencement of the House. It examines all questions of breach of privileges which are referred to it and reports to the House.

**Committee on Government Assurances.** While replying to questions and supplementaries in the House or in the course of discussion on Bills, Resolutions, Motions, etc., Ministers sometimes give assurances or undertakings either to consider a matter or to take action thereupon or to provide to the House full information later. The Speaker appoints for one year a Committee of fifteen on Government Assurances with a view to scrutinize assurances so made and to report to the House whether such assurances, undertakings and promises have been implemented or not. If implemented, the extent of their implementation and whether such implementation was within the time necessary for this purpose. No Minister is nominated to this Committee. The Committee on Government Assurances was first constituted on December 1, 1953. The Rajya Sabha has no such Committee.

**Committee on Subordinate Legislation.** The Indian Legislatures have been delegating the rule-making power for more than a century now, but the parliamentary control over subordinate legislation is a recent innovation. Since 1953 a Committee on Subordinate Legislation has been constituted by the Speaker. The Committee consists of fifteen members nominated by the Speaker for one year. Ministers are not included in it. All Rules, Regulations and Orders framed by the Executive to be laid before the House are examined by this Committee. The functions of the Committee are:

- (1) whether the Rules, Regulations and Orders are in accordance with the general objects of the Constitution or the Act under the authority of which they are made;
- (2) whether they contain matters which should be properly dealt with in an Act;
- (3) whether they contain the imposition of any tax;
- (4) whether they directly or indirectly bar the jurisdiction of the Courts;
- (5) whether they give retrospective effect to any of the provisions where the Act or Constitution does not confer such authority;
- (6) whether they involve expenditure from the Consolidated Fund of the public accounts;
- (7) whether they appear to make any unexpected or unusual use of the powers conferred;
- (8) whether there have been justifiable delays in the publication of the Rules or in laying them before Parliament;



(9) whether for any reason they call for any elucidation.

**Committee on Absence of Members.** The Committee was first constituted on March 12, 1954. It considers applications by members for leave of absence from sittings of the House. It examines the case of members who have been absent for a period of sixty days or more without permission. The Committee recommends to the House whether absence without permission should be condoned or not. In one case it has so far recommended that absence without permission of a member should not be condoned. The Rajya Sabha has no such Committee.

**Business Advisory Committee.** A Business Advisory Committee, consisting of fifteen members, including the Speaker who is its Chairman, was first constituted on July 14, 1952. The Deputy Speaker is also one of its members. It advises the House on the allocation of time for the various items of Government business. In suitable cases the Committee has the power to indicate in that time table the different hours at which various stages of a Bill or other Government business shall be completed. The Committee may also, on its own initiative, recommend to the Government to bring forward particular subjects for discussion in the House and allocates time for such discussion. Questions regarding extension of sessions and fixation of sittings of the House on the day on which it would not normally sit are first considered by the Committee.

The decisions of the Committee are always unanimous and, by convention, are adopted by the House unanimously on a motion moved by the Minister of Parliamentary Affairs. After acceptance, the motion takes effect as an order of the House, and on the expiry of time for each stage all motions pending at the time are guillotined.

**Committee on Private Members' Bills and Resolutions.** Its functions are purely the same as that of the Business Advisory Committee in regard to Government business. It allots time to Private Members' Bills and resolutions, examines Private Members' Bills seeking to amend the Constitution before their introduction, categorises Private Members' Bills according to their nature, urgency and importance, after they have been introduced, and examines such Private Members' Bills where the legislative competence of the House is challenged. The Committee was first constituted on December 1, 1953 and its membership consisted of ten. On May 13, 1954, the membership was raised to fifteen. The Deputy Speaker is its Chairman.

**Rules Committee.** Article 118(1) of the Constitution empowers each House of Parliament to make rules for regulating the procedure and conduct of its business. The Rules Committee has been constituted in pursuance of this provision. It is nominated by the Speaker/the Chairman, and consists of fifteen members. The Speaker the Chairman, is its ex-officio Chairman. The Committee so nominated holds office until a new Committee is nominated.

The function of the Committee is to consider matters of procedure and conduct of business in the House and to recommend any amendments or additions to the Rules of Procedure and Conduct of Business that may be necessary. Apart from the members of the Committee some other

members of the House may also be invited to attend particular sittings of the Committee. The House adjourns to the Chamber of Princes as provided by the Speaker of the Council of Ministers. The recommendations of the Rules Committee are placed before the House and accepted.

**Committees dealing with provision of facilities to Members.** Besides the three Committees mentioned above, there are three Committees to Members. The General Purposes Committee of the House, the Library Committee, and the House of Commons' Privileges Committee is to consider and advise on suggestions for improvement of the House as may be referred to it by the Speaker. The House Committee deals with matters of accommodation, food and medical aid of members. The functions of the Library Committee are to consider and advise on such matters concerning the Library as may be referred to it by the Speaker, to consider suggestions for improvement of the Library and to assist members in fully utilising the services provided by the Committee.

**The Estimates Committee.** To ensure parliamentary control over grants made to the Government and to supervise and control the actual appropriation, Parliament exercises close scrutiny of public accounts through its two Committees, the Estimates Committee and the Public Accounts Committee. The Estimates Committee was constituted for the first time in 1950 replacing the then Standing Finance Committee of Parliament. Its members are thirty in number and they are elected in accordance with the system of proportional representation from among the members of the Lok Sabha for a period of one year. The Deputy Speaker is the Chairman of the Committee.

The function of the Committee is to scrutinize the Budget estimates for the year, to suggest economies in the expenditure, improvement in organization and other steps for increasing efficiency, to find out whether the money is well laid out and also to suggest the form in which the estimates should be presented to Parliament. Usually the Committee functions through sub-Committees, one corresponding to one or more Departments, and their reports are submitted both to the House and to the Government. The Committee does not complete its work with the final passage of the Budget. It continues with its labours throughout the year and exercises scrutiny over one Department or the other as it chooses and deems necessary.

The Committee does not examine the entire estimates. Subjects are chosen for examination and the Committee takes evidence from departmental officials and outsiders and considers and makes its recommendations on the subjects in reports submitted from time to time to the House. The recommendations made by the Committee may or may not be accepted by the Government. Replies of the Departments on the points raised by the Committee are sent to it in the form of minutes and are a part of the subsequent report of the Committee. Commenting upon the utility of the Estimates Committee Asok Chanda says, "In recent years, however, the Committee's contribution has been more impressive.... while the Committee refrains even now from openly criticizing the policy implicit in the estimates, its examination does often indirectly reflect on the manner in which a particular policy has been evolved or is being implemented. There

has also been considerable improvement in the organization of the Committee and in its technique, which has better equipped it to fulfil its responsibilities. Even though it works within the limitations inherent in a democratic form of government, its contributions are tending to become more and more effective in economizing national expenditure."<sup>94</sup> Morris-Jones is rather critical of the role of the Estimates Committee. Its members, he says, "are supposed to look for possible economies but they have in fact been happy to rule out the faint line between economy and efficiency. Further, they have not hesitated to recommend in the name of efficiency large administrative reforms and even re-orientation of policy. Their audacity occasioned strong comment and it may be that they have in the last few years been more modest in the scope of their reports. But "of their growing competence and effectiveness as a control over ministries," he adds, "there can be no doubt. If they find less to be indignant about it, it is in part because their influence is now automatically reckoned with."<sup>95</sup>

**The Public Accounts Committee.** The Public Accounts Committee considers the Appropriation Accounts in details and "it is the twin brother of the Estimates Committee." The Public Accounts Committees were for the first time constituted at the Centre and in the Provinces as early as 1923. But they met under the Chairmanship of the Finance Member of the Governor-General's or Governor's Executive Council. Their secretariat consisted of the Finance Department and their role was technicalities. Moreover, the position of the Auditor-General was more governmental than independent and he was in no sense servant of the Legislature.

In 1950, the Public Accounts Committee was made a real Parliamentary Committee and the independence of the Auditor-General was ensured by the Constitution, thereby, creating an effective examiner of the administration. In 1954, members of the Rajya Sabha were included in it. Its total membership is 15 from the Lok Sabha and 7 from the Rajya Sabha. The members are elected by the system of proportional representation for one year and no Minister can be its member. The Speaker nominates a seniormost non-official member of the Lok Sabha as the Chairman of the Committee, but if the Deputy Speaker is elected a member of the Committee, he acts as the Chairman.

The function of the Public Accounts Committee is to scrutinize the Appropriation Accounts of the Government of India and other accounts laid before the House and the report of the Comptroller and the Auditor-General of India and to satisfy itself that moneys shown in the accounts have been legally disbursed, that expenditure conforms to the authority that governs it and that re-appropriation has been according to rules. The Committee has also to examine the statement of accounts showing the income and expenditure of State Corporations, and manufacturing schemes and projects of autonomous and semi-autonomous bodies. The Committee submits its report to the House and it is a powerful and vital instrument of parliamentary control of public finances.

94. Asok Chanda, *Indian Administration*, p. 186.

95. Morris-Jones, W.H., *The Government and Politics of India*, p. 196.

The Report of the Comptroller and Auditor-General of India furnishes the Public Accounts Committee with most of the material on which it functions. The Committee has, however, the power to scrutinize and report on almost any matter relating to the management of public finance. The report of the Comptroller and Auditor-General is taken up Ministry-wise, and the Departmental Secretaries are required to appear as witnesses to elucidate and explain the observations of audit, in order to enable the Committee to reach final conclusions and formulate its recommendations. The examination of the Committee extends "beyond the formality of the expenditure, to its wisdom, faithfulness and economy." Specifically, the examination covers the manner in which approved policy is being implemented, the degree of efficiency and economy with which plans and programmes are being executed and the manner in which discretionary powers are being exercised. The Committee is not concerned with the question of policy in the broader sense, but it is concerned with the policy of the method of expenditure. The question whether there is any extravagance or waste in carrying out that policy is within the competence of the Committee.

The utility of the Public Accounts Committee is immense. It is a representative Committee of all shades of opinion and members of Parliament who constitute the Committee recognise the question of public accounts as a national question and, accordingly, its deliberations and findings are devoid of party feelings and partisan approach. It directly contacts the executive officers, the administrators and all those who spend money and, thus, direct elucidation of the disputed matters can be sought from these officials. It may even summon further evidence oral or documentary. If necessary, evidence may be taken on oath, but in practice that is not adopted by any Select Committee except in very special cases. This is, no doubt, a post mortem examination, all the same very effective. The Committee has no power to compel any administrative action to be taken on its observations, but this has not affected the effectiveness of its recommendations. Its power is indirect "and lies nominally in the potential results of its reports and the publicity which it is able to give to the question it investigates and in the moral effect of its criticism."<sup>96</sup> Morris-Jones puts it in another way. He says, "The fact that their scrutiny is *ex-post facto* is less important than that the government has continuously to act in the knowledge that scrutiny of any item may take place and that waste and impropriety may be widely exposed in the House and the press. The fact that government replies to the Public Accounts Committee are often vague and cool is less important than that behind the reply there has often been embarrassment and some resolve not to let it happen again."<sup>97</sup>

**The Committee on Public Undertakings.** The Committee has recently been constituted in the Lok Sabha to investigate into the working of public undertakings. It consists of ten members from the Lok Sabha and five from the Rajya Sabha elected on the principle of proportional representation. The functions of the Committee are:

96. Asok Chanda, *Indian Administration*, p. 183.

97. Morris Jones, W.H., *The Government and Politics of India*, pp. 195-96.

- (1) to examine the reports and accounts of the public undertakings specified in the Schedule;
- (2) to examine the reports, if any, of the Comptroller and Auditor-General on the public undertakings;
- (3) to examine, in the context of the autonomy and efficiency of public undertakings, whether the affairs of public undertakings are being managed in accordance with sound business principles and prudent commercial practices; and
- (4) such other functions vested in the Public Accounts Committee and the Estimates Committee in relation to the public undertakings specified in the Schedule or under the Rules of Procedure and Conduct of Business of the House as are not covered by (1), (2), and (3) above and as may be allotted to the Committee by the Speaker from time to time.

The Committee shall, however, not examine and investigate any of the following matters:

- (a) matters of major Government policy as distinct from business or commercial functions of public undertakings;
- (b) matters of day-to-day administration;
- (c) matters for the consideration of which machinery is established by any special statute under which a particular public undertaking is established.

**Delegated Legislation.** An inevitable consequence of extension in the activities of the State, particularly when it aims to establish a socialistic society, is the sizable increase in legislation. Since it is not possible for the legislature to enact measures so numerous and so comprehensive, delegation of authority to the executive becomes not only necessary but quite inescapable. Delegated legislation is usually concerned with minor matters, of details to give effect to the provisions of the statutes. But it is not so always. There are instances both in India and other countries, where important powers, such as the power to determine matters of principle, to impose taxation, to amend Acts of Parliament, to create new offences and to create penalties have been delegated. There are, no doubt, abnormal instances of legislative delegation of authority, but they are by no means rare. The rules and regulations thus made have the force of law and they cannot be challenged in the Courts unless they are ultra vires of the parent Acts.

Speaker G.V. Mavalankar, once remarked, and rightly too, that delegated legislation is both a necessity and a risk. It is a necessity because Parliament has neither the time nor the requisite expert knowledge to deal with the technicalities which legislation now involves. It is a risk because the institution of delegated legislation has significantly added to the powers of the executive. The rules framed thereunder are very often vexatious to the citizens as the administrative officers concerned with the framing of the rules exalt administrative convenience and the national advantage at the expense of the individual and his freedom. To safeguard against the abuse of power, it is, therefore, for Parliament to keep a watchful and even jealous eye on delegated legislation at all its stages.



The usual safeguards are: defining the limits of delegation, laying down a special procedure for rule-making, giving adequate publicity to the proposed rules, requiring the rules made to be laid on the table of the House, and the process of scrutiny. Two Rules of the Procedure of the Lok Sabha set down important provisions. Rule No. 71 states that "a Bill involving proposals for the delegation of legislative power shall further be accompanied by a memorandum explaining such proposals and drawing attention to their scope and stating also whether they are of normal or exceptional character." Rule No. 222 reads, "Each 'regulation', 'rule', 'sub-rule', 'bye-law', etc., framed in pursuance of the legislative function delegated by Parliament to a subordinate authority and which is required to be laid before the House (hereinafter referred to as 'order') shall, subject to such rules as the Speaker may in consultation with the Leader of the House prescribe, be numbered centrally and published in the **Gazette of India** immediately after they are promulgated."

The scrutiny of delegated legislation by Parliament itself is of recent origin, although delegated legislation in India is more than a century old and certain safeguards, such as the publication of the rules and judicial review, have existed from the very beginning. The Committee on Subordinate Legislation was first appointed by the Speaker on December 1, 1953 under Rule 88 of the Procedure. It consisted of 10 members including the Chairman appointed by the Speaker. Now it consists of fifteen members and the function of the Committee is to see and report to the House "whether the powers delegated by Parliament have been properly exercised within the framework of the statute delegating such powers." The powers of the Committee are similar to the financial committees to appoint sub-committees having the power of the main Committee and to require the attendance of persons and production of papers and records. The Government may, however, decline to produce a document on the ground that its disclosure will be prejudicial to the safety or interest of the State.

The terms of reference of the Committee on Subordinate Legislation extend to these nine points: (1) Whether it is in accord with the general objects of the Act pursuant to which the orders are made; (2) whether these orders contain matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament; (3) whether the orders contain imposition of taxation; (4) whether such orders directly or indirectly bar the jurisdiction of the Courts; (5) whether the orders give retrospective effect to any of the provisions in respect of which the Act does not expressly give such powers; (6) whether they involve expenditure from the Consolidated Fund or the Public Revenues; (7) whether they appear to make some unusual or unexpected use of powers conferred by the Act pursuant to which it is made; (8) whether there appears to have been unjustifiable delay in the publication or laying it before Parliament; and (9) whether for any reason its form or purport calls for any elucidation. When the Rules framed by the various authorities are laid before the House, the Committee examines such Rules and reports to the House in the light of its terms of reference as cited above.

The Committee submitted its first report to the Lok Sabha in March 1954 and revealed therein the most unsatisfactory state of affairs. Only

one Bill introduced in the House since 1952 complied with the Rule laying down that an explanatory memorandum should accompany proposals for delegated legislation. It, accordingly, made two recommendations: first, that Bills containing proposals for delegation of legislative power should invariably be accompanied by memoranda explaining the scope and the details of such proposals, and, second that the provisions delegating legislative powers in the various statutes should be of a uniform pattern. Speaker Mavalankar congratulating the Committee on its first report told its members that they were the only protectors of the people against "the 'new despotism' getting aggressive." He reminded them that it was their job "to direct the rule-making power in proper channels." At the same time, he cautioned them not to consider themselves hostile to the administration. They were rather its collaborators, co-operators and friends saving the civil servants, as it were, from their worst selves.<sup>98</sup> The work so far done by the Committee is impressive and the promise for the future is bright. The Committee has constantly drawn attention to several features of orders deemed undesirable, like curtailment of the jurisdiction of the Courts; indefinite, complicated and ambiguous wording; contravention of the provisions of the parent Acts; undue delay between the publication of an order and its being laid on the table of the House.

The Committee on Subordinate Legislation was modelled on the British Select Committee on Statutory Instruments of the House of Commons. There was, however, one important difference between the two. The terms of reference of the Indian Committee are in effect wider, but they still stop the Committee short of a consideration of the merit of an order.<sup>99</sup> The Law Commission, in its report recommended the setting up of a Standing Committee of experts to scrutinize all important rules and orders prior to their presentation to Parliament. Such a committee of experts would, the report said, save endless litigation on the legality of some of the rules. A large assembly, consisting mostly of members possessing ordinary educational qualifications, is hardly a suitable body to examine the legal implication of rules and orders so made. Their critical examination required a high standard of legal acumen and wide experience which only a few legislators possess. Many of the Acts of Parliament, however, provide that Rules are to be made after previous publication. In such cases, a draft of the Rules has to be published in a manner prescribed by the Government, ordinarily in the Gazette of India, and time is given for submitting objections to the draft Rules and the Rule-making authority takes into consideration objections, if any.

In some respects India has established certain advantageous precedents with regard to subordinate legislation. The Speaker has ever appointed a member of the Opposition as Chairman of the Committee on Subordinate Legislation. Since the membership of this Committee is not open to Ministers, it has functioned as a well-knit business committee free from official influence, party spirit and party whip. The Committee has boldly stood by its duty "of checking and eliminating the chance of the possible transgression of authority prescribed by Parliament." Generally,

98. Appendix to the Committee's Third Report (May 1955).

99. Morris-Jones, W.H., *Parliament in India*, p. 312 f.n.

matters before the Committee are decided by common agreement amongst the members and votes had never been taken. It also goes to the credit of various Ministries and their officers that they have always co-operated with the Committee and supplied them with the requisite information. Whenever the Committee apprised the Ministry or the rule-making authority that the rules so framed go beyond the limits prescribed by the parent Act or that they are not in conformity with the spirit of the Act, they have always accepted the viewpoint of the Committee and remedied the defects. The Committee has particularly been careful in scrutinizing that the courts are not excluded from exercising their jurisdiction and that the rule-making authority makes adequate provision for judicial review. The need for judicial review of subordinate legislation cannot be exaggerated. The limits put by the legislature must not be exceeded and all conditions of exercise of delegated power must be satisfied. The Calcutta High Court held that when rules are to be made for carrying out the purposes of the Act the rules cannot travel beyond the four corners of the Act itself.

The Lok Sabha's Committee on subordinate Legislation has helped to establish a healthy precedent by its recommendation that notifications issued by Government under the Essential Services Maintenance Act should cease to have effect if not approved by a resolution passed by both Houses of Parliament within forty days from the date on which the notification is laid before each House. Hitherto, such notifications came into force on their being published in the official gazette, after they were laid on the table of the House members had to take the initiative to move for their notification or annulment. This was not always an effective safeguard. In most cases rules or notifications issued under powers delegated by statutes remained operative for lack of time, or of initiative on the part of members, for raising a discussion.

## CHAPTER VI

# THE SUPREME COURT

**The need for the Federal Judiciary.** A federal judiciary is an essential element in a Federal Constitution. It is at once the interpreter and guardian of the Constitution and a tribunal for the determination of disputes between the constituent units of the Federation. A federation postulates an agreement and the distribution of powers, legislative, financial and executive, between the Union and the Units. Both the Union Government and the State Governments derive their authority from the Constitution and their jurisdiction is limited by the provisions of the Constitution. Where the authority of two sets of government is demarcated and delimited, disputes, as regards the interpretation of the Constitution and the respective rights of the Union and the Units, are sure to arise. It is, accordingly, an essential element of the federal polity that there should be an impartial umpire, a judicial body independent both of the Union Legislature and Executive and of the governments of the Units, which should settle their disputes and preserve the sanctity of the Constitution. In **Hammer v. Dugenhart** the Supreme Court of the United States held, "This Court has no more important function than that which devolves upon it, the obligation to preserve inviolate the constitutional limitation upon the exercise of authority, Federal and State, to the end that each may continue to discharge harmoniously with the other, the duties entrusted to it by the Constitution." And the United States' Constitution empowers the Supreme Court to determine "all controversies to which the United States shall be a party, to controversies between two or more States."

The federation which the Constitution of India establishes is not in the nature of a treaty or agreement between the federating units. There is nevertheless a division of legislative as well as administrative authority between the Union and the States. The Constitution, accordingly, vests the Supreme Court with original jurisdiction to decide disputes between the Government of India and the Governments of the States or between two or more States.<sup>1</sup> There is another important reason which necessitates an independent judicial body in India. The Constitution vests the Union with powers which vitally conflict with the basic principles of a federation and, as such, "it is the interpretation of the Supreme Court in particular cases, that will hold the centripetal and centrifugal forces in the balance and save the original distribution of powers from any aggressive encroachment."

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1. Article III, 2 (1).

2. Article 131. But the Indian Supreme Court has no original jurisdiction as the American and Australian Constitutions give to their Supreme Courts to decide disputes between residents of different States or between a State and a resident of another State. Such disputes under the Indian Constitution come to the Supreme Court only on appeal, if the provisions relating thereto are satisfied.

ment on the part of the Union Government."<sup>3</sup> The future evolution of the Indian Constitution, thus, depends to a large extent upon the work of the Supreme Court and the direction given to it by that Court. In his address on the role of the Supreme Court, Alladi Krishnaswami Aiyar said: "From time to time, in the interpretation of the Constitution the Supreme Court will be confronted with apparently contradictory forces at work in society for the time being. While its function may be one of interpreting the Constitution as contained in the instrument of Government, it cannot in the discharge of its duties afford to ignore the social, economic and political tendencies of the times which furnish the necessary background. It has to keep the poise between the seemingly contradictory forces. In the process of the interpretation of the Constitution on certain occasions, it may appear to strengthen the Union at the expense of the Units and at another time it may appear to champion the cause of provincial autonomy and regionalism. On one occasion it may appear to favour individual liberty as against social or state control, and at another time it may appear to favour social or state control. It is the great tribunal which has to draw the line between individual liberty and social control...."<sup>4</sup>

The Supreme Court is also the guardian of the Constitution. The Constitution of India declares and guarantees Fundamental Rights of citizens<sup>5</sup> and provides remedies against interference with their exercise and enjoyment through the Supreme Court.<sup>6</sup> The Court is constantly called upon to determine the validity of the legislation and executive action with reference to the provisions relating to the Fundamental Rights. The first Attorney-General of India, M.C. Setalvad, in his speech at the inauguration of the Supreme Court, January 28, 1950, while emphasizing the significance of the Supreme Court, *inter alia*, said, "...The detailed enumeration of fundamental rights in the Constitution and the provisions which enable them to be reasonably restricted will need wise and discriminating decisions. On the Court will fall the delicate and difficult task of ensuring the citizen the enjoyment of his guaranteed rights consistently with the rights of the society and the safety of the State."

**Supreme Court in retrospect.** The suggestion to establish a Supreme Court in India is found in the Nehru Report, 1928. But in official parlance the idea of establishing a Supreme Court goes back to the Round Table Conferences when the scheme for establishing a federal Constitution of India was evolved. The White Paper proposals of 1933 recommended the establishment of two courts at the Centre, the Federal Court and the Supreme Court. The former was to be the ultimate tribunal for interpreting the Constitution as well as all questions concerning the spheres of the Federal and Provincial authorities and of the Indian States. It was to have both an original and appellate jurisdiction. The Supreme Court was intended to have jurisdiction extended to British India as a final court of appeal from the decisions of Provincial High Courts on matters other

3. *Commentary on the Constitution of India*, op. cit., p. 400.

4. *Constituent Assembly Debates*, Vol. VIII, pp. 223-24.

5. Chapter III.

6. Article 32.



than those which fell within the jurisdiction of the Federal Court. But the White Paper was not sure of the necessity of establishing a Supreme Court in addition to the Federal Court as the Indian opinion considered it an unnecessary and unjustifiable expense. It was, accordingly, recommended that the Federal Legislature should be empowered to establish the Supreme Court whenever its necessity and justification was recognised, but the Government of India Act should itself prescribe the powers and jurisdiction of the Court if and when it was established.<sup>7</sup>

The proposal of setting up two courts was subsequently abandoned and the Government of India Act, 1935 set up only a Federal Court with original, appellate and advisory powers.<sup>8</sup> The Federal Court was not a court of final jurisdiction and appeals could be carried to the Privy Council in London. The Constituent Assembly of India considered the position of the Federal Court at a very early stage and almost simultaneously with the appointment of the Union Constitution Committee, an *ad hoc* Committee, consisting of S. Varadachariar, Alladi Krishnaswami Ayyar, B.L. Mitter, K.M. Munshi and B.N. Rau, was constituted to consider and report on the Constitution and powers of the Federal Court, to be named as Supreme Court of India. The Committee submitted its report on May 21, 1947. Its recommendations were essentially based on the Government of India Act, 1935. The Committee referred to the recommendations of the Advisory Committee on Fundamental Rights that the right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights should be guaranteed by the Constitution. But the Committee did not consider it desirable to make the jurisdiction of the Supreme Court exclusive. The Committee proposed that in case there was no other court with the necessary jurisdiction, the Supreme Court should exercise that jurisdiction, but where there was some other court with the necessary jurisdiction, the Supreme Court should have appellate powers, including powers of revision.<sup>9</sup> Since under the new Constitution the jurisdiction of the Privy Council, as the ultimate appellate authority, was to be abolished, the Committee proposed that a similar jurisdiction should be conferred on the Supreme Court.<sup>10</sup>

With regard to the organization of the Supreme Court, the Committee suggested that it should have two Division Benches, each consisting of five Judges. The Committee emphatically suggested that the appointment of Judges should not be left to the unfettered discretion of the Executive. Two alternative proposals were suggested in this respect. One was, that for the appointment of puisne Judges the President should in consultation with the Chief Justice of India make a nomination which should be confirmed by at least seven out of a panel of eleven persons, composed of some of the Chief Justices of the High Courts, members of the Central Legislature and some of the law officers of the Union Government. The other method was that the panel should put forward three names for every

7. *Proposals for Indian Constitutional Reforms*, 1933.

8. See *ante*.

9. *The Framing of India's Constitution, Select Documents*, Vol. II, p. 588.

10. *Ibid.*, pp. 588-89.

vacancy and the final choice should rest with the President in consultation with the Chief Justice of India. The same procedure, except that the Chief Justice would not be consulted, would also apply in the appointment of the Chief Justice of India. In order to ensure the independence of the panel, it was suggested that every panel should function for a period of ten years. As regards the qualifications of the Judges, the Committee recommended that similar qualifications as prescribed by the Government of India Act, 1935, for the appointment of the Judges of the Federal Court should be adopted and the age-limit might continue to be 65. The Committee did not approve the appointment of temporary Judges and suggested that *ad hoc* Judges, out of a panel of Chief Justices and Judges of the High Courts, might be appointed, to deal with temporary increase in work.

The Constitutional Adviser incorporated these recommendations in his Memorandum of May 30, 1947 on the Union Constitution, with one modification that the Judges would be appointed by the President with the consent and approval of two-thirds of the Council of State. As said earlier, the Council of State was to be an advisory body in the nature of the Privy Council, for advising the President on certain matters on which decisions were required on independent, non-party lines.

The Union Constitution Committee did not accept the Constitutional Adviser's suggestion relating to the setting up of a Council of State and, accordingly, proposed that the President should appoint Judges in consultation with the Chief Justice of India and such other Judges of the Supreme Court, as also such Judges of the High Courts as might be deemed necessary. The Committee adopted all other proposals of the *ad hoc* Committee on Supreme Court. The recommendation of the Committee was, "There shall be a Supreme Court with the Constitution, powers and jurisdiction recommended by the *ad hoc* Committee on the Union Judiciary, except that a Judge of the Supreme Court shall be appointed by the President after consulting the Chief Justice and such other Judges of the Supreme Court, as also such Judges of the High Courts as may be necessary for the purpose."<sup>11</sup>

The proposals of the Union Constitution Committee were discussed in the Constituent Assembly on July 29, 1947. Alladi Krishnaswami Ayyar moved an amendment specifically declaring that a Judge of the Supreme Court would not be removed from his office except "on the ground of proved misbehaviour or incapacity" and that too only by the President on an address from both Houses of Parliament in the same session. Various other points were raised in the course of consideration of the Report and several amendments were also moved. The Assembly finally accepted the Committee's report together with Alladi Krishnaswami Ayyar's suggestion regarding the procedure for the removal of Judges. These decisions were incorporated in the Draft Constitution prepared by the Constitutional Adviser in October 1947.

Shortly thereafter the Constitutional Adviser visited the United States of America, Canada, Britain and Ireland to study the working of their

11. *Ibid.*, p. 583.

Constitutions. He discussed with some eminent persons the relevant provisions adopted by India from their Constitutions and as a result of these discussions he made two suggestions relating to the Supreme Court. He suggested, in the first place, that Judges in the United States had the option to retire, on attaining the age of seventy and on completing ten years' service in the Supreme Court and it would be desirable if this provision was adopted in India too. Secondly, the jurisdiction exercisable by the Supreme Court should be exercised by the full court and it should not sit in two divisions as suggested by the *ad hoc* Committee on Supreme Court. Justice Frankfurter of the United States' Supreme Court had attached considerable importance to it, he added.

The Drafting Committee gave utmost consideration to all these suggestions and the Draft Constitution, as it emerged out of its deliberations, provided that the Supreme Court would consist of a Chief Justice and such number of other Judges not less than seven as might be fixed by Parliament. The age of retirement would be 65 and no Judge could be removed from office except by an order of the President passed after an address supported by not less than two-thirds of the members present and voting had been presented by both Houses of Parliament in the same session for such removal on the ground of proved misbehaviour and incapacity. The appointment of the Judges was to be made by the President after consultation with such of the Judges of the Supreme Court and the High Courts as might be necessary for the purpose; consultation with the Chief Justice of India being compulsory in the case of appointment of puisne Judges. The salaries and allowances of Judges were to be determined by an Act of Parliament and until such an Act was passed as prescribed by the Constitution. Two methods were provided for filling temporary vacancies. In a situation where quorum was not available, the Chief Justice could, after consultation with the Chief Justice of a High Court, request one of the Judges of that High Court to serve as an *ad hoc* Judge. Alternatively, he could request a retired Judge of the Supreme Court to function as a Judge.

The jurisdiction of the Supreme Court was determined on the lines already approved by the Constituent Assembly. It was to have exclusive original jurisdiction in all disputes between the Government of India and one or more States; between the Government of India and any State or States on one side and one or more States on the other or between two or more States. Its appellate jurisdiction would extend to all cases involving a substantial question of law, as to the interpretation of the Constitution, but an appeal on this ground could be entertained only on a certificate given by the High Court or, where High Court refused to grant such a certificate, by special leave of the Supreme Court. Appellate jurisdiction was also conferred in civil cases of the value of Rs. 20,000 subject to the condition that if the High Court had affirmed the judgment of the lower court, a certificate was necessary from the High Court to the effect that the case involved a substantial question of law. It was, however, open to the High Court to certify in any civil case that it was a fit case for appeal to the Supreme Court. The Supreme Court could also grant special leave in any case, civil or criminal. The Draft Constitution also

provided for the advisory jurisdiction of the Supreme Court. The President could refer any question of law or fact to the Supreme Court in order to obtain the opinion of the Court.

When the Draft Constitution was circulated there were several suggestions especially contained in a Joint Memorandum representing the views of the Federal Court and of the Chief Justices of the High Courts. Suggestions also came from the High Courts, Provincial Governments and other official organizations, as well as private individuals. On the whole, the consensus of opinion was in favour of the basic principles governing the jurisdiction and powers of the Supreme Court as provided in the Draft Constitution. There were, however, quite a good number of proposals relating to the appointment of Judges in order to ensure the independence of the judiciary. The Drafting Committee itself moved a number of amendments to these provisions. Other members of the Constituent Assembly, too, moved amendments mainly hinging upon the procedure for the appointment of Judges, the age of retirement, and the acceptance of office by Judges after retirement.<sup>12</sup> But all such amendments were rejected except the one moved by H.V. Kamath which was to enable an eminent jurist to be appointed a Judge of the Supreme Court even if he did not possess the required qualification that he had been an advocate or a Judge for the specified number of years.

There was also a good deal of controversy on the civil and criminal jurisdiction of the Supreme Court. Some members argued that in all cases where a substantial question of law was involved, a High Court should grant a certificate and the Supreme Court should be empowered to hear all such appeals.<sup>13</sup> Alladi Krishnaswami Ayyar, K.M. Munshi and Dr. Ambedkar maintained, on behalf of the Drafting Committee, that the Supreme Court had already "wider jurisdiction than any superior court in any part of the world,"<sup>14</sup> but power would be conferred on Parliament to vest the Supreme Court with jurisdiction in criminals appeals.<sup>15</sup> Dr. Ambedkar, however, finally moved a new Article 111-A conferring on the Supreme Court appellate criminal jurisdiction in cases where:—

- (i) the High Court had on appeal reversed an order of acquittal of an accused person and sentenced him to death;
- (ii) the High Court had withdrawn a case for trial before itself from a subordinate court and sentenced the accused person to death;
- (iii) the High Court had certified that the case was fit one for appeal to the Supreme Court.<sup>16</sup>

The new Article was adopted by the Constituent Assembly and it figured as Article 134 of the Constitution.

T.T. Krishnamaachari and Dr. Ambedkar moved two more amend-

12. *Constituent Assembly Debates*, Vol. VIII, p. 258.

13. *Ibid.*, p. 593.

14. *Ibid.*, p. 596.

15. *Ibid.*, p. 607.

16. *Ibid.*, p. 840.



ments on behalf of the Drafting Committee. These amendments laid down that it would be necessary to obtain the approval of the President for the appointment of *ad hoc* Judges by the Chief Justice of India, and for the fixation of salaries, allowances, leave and pensions of the staff of the Supreme Court. The first amendment was adopted without discussion and the second was adopted with a slight amendment relating to the general scale of salaries of the staff of the Supreme Court.

**Establishment and the Constitution of the Supreme Court.** The Constitution provided for the establishment of a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribed a larger number, of not more than seven Judges.<sup>17</sup> The Supreme Court (Number of Judges) Act, 1956 raised the maximum to ten excluding the Chief Justice. This number was again raised in 1960 to fourteen including the Chief Justice. The increase was necessitated to expedite the disposal of cases in arrears by creating one more Bench of three Judges.

There is no minimum number of Judges fixed by the Constitution. But when the Constitution says that no case involving a substantial question of law as to the interpretation of the Constitution<sup>18</sup> or a reference under Article 143 shall be decided by less than five Judges, it follows that the Supreme Court cannot exercise its appellate jurisdiction in constitutional cases or the advisory jurisdiction unless there are five Judges to constitute a Bench. Moreover, if an ordinary Bench hearing an appeal finds that a question of constitutional law is involved, it shall refer that question to the Constitutional Bench consisting of five Judges.

If at any time there is no quorum<sup>19</sup> of Judges available to continue or hold any session of the Supreme Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request a Judge of the High Court, duly qualified to be a Judge of the Supreme Court, to attend the sittings of the Court as an *ad hoc* Judge for such period as is necessary. He shall remain a High Court Judge and his duties at the Supreme Court are additional, but during his attendance at the Supreme Court he has all the jurisdiction, powers and privileges of a Supreme Court Judge.<sup>20</sup> The

17. Article 124.

18. Article 145 (3).

19. Apart from the constitutional provision that not less than five judges shall sit to decide constitutional cases and hearing of advisory reference, Rules of the Supreme Court provide, "Subject to other provisions of these Rules, every cause, appeal or matter shall be heard by a Bench consisting of not less than three Judges nominated by the Chief Justice."

20. Article 127. Section 30 of the Canadian Supreme Court Act provides, "Appointment of *ad hoc* judges—if at any time there should not be a quorum of Judges of the Supreme Court available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in discharge of other duties, assigned by State or Order in Council or to the disqualification of a judge or judges, the Chief Justice, or, in his absence, the Senior puisne judge may in writing request the attendance at the sittings of the Court, as an *ad hoc* judge, for such period as may be necessary, of a judge of the Exchequer Court, or should the judges of the said Court be absent from Ottawa or for any reason unable to sit, of a judge of a provincial superior Court to be designated in writing by the Chief Justice or in his absence by any acting Chief Justice or the senior puisne judge of such provincial Court upon such request being made to him in writing."



Constitution of India also provides for the attendance of retired Judges of the Supreme Court in the sitting of the Court. The Chief Justice of India may, at any time, with the consent of the President request an ex-Judge of the Supreme Court or of the Federal Court to act and sit as a Judge of the Supreme Court.<sup>21</sup> It should, however, be noted that while absence of a quorum of the permanent Judges of the Supreme Court is a condition precedent for the appointment of *ad hoc* Judges, there is no such condition for the appointment of a retired Judge of the Supreme Court or of the Federal Court. A retired Judge may be appointed at any time by the Chief Justice of India with the previous consent of the President.

The Constitution (Fifteenth Amendment) Act, 1963 makes a provision that any person who has held the office of the Judge of a High Court or is duly qualified for appointment as a Judge of the Supreme Court may be appointed as an *ad hoc* Judge of the Supreme Court. The amendment widens the scope of selection of the *ad hoc* Judges and removes the difficulty hitherto experienced.

**Qualifications for Appointment of a Judge.** A candidate for appointment as a Judge of the Supreme Court must be a citizen of India and must have been a Judge of one or more High Courts for five successive years, or an advocate of one or more High Courts for ten successive years, or must be, in the opinion of the President, an eminent jurist. There was no provision in the Draft Constitution for the appointment of non-practising lawyers as Judges of the Supreme Court. It was during the consideration stage of the Draft Constitution that the qualification of being a distinguished jurist was accepted, thus, enabling the Supreme Court to get the benefit of the services of talented non-practising lawyers. While providing for this qualification the Constituent Assembly was prompted by the practice obtainable in the United States where there are several precedents of non-practising lawyers being appointed Judges of the Supreme Court, the most notable and recent example being that of Felix Frankfurter, Professor of Law at Harvard. Ananthasayanam Ayyangar while pleading for the inclusion of an eminent jurist among the Judges of the Supreme Court said, "Sir, I agree with my Honourable Friend, Mr. Kamath, when he says that the choice of the Supreme Court Judges ought not to be limited to Judges already in service and of advocates of ten years' standing. He has moved that it ought to be open to the President, if he so chooses in the interest of proper administration of justice, to include a distinguished jurist. His amendment does not make it obligatory upon the President to choose only a jurist among jurists. In various cases a Supreme Court has to deal with constitutional issues. A practising lawyer barely comes across constitutional problems. A person may enter the profession of law straightaway. He might be a member of a Law College or be a Dean of the Faculty of Law in a University. There are many eminent persons, there are many writers, there are jurists of great eminence. Why should it not be made possible for the President to appoint a jurist of distinction if it is necessary? As a matter of fact, I would advise that out of the seven Judges one of them must be a jurist of great eminence."<sup>22</sup>

21. Article 128.

22. *Constituent Assembly Debates*, Vol. VIII, p. 254.

Every Judge of the Supreme Court is appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts as the President may deem necessary for such purpose, but the Chief Justice of India shall always be consulted. A Judge holds office until he attains the age of 65. He may resign from his office. He may also be removed from his office after an address for removal is presented to the President by each House of Parliament. Such an address should be supported by a majority of the total membership of the House and also by a majority of not less than two-thirds of the members of that House present and voting in the same session. Removal can take place only on the ground of misbehaviour or incapacity investigated and proved in accordance with the procedure which Parliament may by law determine.

Every Judge of the Supreme Court before he enters upon his office has to make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation that "I will bear true faith and allegiance to the Constitution of India as by law established, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."<sup>23</sup>

**Salaries, etc., of the Judges.** The Judges of the Supreme Court are paid salaries as specified in the Second Schedule of the Constitution: the Chief Justice Rs. 5,000 and any other Judge Rs. 4,000 a month. The salaries of the Supreme Court Judges are, thus, fixed by the Constitution itself and not determined by Parliament. But the President has the power to reduce the salaries of the Judges during the continuance of the Proclamation of Financial Emergency.<sup>24</sup>

The Judges are also entitled without payment of rent to the use of an official residence. They are further entitled to travelling facilities or allowances when they travel on duty, the right to leave of absence and pension on retirement. The salaries, allowances, and pensions of the Judges are charged on the Consolidated Fund of India<sup>25</sup> and are, accordingly, not subject to the vote of Parliament. The privileges, allowances and other rights in respect of leave of absence and pension are fixed by an Act of Parliament, but may not be varied to their disadvantage after their appointment.<sup>26</sup>

Thus, the Constitution guarantees to the Judges of the Supreme Court both security of service and emoluments. These provisions are intended to make the judiciary independent, impartial, incorruptible, and having the courage and conviction to do the right as defined by law. "Next to permanency in office", observed Alexander Hamilton, "nothing can contribute more to the independence of the Judges than a fixed provision for their support....In the general course of human nature a power over man's subsistence amounts to a power over his will." The maximum pen-

23. Third Schedule IV.

24. Article 360 (4) (b).

25. Article 112 (2) (d) (i).

26. Article 125 (2).

sion for a Judge is Rs. 26,000 a year. In case he has not completed seven years' service, he is entitled to Rs. 7,800 a year.

**Independence of the Judges.** The Constitution ensures the independence of the Judges and there are eight main provisions which safeguard it and are recapitulated for clarity.

(1) **Appointment.** As already said, the Judges are appointed by the President in consultation with the Chief Justice of India and such other Judges of the Supreme Court and the High Courts as the President may deem necessary. The Constitution makers were at pains to avoid any political consideration in the appointment of Judges as the President acts on the advice of his Council of Ministers and, accordingly, they prudently provided the method of consultation with the Judges themselves both of the Supreme Court and the High Courts and whom the President considered eminently suitable to tender advice. Dr. Ambedkar elucidated the point in the Constituent Assembly. He said, "It seems to me that in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find in the United Kingdom, it would be dangerous to leave the appointments to be made by the President without any kind of reservation or limitation. Similarly, it seems to me that to make every appointment which the Executive wishes to make to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are *ex hypothesi* well qualified to give proper advice in the matters of this sort." In Britain appointments of Judges are made by the Crown whereas in the United States Judges of the Supreme Court are appointed by the President with the consent of the Senate.

(2) **Qualifications.** Under the Constitution only a citizen of India who has been for at least five years a Judge of a High Court or for ten years an Advocate of a High Court or a person who in the opinion of the President is a distinguished jurist is qualified to be appointed a Judge of the Court. It all aims to achieve high minimum qualifications for appointment to that august office eliminating thereby import of politics. The Constitution of the United States does not state what qualifications are demanded of Judges of the Supreme Court.

(3) **Tenure.** The age of retirement of a Judge is sixty-five. The Constitution also provides for retired Judges of the Supreme Court to act as a Judge of that Court. The Law Minister while justifying both these provisions said in the Constituent Assembly, "If you fix any age-limit, what you are practically doing is to drive out a man who, notwithstanding the age that we have prescribed, is hale and hearty, sound in mind and sound in body, and capable for a certain number of years of rendering perfectly good service to the State. I entirely agree that sixty-five cannot always

be regarded as the zero hour in a man's intellectual ability. Hence, the special provision in the Constitution for appointing a retired Judge. Therefore, there is less possibility of losing the talent of individual people who have already served in the Supreme Court."<sup>3</sup> Judges of the Supreme Court in the United States hold office during good behaviour and there has been much criticism of life appointments. By the Act of 1937, Justices may retire, without resigning, after ten continuous years of service and upon reaching the age of 70.

(4) **Removal from office.** A Judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address by each House of Parliament, supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members present and voting, has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. There can be no other cause for removal and the removal must alone be on the ground of proved misbehaviour or incapacity. Judges in Britain are removed only by joint address of both Houses of Parliament to the Crown. In the United States of America Judges of the Supreme Court can be removed by impeachment.

(5) **Remuneration.** The Constitution fixes the salary of the Chief Justice at Rs. 5,000 per month and of the other Judges at Rs. 4,000. Each Judge gets a rent-free house and is entitled to certain other allowances and privileges. The maximum pension for a Judge is Rs. 26,000 a year. In case he has not completed seven years' service, he is entitled to Rs. 7,500 a year. The salary, allowances, privileges and other rights of the Judges in respect of leave of absence or pension after retirement cannot be varied to their disadvantage after their appointment, except during the continuance of Financial Emergency when salaries of the Judges may be reduced by a law of Parliament. The salaries and allowances of the Judges are charged on the Consolidated Fund of India and, accordingly, are not subject to the vote of the Lok Sabha.

(6) **Immunities of Judges.** The Constitution provides that no discussion on the conduct of a Judge in the discharge of his duties shall take place in Parliament. This has been done to ensure independence of the Judges so that they uphold the Constitution and perform their duties without fear or favour. Nor can the actions and decisions of the Judges in their official capacity be subjected to criticism so as to impute motives of any kind. The Supreme Court has the power to initiate contempt proceedings against any alleged offender indulging in malicious and tendentious criticism. In the contempt proceedings against the Editor, Printer and Publisher of **The Times of India**, the Court held, "No objection could have been taken to the article (editorial), but had it merely preached to Courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges it not only transgressed the limits of fair and bona fide criticism, but had a clear tendency to affect the dignity and prestige of this Court. The article in question was thus a gross contempt of Court. It is obvious that if an impression is created in the minds of the public that the judges in the highest court

of the law act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined. It was for this reason that the rule was issued against the respondents."<sup>29</sup>

The Court may also initiate contempt proceedings if an attempt direct or indirect, is made to prejudice the mind of the Judge in coming to an impartial and independent decision. In *Dalit's State of U.P.*, the Court held, "... that the object of writing this pamphlet and publication of publishing it at the time it was actually being was quite clearly to affect the minds of the Judges and deflect them from the strict performance of their duties. The offending passage and the time and the place of its publication certainly tended to hinder or obstruct the due administration of justice and was a contempt of Court."<sup>30</sup>

(7) **Establishment.** The Constitution empowers the Supreme Court to have its own establishment and to exercise complete control over it. All appointments of officers and other employees of the Supreme Court are made by the Chief Justice or any other Judge or officer who may be directed for the purpose. The conditions of service of all categories of such employees are determined by the Court. All administrative expenses, salaries and allowances of these employees as well as other maintenance charges of the Courts establishment are charged on the Consolidated Fund of India and are not subject to the vote of the Lok Sabha.

(8) **Prohibitions after retirement.** No person who has been a Judge of the Supreme Court is entitled to plead or act in any Court or before any authority in the country. Even if a Judge resigns office he is debarred from pleading.

**Supreme Court to be a Court of Record.** The Supreme Court is a court of record and has all the powers of such a Court including the power to punish for contempt of itself. A Court of record is a Court whose acts and proceedings are enrolled for perpetual memory and testimony. These records are of such high and super-eminent authority that their truth is not to be called in question in any Court, though the Court of record itself may amend clerical slips and errors. A Court of record has the power to fine and imprison for contempt of its authority.

In the Draft Constitution there was no Article defining the status of the Supreme Court. Article 108 of the Constitution was added at the instance of Dr. Ambedkar. While introducing the amendment he observed, "Sir, the new Article 108 is necessary because we have not made any provision in the Draft Constitution to define the status of the Supreme Court. If the House will turn to Article 129, they will find exactly a similar Article with regard to the High Courts in India. It seems, therefore, necessary that similar provision should be made in the Constitution in order to define the position of the Supreme Court. I do not wish to take much time of the House in saying what the words 'a Court of record' mean. I may briefly say that the Court of record is a Court, the records of which are

29. S.C.B., 1953, 215

30. A.I.R., 1954, S.C., 743.



admitted to be of evidentiary value and they are not to be questioned when they are produced before any Court. That is the meaning of the words 'Court of record'. Then, the second part of Article 108 says that the Court shall have the power to punish for contempt of itself. As a matter of fact, once you make a Court a Court of record by statute, the power to punish for contempt necessarily follows from that position. But it was felt that in view of the fact that in England this power is largely derived from Common Law and as we have no such thing as Common Law in this country, we felt it better to state the whole position in the statute itself."<sup>31</sup>

The two chief characteristics of a Court of record, therefore, are: (1) the proceedings of the Court of record, preserved in its archives, are called records, and are conclusive evidence of that which is recorded by it, and (2) the Court has power to punish for contempt of itself. In **Vinayak Shamrao v. Moreshwar Ganesh**, Justice Bose observed, "That is the whole point of a Court of record. All its judgments are preserved, and not merely those which are specially approved or favoured. Why? Because they operate as precedents and may be sent for and studied and followed as occasion requires."

## JURISDICTION AND POWERS OF THE SUPREME COURT

**Powers of the Supreme Court.** The powers and functions of the Supreme Court are reflected in its jurisdiction. In his speech at the inaugural sitting of the Federal Court in 1937, Sir Maurice Gwyer, the first Chief Justice of India, said, "But if, obeying the old maxim that it is the part of a good Judge to enlarge his jurisdiction, I have for a moment looked too far into the future, I do not forget the immediate functions of the Courts; and these are of the first importance. Independent of Governments and parties and unaffected by the vicissitudes of politics, its primary duty is to interpret the Constitution and to provide a peaceful and rational solution of differences which, in the absence of an impartial and independent arbiter, might inflame passions and even issue in violence. It will always be our endeavour to look at the Constitution of India, whether in its present form or in any other form which it may assume hereafter, not with the cold eye of the anatomist, but as a living and breathing organism which contains within itself, as all life must, the seeds of future growth and development. And let me add that I hope that no canons of interpretation which we may adopt will ever hamper the free evolution of those constitutional usages and conventions for which indeed the law provides no sanction, but in which, if opportunity is given, the political genius of a people can find its most fruitful and effective expression."

"The Federal Court will declare and interpret the law, and that I am convinced, in no spirit of formal or barren legalism. But I do not wish to be misunderstood. This Court can, and I hope will, secure that those political forces and currents, which alone can give vitality to a Constitution, have free play within the limits of the law; but it cannot under the current of interpretation alter or amend the law; that must be left to other autho-

titles. Nevertheless, with the passage of time, it has come to be no doubt that the Court is the final arbiter of the disputes between the Federal Government and the States, and that it has a link between the Federal Government and the States, and that it is its own."

It is a lengthy and detailed report of the Supreme Court of the United States, which is the highest Court in the country, and the only one which is not subject to appeal. The Constitution of India, which is the basis of the Government, provides for the Supreme Court. It is a Court of final appeal, and it has the original jurisdiction in the disputes between the Union and the States, and in the disputes between the States. It also has the jurisdiction to issue writs for the enforcement of Fundamental Rights. It is the highest Court in the country, and it is the final arbiter of the disputes between the Federal Government and the States, and between the States. It is the link between the Federal Government and the States, and it is its own.

## ORIGINAL JURISDICTION

1. **Jurisdiction relating to disputes.** In a federal polity, the disputes as said earlier, are decided by the Court of the National Government, State Governments, and local authorities. It is important that there should be an independent national authority to settle the disputes between the Union and the States, and to secure the respective rights of the Union and the States. The Constitution of India vests the Supreme Court with the original and exclusive jurisdiction in any dispute:

- (a) between the Government of India and one or more States;
- (b) between the Government of India and any State or States on one side and one or more States on the other side; or
- (c) between two or more States

which involves any question of law or fact on which the existence or extent of a legal right depends. That is to say, the dispute between the Union and the States or between the States *inter se* must be a justiciable right. Where the claim made by one of the parties is not dependent on law but on legal considerations, the Supreme Court has the original jurisdiction. Thus, in order to invoke the original jurisdiction of the Supreme Court two conditions are necessary (1) as to parties, and (2) as to the nature of the dispute. If these two conditions are not satisfied, a suit cannot be brought before the Supreme Court.

The Supreme Court of India, unlike the American Supreme Court, has no original jurisdiction over cases involving ambassadors and Public ministers or treaties.<sup>32</sup> Nor can it entertain suits to which citizens are a party. Suits by individuals against the Union or a State can be brought in the ordinary Courts and would come up to the Supreme Court only in

32. Article 131.

33. Refer to Art. III, Sec. 2 (2).

34. Proviso to Article 131.

appeal, if the provisions relating thereto are satisfied. The Constitution, also, excludes from the original jurisdiction of the Supreme Court disputes relating to water of inter State rivers or river valleys referred to a special statutory tribunal, matters referred to the Finance Commission, adjustment of certain expenses between the Union and the States, and bar to interference by Courts in disputes arising out of certain treaties, agreements, etc.<sup>35</sup>

2. **Jurisdiction in the matter of Fundamental Rights.** The Supreme Court has been invested with special jurisdiction and responsibility in the matter of the enforcement of Fundamental Rights<sup>36</sup> and in the exercise of this jurisdiction the Court has the power to issue directions or orders or writs in the nature of **habeas corpus, mandamus, prohibition, quo warranto** and **certiorari**, whichever may be appropriate. The Constitution also provides that Parliament may by law confer on the Supreme Court power to issue directions, orders or writs in the nature of **habeas corpus, mandamus, prohibition, etc.**, for any purposes other than the enforcement of Fundamental Rights.<sup>37</sup> It would, thus, be clear that in the exercise of its original jurisdiction the Supreme Court may issue directions or orders in the nature of these writs for the enforcement of Fundamental Rights and for other purposes, if so empowered by an Act of Parliament. It must, however, be noted that the jurisdiction of the Supreme Court to issue directions or orders in the nature of writs for the enforcement of Fundamental Rights is not exclusive. It is concurrent with that of the High Courts.<sup>38</sup> The High Courts are also empowered to issue directions, orders or writs for the enforcement of the Fundamental Rights and for any other purpose, but the Constitution places special responsibility on the Supreme Court when it ordains: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed."<sup>39</sup> No such responsibility is laid on High Courts under Article 226. In **Romesh Thapar v. State of Madras** the Supreme Court held that Article 32 of the Constitution does not merely confer power on the Supreme Court as Article 226 does on the High Courts, to issue certain writs for the enforcement of Fundamental Rights or for any other purpose as part of its general jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a Fundamental Right by being included in the Chapter on Fundamental Rights in the Constitution. The Supreme Court as such constituted is "the protector and guarantor of fundamental rights, and it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights. A

35. Article 262.

36. Article 280.

37. Article 290.

38. Article 363 (1).

39. Article 32 (2).

40. Article 139.

41. Article 226.

42. Article 32 (1).

citizen can resort directly for such relief to the Supreme Court without first resorting to the High Court under Article 226 of the Constitution."

It may further be added that the Supreme Court has made it abundantly clear that remedy under Article 32 can only be permitted in the case of an infringement of a Fundamental Right and cannot be extended to cover cases of infringement of any other constitutional right. In **Ramjilal v. Income Tax Officer** the Supreme Court has held that the immunity from the imposition or collection of taxes by authority of law which is conferred by Article 265 is not a Fundamental Right and cannot, therefore, be enforced by a petition under Article 32.<sup>43</sup>

Secondly, the Supreme Court has also laid down that a petition under Article 32 must establish not only that the impugned law is an infringement of a Fundamental Right but that it also affects or involves the Fundamental Right of the petitioner guaranteed by the Constitution. In **Charanjitlal v. Union of India**, a shareholder of a company sought to enforce a Fundamental Right of the Company under Article 32, and it was held by the Court that he could not do so unless his own Fundamental Right had been infringed.<sup>44</sup>

The Supreme Court is also empowered to decide any dispute relating to the election of the President or the Vice-President.

### APPELLATE JURISDICTION

The Supreme Court also exercises appellate jurisdiction from High Courts and other Tribunals in the States. The Supreme Court is, thus, the final appellate court in the country. An appeal to the Supreme Court is provided in all cases, civil, criminal, or other proceedings, in which a constitutional question is involved.<sup>45</sup> The Court in **Election Commission v. Venkatarao** observed: "The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions." In civil cases there will lie an appeal as of right to the Supreme Court once the certificate as to value is obtained from the High Court.<sup>46</sup> In criminal cases, too, the appeal lies to the Supreme Court as of right in cases involving death sentence and as specified in clauses (a) and (b) of Article 134(1).<sup>47</sup> Moreover, the right of the Supreme Court to entertain

43. Also refer to *Nun Sukh v. State of U.P., Kastari and Sons Ltd. v. Saklateswaram*.

44. Also refer to *Dwarkadas Shrinivas v. Sholepur Spinning and Weaving Company*.

45. Article 132 (1).

46. Article 133 (1) (a) (b) The value involved must not be less than Rs. 20,000 or any other amount determined by an Act of Parliament.

47. When the High Court reverses an order of acquittal and the accused person is sentenced to death or the High Court has withdrawn the case from a subordinate Court to its authority and sentenced the accused person to death.

appeal, by special leave, in any cause or matter determined by any Court in India, except Military Tribunals, is unlimited."

The Supreme Court as the highest Court of appeal stands at the apex of the Indian Judiciary. Its appellate jurisdiction is much wider than that of the Supreme Court of the United States which concerns itself only with cases arising out of federal jurisdiction, or the validity of laws. M.C. Setalvad, in his speech at the inauguration of the Supreme Court on January 28, 1950, said: "The writ of this Court will run over territory extending to over two million square miles inhabited by a population of about 300 millions. . . . It can truly be said that the jurisdiction and powers of this Court in their nature and extent are wider than those exercised by the High Courts of any country in the Commonwealth or by the Supreme Court of the U.S.A. . . . In fact, the Supreme Court has shown willingness to entertain appeals not only from ordinary courts but also from industrial courts, election tribunals and other quasi-judicial adjudicating bodies.

The appellate jurisdiction of the Supreme Court for purposes of clarity may be discussed under four categories:

(1) **Constitutional cases.** An appeal lies to the Supreme Court from any judgment, decree or final order of a High Court in India, whether in a civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.<sup>48</sup> Where the High Court has refused such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant special leave to appeal from such judgment, decree or final order.<sup>49</sup> When a certificate by the High Court or special leave by the Supreme Court has been granted any party in the case may appeal to the Supreme Court on the ground that the High Court has wrongly decided the question of law regarding the interpretation of the Constitution. But the appellant may, with the permission of the Supreme Court, take other grounds also in support of his appeal.<sup>50</sup> And the new ground taken with the permission of the Supreme Court need not be a constitutional ground.

It follows that the decision of the High Court upon the validity of an Act or any other question involving the interpretation of the Constitution shall not be final. The final authority for interpreting the Constitution rests with the Supreme Court, whatever be the nature of the suit or proceedings. It may, however, be noted that the case appealed in the Supreme Court, either when the High Court grants a certificate or where the Supreme Court grants special leave, must involve a question of law and it must be a substantial question of law as to the interpretation of the Constitution. It must not be a question of fact and it must not be a question of interpretation of any other law which does not involve the interpretation of the Constitution. The minimum number of Judges, who sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution, is fixed by the Con-

48. Article 136.

49. Article 132 (1).

50. Article 132 (2).

51. Article 132 (3).



stitution at five.<sup>52</sup> That is, the constitutional Bench of the Supreme Court must consist of at least five Judges.

(2) **Appeals in civil matters.** Article 133 provides for a right to appeal to the Supreme Court in civil proceedings against a judgment, decree or final order of a High Court if it certifies the case as fit for appeal.<sup>53</sup> An appeal also lies on the certificate of a High Court either that the matter in dispute, both at the inception of the suit and when the certificate is sought, is not less than Rs. 20,000,<sup>54</sup> or that the decision involves a question respecting property of that value. But if the High Court's judgment confirms a judgment of an inferior Court a further certificate that a further question of law is involved is required. A party which secures a certificate that a substantial question of law is involved cannot be debarred from raising a constitutional point.

(3) **Appeals in criminal cases.** An appeal lies to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if it (1) sets aside on appeal an order of acquittal passed by the lower Court and sentences the accused person to death; or (2) has withdrawn for trial before itself a case from a subordinate Court and has, in such trial, convicted the accused and sentenced him to death; or (3) certifies that the case is a fit one for appeal to the Supreme Court.<sup>55</sup>

The Constitution further authorises Parliament by law to enlarge the appellate jurisdiction of the Supreme Court in criminal matters.<sup>56</sup> But so long as Parliament does not legislate as such the Constitution intends that, except in cases referred to above, the State High Courts shall normally be the final Courts of appeal in criminal matters. Hence, where a High Court grants a certificate that the case is a fit one for appeal to the Supreme Court it should do it only in exceptional cases "where it is manifest that by disregard of legal process or by violation of the principles of natural justice or otherwise, substantial and grave injustice has been done."<sup>57</sup>

(4) **Special leave to appeal by the Supreme Court.** The Supreme Court may, in its discretion, grant leave to appeal from any judgment, decree or order, etc., in any cause or matter made by any Court or tribunal in India, other than a Court Martial.<sup>58</sup> This provision gives very wide powers to the Supreme Court. Articles 132 to 135 deal with ordinary appeals to the Supreme Court and they lay down the conditions under which an appeal will ordinarily lie to the Supreme Court. But under Article 136 discretion is conferred on the Supreme Court to grant special leave of appeal from any decision of any Court or tribunal other than a Court Martial. It means that the leave to appeal may be granted notwithstanding the limitations contained in Articles 132 to 135 and notwith-

52. Article 145 (3).

53. Article 133 (3).

54. Article 133 (1).

55. Article 134.

56. Article 134 (2).

57. *Mohinder Singh v. The State.*

58. Article 136.

standing that the High Court has refused leave to appeal. The power of the Supreme Court to grant special leave to appeal is, thus, not subject to any constitutional limitation. It is left entirely to the discretion of the Supreme Court. "Broadly speaking," writes Durga Das Basu, "the Supreme Court could exercise this power to give relief to the aggrieved party in cases where the principles of natural justice have been violated, even though the party may have no footing to appeal as of right."

Moreover, the special leave to appeal under the provisions of Article 136 can be not only from a High Court but also from any Court or tribunal in the territory of India. The Supreme Court has, thus, power to grant special leave to appeal even from the judgment of a Court subordinate to a High Court or a tribunal, the duties and functions of which are similar in the nature to those of a Court. In **Bharat Bank v. The Employees of the Bharat Bank** Justice Fazl Ali observed: "Can we then say that an Industrial Tribunal does not fall within the scope of Article 136? If we go by a mere label, the answer must be in the affirmative. But we have to look further and see what the main functions of a Tribunal are and how it proceeds to discharge those functions. This is necessary because I take it to be implied that before an appeal can lie to this Court from a Tribunal, it must perform some kind of judicial function and partake to some extent of the character of a Court."

It will be, thus, clear that subject to the exception that no appeal lies to the Supreme Court from any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces, the extraordinary jurisdiction of the Supreme Court extends to all cases and all matters, civil, criminal or otherwise. It has also been held by the Supreme Court, in **Raj Krishna Bose v. Binod Kanungo**, that even when the Legislature states that the orders of a tribunal under an Act like the Representation of the People Act, shall be conclusive and final, the Court can interfere under Article 136 as the jurisdiction conferred by this Article cannot be taken away or whittled down by the Legislature. The discretion of the Court, so long as this provision remains, is unfettered.

As regards the precise extent of the jurisdiction under Article 136 the Supreme Court has held in **Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax**, that "It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in the Supreme Court by the constitutional provision made in Article 136. The limitations, whatever they may be, are implicit in the nature and character of the power itself. It being an exceptional and over-riding power, naturally it has to be exercised sparingly and with caution and only in special and exceptional situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rules". The Court, accordingly, does not grant special leave to appeal unless it is specifically shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and the case in question presents fea-

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59. *Commentary on the Constitution of India*, p. 444. Also refer to **Bharat Bank v. Employees of the Bharat Bank**.

tures of sufficient gravity to warrant a review of the decision appealed against.<sup>60</sup>

**Enlargement of the Jurisdiction of the Supreme Court.** The Constitution provides for further enlargement of the jurisdiction of the Supreme Court by an Act of Parliament. But if the enlargement of such jurisdiction affects matters on the Union List, the agreement of the State Governments is a prerequisite. The enlargement of powers may be in relation to the original or the appellate jurisdiction of the Supreme Court. This power follows from the power of Parliament to legislate with respect to such matters. The *ad hoc* Committee on Supreme Court observed: "If the Union Legislature is competent to legislate on a certain matter, it is obviously competent to confer judicial power in respect of that matter on a tribunal of its own choice, and if it chooses the Supreme Court for the purpose, the Court will have the jurisdiction so conferred."<sup>61</sup>

Parliament may by law confer on the Supreme Court power to issue directions, orders or writs for any purpose other than the enforcement of Fundamental Rights. It should be noted here that while the power of the Supreme Court to issue directions, orders or writs for the enforcement of Fundamental Rights is conferred by the Constitution itself and is guaranteed by it, the power of the Supreme Court to issue directions, order or writs for other purposes depends on an Act of Parliament and is consequently subject to regulation by Parliament.

Parliament may by law make provision for conferring on the Supreme Court such ancillary powers as may be necessary to enable it to perform the functions placed upon it under the Constitution. But such law of Parliament must not be inconsistent with any of the provisions of the Constitution.<sup>62</sup>

**Power to review its own decisions.** Like the highest Courts in other countries the Supreme Court of India, too, is not bound by its own decisions. It can reconsider its own decisions provided that such review is in the interest of the community and justice. An application for review must be filed with the Registrar of the Supreme Court within thirty days its judgment is delivered in appeal and it must briefly and distinctly state the grounds for review. The application for review must also be accompanied by a certificate by a counsel that it is supported by proper grounds. Any such review is undertaken by a larger Bench than the one which passed the original judgment. The Supreme Court's power to review its earlier decisions helps it to correct any decision which may be erroneous.

**Enforcement of decrees and orders of the Supreme Court.** The decisions of the Supreme Court are binding on all Courts in India.<sup>63</sup> It may pass any order to do complete justice in any cause or matter before it,

60. *Sadhu Singh v. State of Pepsu*.

61. Article 138.

62. Report of the *ad hoc* Committee on Supreme Court. *The Framing of India's Constitution, Select Documents*, Vol. II, p. 588.

63. Article 139.

64. Article 140.

65. Article 141.

and its orders are enforceable throughout the territory of India in such manner as may be prescribed by an Act of Parliament.<sup>66</sup> All civil and judicial authorities are constitutionally bound to act in aid of the Supreme Court.<sup>67</sup>

The Constitution, accordingly, gives a binding nature to the decisions of the Supreme Court and the supreme and overriding status of these judgments is placed beyond the reach of an ordinary legislative enactment.

**Consultative or advisory functions.** The Constitution confers on the President the power to refer to the Supreme Court any question of law or fact which in his opinion is of public importance. The President may refer such a question not only where it has actually arisen but also where it appears to the President that it is likely to arise. The President can, accordingly, refer to the Supreme Court the question whether a proposed Bill will be *intra vires* of the Constitution. Such references are heard by a Bench consisting of at least five Judges and the Court follows the procedure of a regular dispute that comes before it. The opinion of the Court is pronounced in open Court. It may not be a unanimous opinion and the dissenting Judges can give their separate opinion. But the opinion of the Supreme Court is not binding on the President as it is not of the nature of a judicial pronouncement. It is also not obligatory on the Supreme Court to give its opinion; it may or may not.

Under Clause (2) of Article 143 the President may refer to the Supreme Court for its opinion dispute arising out of any treaty, agreement, etc., which had been entered into or executed before the commencement of the Constitution. In the case of such references, it is obligatory for the Supreme Court to give its opinion to the President.

The first reference made by the President to the Supreme Court for its opinion was in 1951. The Court was asked to determine the validity of certain provisions of the Delhi Laws Act, 1912, the Ajmere Marwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950. The second reference was on the Kerala Education Bill in 1957. A reference was made in connection with an Indo-Pakistan agreement relating to the exchange of enclaves (Berubari Union). The opinion of the Supreme Court in this case was against the views of the Government of India which had held that Parliament was competent to implement the agreement by an ordinary enactment and amendment of the Constitution was not necessary.

The latest reference made by the President was relating to the resolution of conflict between the Uttar Pradesh Legislative Assembly and the Allahabad High Court. The facts of the case were as follows: a person who had been sentenced for contempt of the Assembly approached the High Court for a writ of *habeas corpus*. The Assembly summoned to its bar the Judges of the High Court who had issued the rule on the ground that the Judges had been guilty of contempt. The Supreme Court held that in a case involving contempt allegedly committed by a person

66. Article 142.

67. Article 144.

who is not a member of the Assembly, the High Court can deal with a petition challenging the order of the Legislature. The Court also ruled that a Judge who passes an order on such petition does not commit contempt of the Legislature.

The advisory function of the Supreme Court is analogous to that possessed by the Privy Council in Britain. Section 4 of the Judicial Committee Act, 1833 provided that His Majesty may refer to the Judicial Committee of the Privy Council "any such matter whatsoever as His Majesty shall think fit". The Committee shall, where a reference is made to it, hear and consider the same and advise His Majesty. But dissenting opinions are not delivered in the Privy Council and here the procedure followed in India differs from that of the Privy Council.

Similarly, Section 60 of the Canadian Supreme Court Act, 1906 authorises the Governor General to refer important questions of law and fact and obtain the opinion of the Supreme Court thereupon. The Supreme Court is bound to entertain and answer the references and the answers are advisory. But the Constitution of the United States does not contain any corresponding provision and the Supreme Court has consistently refused to pronounce advisory opinions upon abstract questions of law. To do so, the Supreme Court held, would be incompatible with the position the Court occupies in the Constitution of the United States.<sup>68</sup>

There had been a good deal of difference of opinion among jurists and political thinkers in India on the advisability of placing a constitutional obligation on the Court to give opinion to the executive on questions of law. The framers of the Constitution, however, thought it expedient to confer advisory functions on the Supreme Court. The *ad hoc* Committee on Supreme Court in this connection observed: "Having given our best consideration to the arguments pros and cons, we feel that it will be on the whole better to continue this jurisdiction" even under the new Constitution. It may be assumed that such jurisdiction is scarcely likely to be unnecessarily invoked...."<sup>69</sup> Durga Das Basu objects to the use of the word "jurisdiction". He refers to Halsbury's *Laws of England* where jurisdiction of a Court is defined as "the authority or power of a Court to hear and determine a cause or complaint presented in a formal way for its decision. The authority conferred on the Supreme Court in this respect, he says, is not the authority to hear any cause or complaint. The Court is required to give its opinion on any question of public importance that may be referred to it by the President. Opinion so given by the Supreme Court is not of the character of judgment and is, therefore, not binding upon the Courts in India, although all such opinions carry great weight and authority with all courts and tribunals.

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68. *Muskrat v. United States*.

69. Also refer to Professor Felix Frankfurter's (now a Justice of the Supreme Court of the United States) opinion. This is quoted by V.N. Shukla in his *Constitution of India*, p. 142.

70. Section 213 of the Government of India Act, 1935 conferred advisory jurisdiction on the Supreme Court.

71. *The Framing of India's Constitution, Select Documents*, Vol. II, p. 589.



If the Chairman or any other Member of the Public Service Commission is sought to be removed from his office on grounds of misbehaviour, a reference must be made by the President to the Supreme Court, which will report in favour or against such removal after an inquiry. But a novel extension of the advisory functions of the Supreme Court has recently been observed. The Prime Minister made a statement in Parliament on May 7, 1963, that a Supreme Court Judge would make a quasi-judicial inquiry into the dealings of Minister of Mines and Oils, K.D. Malaviya *vis a-vis* Serajuddin and Company.

## SUPREME COURT AND JUDICIAL REVIEW

The Supreme Court is the guardian of the Constitution. The power of the Courts to interpret the Constitution and to secure its supremacy is, in fact, inherent in any Constitution which provides government by defined or limited powers. "A limited Constitution...one which contains certain specified exceptions to the legislative authority...can be preserved in practice in no other way than through the medium of the Courts of Justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges amount to nothing."<sup>72</sup> This point was succinctly elaborated by Chief Justice Marshall of the United States in the famous case of *Maybury v. Madison*. He observed: "The powers of the Legislature are defined; and that these limits may not be mistaken or forgotten, the Constitution is written...The Constitution is either superior, a paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it...If the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power, in its own illimitable...."

"It is emphatically the province and duty of the judicial department to say what the law is...If, then, Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution and not such ordinary act must govern the case to which they both apply."

The Constitution of the United States does not specifically empower the Supreme Court to declare the constitutionality or otherwise of State or Federal Acts. But the Supreme Court has deduced this power from two important provisions of the Constitution which are, also, indicative of the intention of its framers. Article VI establishes the supremacy of the Constitution and Article III extends the federal judicial power to "all cases, in law and equity arising under this Constitution." Chief Justice Marshall relying upon these provisions, declared in *Marbury v. Madison* that the Supreme Court determines the constitutionality or otherwise of the laws, Federal and State, and this power with the Supreme Court was a necessary consequence of the supremacy of the Constitution. Otherwise the declaration of the supremacy of the Constitution, Marshall concluded, would have no meaning. Since Marshall's decision in 1803, the principle

of judicial review is firmly embedded in the American system of government and it has, as Dicey maintained, become a duty of every Judge in the United States to treat as void any enactment which violates the Constitution.

There is no express provision in the Constitution of India declaring the Constitution to be the supreme law of the land. Perhaps, the framers of the Constitution deemed such a declaration superfluous, because they might have believed the power to be clearly enough implied when all the organs of Government, Federal and State, owe their origin to the Constitution and derive powers therefrom, and the Constitution itself cannot be altered except in the manner specifically laid down in the Constitution as provided for in Article 368.

It is, again, true that the Constitution does not expressly empower the Courts to declare laws invalid. But the absence of such a provision in the Constitution does not, as said before, restrict the right of the Courts to decide whether a piece of legislation is void or not. It is a necessary consequence of the supremacy of the Constitution. Moreover, a Federal polity functions within demarcated and delimited spheres. The Constitution, as such, imposes definite limitations on the different organs of Government and exercise of any excess of authority by any organ of Government is transgression of the constitutional limitations and, accordingly, void of the Constitution. It is for the Courts to determine whether any of the constitutional limitations has been exceeded or not.

The Constitution of India imposes two kinds of limitations on the powers of the Legislature: (a) Legislative competence, and (b) Fundamental Rights conferred by Part III of the Constitution.

(a) **Legislative Competence.** Articles 251 and 254 provide that in case of inconsistency between law made by Parliament and law made by the Legislatures of State, the law made by Parliament prevails and the State law shall be void. There is no corresponding provision nullifying Union law with respect to a matter included in the State List. But Article 246 demarcates the subject matter of laws within the competence of Parliament and the State Legislatures, and these subjects are enumerated in List I and List II. It is, further, provided that Parliament has exclusive power to make laws with respect to the subjects enumerated in the Union List, and the State Legislatures have exclusive power to make laws with respect to subjects enumerated in the State List. The Union Parliament, no doubt, has the power to legislate for the whole or any part of the territory of India under Article 245, but this territorial jurisdiction of Parliament is "subject to the provisions of the Constitution", and the provisions of the Constitution limit the jurisdiction of Parliament to subjects enumerated in the Union List. If Parliament directly makes law with respect to a subject matter included in the State List and it is not "subject to the provisions of the Constitution," it is the duty of the Courts to declare such law of Parliament void.<sup>73</sup> Thus, the Courts in India have the power to pronounce upon the validity of laws on the ground of excess

of legislative powers, though such powers is vested in the High Court and the Supreme Court.<sup>74</sup>

(b) Other provisions which limit the powers of Parliament and State Legislatures are those relating to the Fundamental Rights contained in Part III of the Constitution. Article 13 declares that any Law of the Legislature which contravenes any of the provisions of the Part on Fundamental Rights shall be void. The inclusion of Article 13 in the Constitution is, in fact, a matter of abundant caution. Even in the absence of this Article, if any of the Fundamental Rights was infringed by any enactment of the Legislature, the Courts have always the power to declare the enactment, to the extent it transgresses the limits, invalid. Chief Justice Kania observed in *Gopalan v. The State of Madras*, "The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the Fundamental Rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid. The existence of Article 13(1) and (2) in the Constitution therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution itself."

The Fundamental Rights conferred by the Constitution are not absolute. They are limited. In some cases the limitations are imposed by the Constitution itself, while others leave it to the Courts to determine the reasonableness of the restrictions. It must, however, be noted that in every case it is the rights which are fundamental and not the limitations. It is the duty of the Supreme Court, therefore, to see that the rights which are intended to be Fundamental are kept Fundamental and if any law has transgressed any of these limitations it is to be ascertained by the Court. If the Court determines that the law exceeds the limits so imposed, it will declare the law to be void. The Court must see that neither Parliament nor the Executive exceed the bounds within which they are confined by the Constitution.

The power of judicial review exercised by the Supreme Court was abundantly made clear by Justice B.K. Mukerjee. "The Constitution of India," His Lordship observed, "is a written Constitution and though it has adopted many of the principles of the English parliamentary system, it has not accepted the English doctrine of the absolute supremacy of Parliament in matters of legislation. In this respect, it has followed the American Constitution and other systems modelled on it. Notwithstanding the representative characters of their political institutions, the Americans regard the limitations imposed by their Constitution upon the action of the Government, both legislative and executive, as essential to the preservation of public and private rights. They serve as a check upon what has been described as the despotism of the majority...."

"In India it is the Constitution that is Supreme and Parliament as well as State Legislatures must not only act within the limits of their respective legislative spheres as demarcated in the three lists occurring in the

74. Article 228.

75. Articles 131-36.

Seventh Schedule to the Constitution, but Part III of the Constitution guarantees to the citizen certain fundamental rights which the legislative authority can on no account transgress. A statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not".

Apart from being implied in the division of powers between the Union and the States and in the inclusion of the Fundamental Rights, judicial review is explicit in the constitutional provisions that the Supreme Court exercises jurisdiction in cases between the Union and one or more States or the States *inter se*, that it is the Court of appeal in cases involving interpretation of the Constitution and that the right to move the court for the enforcement of Fundamental Rights is itself a fundamental right.

Judicial review is, therefore, an essential part of the Indian constitutional system and the framers of the Constitution gave an unequivocal expression of it when they described the Supreme Court in the Constituent Assembly as "the Guardian of the Constitution", a "Champion of liberties", "a watch-dog of Democracy," and so on. This is further authenticated by para 5 of the Report of the Drafting Committee which read, "The Drafting Committee had attempted to make these rights (Fundamental Rights) and the limitations to which they must necessarily be subject as definite as possible, since the Courts may have to pronounce upon them." Then, the Judges of the Supreme Court, as also that of the High Courts, make and subscribe an oath and affirmation, before assumption of office "to uphold the Constitution and laws".<sup>76</sup> No other functionary—"not even the President of India—", cogently observes Dr. Dash, "is administered a similar oath and as such the Judiciary has the solemn duty of upholding the Constitution against attacks from the legislature and the executive and again to uphold the laws against arbitrary action of man in power, in order that there shall be a government by laws and not of men."<sup>77</sup> Justice S.R. Das also held that "the Court is bound by its oath to uphold the Constitution".

But it does not mean that the scope of the power of the Supreme Court is as extensive as that of the Supreme Court of the United States. This position has been accepted by the Supreme Court itself. There is no "due process of law" clause in the Indian Constitution and, as such, the Supreme Court in India, unlike the American Supreme Court, cannot bring in their own conception of justice and equity. It has no authority to question the wisdom or policy of the law duly made by the Legislature, at the Centre or in the States. Nor can it declare a law unconstitutional on the ground of unjust and oppressive provisions or because it is supposed to violate natural, social or political rights of citizens unless such injustice is prohibited or such rights are guaranteed or protected by the Constitution.

**Role of the Supreme Court.** The role of the Supreme Court is, indeed, great and its powers wide. The Supreme Court of India, in the words of Alladi Krishnaswami Aiyar, "has more powers than any other Supreme Court in any part of the world". Placed as it is at the apex of

76. Third Schedule, Parts IV and VIII.

77. Dash, S.C., *The Constitution of India*, p. 353.



a single unified judiciary. it lays down not only the law of the Constitution, but also the general law. Its foremost duty is to see that the laws are fairly administered and justice is denied to none by any Court or tribunal. In addition to ordinary channels of appeal the Constitution confers on the Supreme Court extraordinary powers where justice might require the interference of the Court. The power of the Supreme Court to grant special leave to appeal from the decision of any Court or tribunal, except military tribunals, is not subject to any constitutional limitation. It is entirely the discretion of the Supreme Court and it may give relief to any aggrieved party in cases where the principles of natural justice have been violated.

Then, the Supreme Court is a Court of record and has all the powers of such a Court including the power to punish for contempt of itself. The acts and proceedings of a Court of record are of such high and super-eminent authority that their truth is not to be called in question in any Court. This gives a pre-eminent position to the Supreme Court. Its decisions are binding on all Courts in India and the supreme and overriding status of its judgments is placed beyond the reach of an ordinary legislative enactment. And consultative functions of the Supreme Court are important inasmuch as that it can pronounce advisory opinions even upon abstract questions of law.

But the primary duty of the Supreme Court is to interpret the Constitution and declare laws. It interprets the Constitution and determines laws in case of conflict of authority between the Union and the States. In this respect the role of the Indian Supreme Court vitally differs from that of the Supreme Court of the United States. This is obviously for the reason that there is difference in the very nature of the federation in the two countries. The exhaustive enumeration of powers of the Union and the States in the Seventh Schedule of the Indian Constitution, the vesting of residuary powers and the power of issuing directions in the Union and overriding powers in emergencies minimise the possibilities of disputes to arise between the Union and the States and consequently the Supreme Court to assume such extensive powers of judicial review as it is in the United States.

The detailed enumeration of Fundamental Rights in the Constitution and the provisions which enable them to be reasonably restricted renders judicial review inescapable. But the power of invalidating laws vested in the Supreme Court on the ground of contravention of the Fundamental Rights, again, differs from that of the United States' Supreme Court. There is under the Indian Constitution no "due process" clause and no doctrine of "judicial supremacy". The "due process" clause in the Constitution of the United States and the doctrine of "judicial supremacy" have made the American Supreme Court the arbiter of social policy in the United States; a kind of super-legislature which justifies the claim of Chief Justice Hughes that "we are under a Constitution but the Constitution is what the judges say it is." In India, on the other hand, there had hitherto prevailed the doctrine of "legislative supremacy" subject to constitutional limitations. The Court declared an Act void where it was in clear contravention of the constitutional limitations, but it did not question the policy involved in the legislation. While the Court was always vigil-



ant to prevent any encroachment by the Legislature upon the Fundamental Rights, it was yet not a third Chamber sitting in judgment on the policy laid down by the Legislature and embodied in the legislation which the Court was considering. The Supreme Court itself defined its powers in **Gopalan v. State of Madras**. It held, "In India, the position of the judiciary is somewhere between the Courts in England and the United States . . . no scope in India to play the role of the Supreme Court in the United States." The authority of the Court is to be exercised in such manner that neither Parliament nor the executive exceed the limits set for them by the Constitution; if they do the Supreme Court has the power to halt them.

But the recent decision of the Supreme Court in **Golak Nath and Others vs. The State of Punjab** that in future Parliament cannot abridge any of the Fundamental Rights through the normal procedures of Constitutional amendment under Article 368 raises issues of far-reaching political and juristic importance. In this case the Court has overruled its own unanimous decision to the contrary. "We would be very reluctant", observed Mr. Justice Wanchoo, in his minority judgment, "to overrule the unanimous decision in the **Shankariprasad** case or any other unanimous decision by the slender majority of one in a large Bench constituted for the purpose." The decision in this case was reached by a six to five majority and unless it is reversed by the Supreme Court itself on some future date, it must prevail. The two important implications of the majority decision are that a permanent restraint has been placed on Parliament's power to pass any amendment (even where this is supported by a two-thirds majority in Parliament) which has the effect of taking away or abridging the individual's constitutional rights, and, secondly, the Directive Principles of State Policy must be enforced without amending the Fundamental Rights.

Thus, the delicate and difficult problem of adjusting the Fundamental Rights and restrictions thereon to the ever-changing unforeseen social demands will in future be the responsibility of the judiciary. Sir Maurice Gwyer said, in his speech at the inaugural sitting of the Federal Court, that while declaring and interpreting the law the Court should not look at the Constitution "with the cold eye of the anatomist, but as a living and breathing organism which contains within itself, as all life must, the seeds of future growth and development."<sup>78</sup> In short, the Supreme Court must take into account the "new atmosphere" in Parliament and in the country as Prime Minister Nehru put it while clarifying the Government's position on the Constitution (Fourth Amendment) Bill. The words of Sir Maurice Gwyer that "the Federal Court will declare and interpret the law and that I am convinced, in no spirit of formal or barren legalism" describes the precise role of the Supreme Court. M.C. Setalvad, former Attorney-General of India, referring to the decision in **Golak Nath** case hopes that the Supreme Court itself would work out a solution which would not bar representatives of the people from leading the nation on its onward march of ordered progress and development.<sup>79</sup>

78. December 6, 1937.

79. Address delivered on the occasion of the establishment of the C.P. Ramaswamy Aiyer Foundation in Madras on April 8, 1967. *The Indian Express*, New Delhi, April 10, 1967.

The authority of the Supreme Court of India is intended to be more a check on the executive excess than to legislative acts and the Constitution confers definite powers on it in this respect. In addition to the jurisdiction over illegal acts in appeal, the Supreme Court possesses revisional powers through the judicial writs of *certiorari*, *mandamus*, etc. These writs are really the bulwark of the liberties of the people and their utility with the expansion of the province of the State has still more increased. Alladi Krishnaswami Aiyar aptly said that "with the expansion of the sphere of governmental activity, inevitable under modern conditions in spite of the strong criticism of the late Lord Chief Justice of England, the institution of Administrative Tribunals and Agencies invested with judicial or quasi-judicial functions will continue to be a feature of modern government and it has almost become unavoidable. The only safeguard against the abuse of the power vested in such tribunals and bodies is in the ultimate or revisory jurisdiction being vested in the higher courts of the realm and in the Supreme Court."<sup>80</sup>

Another sphere in which the Supreme Court has commendably intervened is that of industrial disputes. A rapidly developing country like India needs well-defined laws governing the relations between the industrial employer and the worker. The various industrial tribunals "who have been given the authority to regulate the relation of the worker with his master have enunciated concept of social justice which are more in the nature of benevolent despotism than a law of the land." This has tended to produce increasing complications thereby retarding the fulfilment of the targets of the Five-Year Plans and the industrial progress of the country. The Supreme Court has so far disposed of finally more than seventy matters connected with industrial disputes. There are standing orders from the Chief Justice that labour matters must get priority in disposal over other civil matters. In a series of judgments relating to the matters so far decided the Supreme Court "has placed the law relevant" to the industrial relations between the employer and the worker, "on a firmer and sounder basis."

The Supreme Court is, thus, the repository of justice and human rights in various spheres. This august body is ever watchful of the activities of all those who have the authority of the Indian citizen. In playing this role, it has with wisdom and dignity defined the rights and obligations of all concerned—the individual, the Legislature and the Executive, "and commands the confidence and respect of the people in a larger measure than any other institution in the country."

**Report of the Law Commission.** The Report of the Law Commission on the reform of the judicial administration was presented to Parliament on February 25, 1959. The Report is a massive document covering 1,282 pages and is divided into two volumes. Among other things, the Commission has adversely commented on the appointment of the Judges of the Supreme Court and the High Courts. The Commission has held that the best talent among the Judges of the High Courts has not always found its way to the Supreme Court. On the other hand, it is widely

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80. As quoted by Durga Das Basu in his *Commentary on the Constitution of India*, p. 406.

felt that "communal and regional considerations and executive influence (exerted from the highest quarters) have been responsible for some appointments." The Commission has deplored this trend and said that "such considerations should not prevail."

Stating that appointments hitherto made to the Supreme Court have been practically confined "to one class of persons", the Commission says that an effort should be made to directly recruit distinguished members of the Bar at a time when they can look forward to a fairly long tenure on the Bench. The person selected should have a tenure of at least ten years in the interests of stability of judicial administration. The Commission, however, is not in favour of raising the retiring age of Judges. As for the tenure of office of the Chief Justice of India, the Commission suggests that the period should be at least five to seven years "as the manifold duties of his office would require some time to familiarise himself with them."

The present practice of appointing the seniormost puisne Judge of the Supreme Court as the Chief Justice of India has been severely criticised by the Law Commission. The Commission feels that this practice 'is not desirable, because the duties of the latter require not only a person of ability and experience, but also a competent administrator, capable of handling complex matters.' Instead, the Commission has recommended that the most suitable person, whether from the Supreme Court, the Bar or the High Courts, should be chosen as the Chief Justice of India.

As for the jurisdiction of the Supreme Court, the Commission feels that it is not necessary to enlarge it in criminal matters. The Commission feels that although the exercise of jurisdiction under Article 136 of the Constitution has prevented grave miscarriage of justice in some cases, yet the Court might be chary of granting special leave freely as such a practice has a tendency to affect the prestige of the High Courts.

With regard to appeals on matters relating to labour disputes, the Commission says that the file of the Supreme Court is clogged with such appeals. The Commission recommends that relief should be given to the Supreme Court by enabling the parties to file appeals in such matters to the High Courts or to a special tribunal constituted for the purpose, without taking away the jurisdiction of the Court under Article 136 of the Constitution. In spite of the increase in the pending cases before the Court, the Commission feels that a further increase in the strength of the Court will have to be deferred for the present. The Court may, in the meantime, consider the desirability of instituting a system of preliminary hearing in Article 32 petitions and of enlarging the powers of a single judge or of a division Bench to deal with contested interlocutory and miscellaneous matters.

No part of the Law Commission's report has attracted such wide attention as its references to the methods of appointment of Judges and their service conditions. The Commission has rightly observed that it is not consistent with the dignity of retired Judges to have chamber practice. It further urges that retired Judges should be barred from Government service except what is provided under Article 128 of the Constitution. The practice of providing retired Judges diplomatic or other posts is plainly

undesirable and should be discontinued. These feelings were voiced in both the Houses of Parliament when the Law Commission report was discussed. Dr. H.N. Kunzru pleaded in the Rajya Sabha that retired Judges should not be reappointed in any capacity other than judicial.<sup>81</sup> The issue had also earlier been raised in the Lok Sabha, when demands for grants of the Law Ministry were discussed.<sup>82</sup>

The Law Minister, A.K. Sen, repudiated in the Lok Sabha<sup>83</sup> the finding of the Law Commission that considerations other than merit had weighed with the Government for some appointments in the Supreme Court and the High Courts. The Law Minister declared emphatically: "I consider it my duty to say that never during the last eight or nine years has the Government imposed any of its nominee on the High Court or the Supreme Court." Pandit G.B. Pant, the Home Minister, came out strongly, in the Lok Sabha while winding the debate on his Ministry's demands for grants,<sup>84</sup> against these observations of the Law Commission. The Home Minister said that since the Constitution came into force 19 judges had been appointed to the Supreme Court and every one of them was nominated and recommended by the Chief Justice of India.

In spite of such categorical repudiations the issue was, again, vehemently raised in Parliament in the debate on the Report of the Law Commission. Repudiating the criticism that the appointment of judges was vitiated by extraneous consideration the Home Minister said, "In this matter our position is unassailable." He, however, expressed his sorrow that certain "myths" had crept into the Law Commission's Report, and though they had been exploded they were still being repeated.<sup>85</sup> Two important considerations, which weighed in the appointment of Judges, said B.N. Datar, Minister of State for Home Affairs, in the Lok Sabha during the debate on the Bill to provide for the appointment of three more judges to the Supreme Court, were merit and longest period of experience. Most of the Judges, he added, in the High Courts were recruited from the Bar. They acquired sufficient experience before being appointed to the Supreme Court.<sup>86</sup> Referring to the demand that the members of the Bar should be appointed Supreme Court Judges, the Minister said that the Government had no alternative but to promote High Court judges to the Supreme Court. The Minister disclosed that an offer for appointment had been made to two eminent lawyers, but they had declined.

An impartial judiciary and an efficient and economical legal system are the basic conditions of the Rule of Law. The Government, the Courts, the Bar and the public all have to co-operate to create these conditions. It is really sad that the Law Commission Report had pointed out that communal and regional considerations had prevailed in certain cases in the appointment of even Supreme Court Judges. But to cast reflections on the Judges, even indirectly, is in a way undermining their prestige and impair-

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81. November 24, 1959.

82. March 18, 1959.

83. March 18, 1959.

84. March 20, 1959.

85. November 24, 1959, Rajya Sabha.

86. April 20, 1960.

ing the confidence of the people in the judiciary. Recruitment of Judges from the Bar is, no doubt, a fitting measure to foster confidence in the highest Court in the country. It is really regretted, as the Home Minister said in Parliament, that prominent members of the Bar had declined offers to join the Supreme Court evidently on the plea of low salary. Such an attitude did not speak well of the members of the profession. There ought to be a tradition, as in Britain, of the best talent serving the Supreme Court Bench for a term. In Britain, there is a long list of legal talent, such as Lord Reading, Lord Simon, Sir Stafford Cripps and others who served the Bench at great personal sacrifice and only with a view to serving the nation. It is, accordingly, essential that conditions of public awareness of the vital functions of the highest Court of justice in the country should be created.



## CHAPTER VII

# THE UNION AND THE STATES

**Original Units of the Union.** Before 1947 there were politically two Indias—British India, governed by the British Crown according to the laws passed, from time to time, by the British Parliament and enactments of the Indian Legislature, and the Indian States, about 600 in number and popularly known as Princely States, under the suzerainty of the British Crown but for the most part under the personal rule of the Princes. In 1950, when the new Constitution of the Sovereign and Independent Republic of India came into being, the Indian States had been liquidated and the country was welded into a single political entity. Three different patterns were discernible in the process of their integration into the Union of India:

(1) 216 States having a population of over 19 millions were merged in the neighbouring Provinces which were designated in the Constitution as Part A States;

(2) 61 States having a population of about 7 millions were constituted into newly Centrally administered units known as Part C States;

(3) 275 States with a population of about 35 millions were integrated to create new administrative units, namely, Part B States of Rajasthan, Madhya Bharat, Travancore-Cochin, Saurashtra and Patiala and East Punjab States Union (PEPSU); and

(4) 3 States, Hyderabad, Jammu and Kashmir and Mysore became Part B States.

The constituent units of the Union of India were, therefore, divided into three categories. Part A States which included Assam, Bihar, Bombay, Madhya Pradesh, Madras, Orissa, Uttar Pradesh, West Bengal and Punjab. The Andhra State was created in 1953 out of Telugu-speaking areas of Madras, thus, making a total of 10. Part B States were 8: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan, Saurashtra, and Travancore-Cochin. The State of Jammu and Kashmir, though specified in Part B of the First Schedule, was placed on a special footing and there was a special Article (370) in the Constitution dealing with it. Other Part B States were covered by Article 238 in Part VII of the Constitution.

Part C States consisted of Ajmer, Bhopal, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura, and Vinchya Pradesh. Cooch-Bihar, which was originally a Part C State, was subsequently merged with West Bengal. Bilaspur, too, was originally a separate unit, in Part C but was afterwards merged in Himachal Pradesh.

**Disparate Status of the Constituent Units.** A peculiar feature of the

Indian Constitution was the disparate status of the constituent units. The Drafting Committee explained the reasons for this disparity. The Committee said, "In Article I of the Draft, India has been described a Union of States. For uniformity the Committee has thought it desirable to describe the units of the Union in the new Constitution as States, whether they are known at present as Governors' Provinces, or Chief Commissioners' Provinces or Indian States. Some differences between the units there will undoubtedly remain in the new Constitution, and in order to mark this difference, the Committee has divided the States into three classes: those enumerated in Part I of the First Schedule, those enumerated in Part II, and those enumerated in Part III." The Constitution maintained this difference and established, as said above, three categories of States and gave each category a pattern and status of its own.

The status of Part A and Part B States was based on the concept of federalism, but there were a few significant differences in the governance of the two. The head of a Part A State was a Governor appointed by the President for a period of five years. The head of a Part B State was a Rajpramukh and the office was hereditary in the case of Hyderabad and Mysore. The head of Jammu and Kashmir State was designated Sardar-i-Riyasat and he was elected by the State Legislature for a period of five years. A Rajpramukh of a Union of States was the ruler of one of the principal constituent states and was elected by the Council of Rulers of the States forming that Union. The Rajpramukh was to be recognised by the President. The President also recognised the Sardar-i-Riyasat of Jammu and Kashmir, although it was just a formality. But the main feature that distinguished Part B States from Part A States was the provision contained in Article 371 which vested the Union Government with the authority of exercising general control over the Governments of those States for a period of ten years from the commencement of the Constitution, or for such longer or shorter period as determined by Parliament. It was further provided that Part B States must comply with such particular directions as could be given to them from time to time by the President. And the directions were in practice so ubiquitous and frequent that the control exercised by the Union Government was characterised by many as "the new paramountcy." The State of Mysore was, however, exempted from such a control.<sup>2</sup>

Part C States which ranked lowest in the hierarchy were administered by the Union Government on a unitary basis. The Constitution clearly specified that the President would administer these States and in administering them he might act through a Lieutenant-Governor or a Chief Commissioner to be appointed by him, or through the Government of a neighbouring State.<sup>3</sup> The Constitution further provided that Parliament might create by law or continue by law local legislatures for these States and specify their functions.<sup>4</sup> Parliament was also authorised to create for each of such States a Council of Advisers or Ministers.<sup>5</sup> Parliament, accord-

1. Draft Constitution of India, p. iv.
2. Proviso to Article 371.
3. Article 239 (1).
4. Article 240 (1) (a).
5. Article 240 (1) (b).

ingly, passed the Government of Part C States Act, 1951, providing for the setting up of the Legislatures and Ministries in Part C States. But this devolution of powers to Legislatures and Governments of Part C States did not detract the Legislative authority of Parliament over those States or from the responsibility of the Union Government to Parliament for their administration. It was really unfederal to deem Part C States as the units of a federation.

Apart from the States of the Union, the Constitution also provided for the administration of the territories in Part D and other territories including the acquired territories but not specified therein. The only territory specified in Part D was the Andaman and Nicobar Islands. A territory, unlike a State, did not form a unit of the Union of India and as such it essentially differed from the States of the Union in matters of representation in the Union Parliament. Representation in the Rajya Sabha was only limited to the States<sup>6</sup> and a territory being not a unit of the Union did not have representation there. The peoples of the States of the Union had representation in the Lok Sabha by virtue of the Constitution whereas representation of the people of a territory depended upon legislation by Parliament.<sup>7</sup>

A territory was administered by the President through a Chief Commissioner or other authority appointed by him, and by regulations which had the force of an Act of Parliament.<sup>8</sup> The legislative powers of Parliament also included matters in the State List.<sup>9</sup> The authority of the Union Government, administrative and legislative, including the regulation-making power, was, thus, complete in all respects.

But public opinion, both within and without the Part B and Part C States, had been consistently critical of this constitutional anomaly which, it was argued, offended the principle of equality of status between the constituent units of a federation. It also contradicted, the critics maintained, the principle of equal rights and opportunities for the people of India. The States Reorganisation Commission was "impressed by the weight of the public sentiment on this matter" and, accordingly, recommended that the existing constitutional disparity between the different units of the Union to disappear as a necessary consequence of reorganisation. "The only rational approach to the problem, in our opinion," observed the Commission, "will be that Indian Union should have primary constituent units having equal status and a uniform relationship with the Centre, except where, for any strategic security or other compelling reasons, it is not practicable to integrate any small area with the territories of a full-fledged unit."<sup>10</sup> The Commission held that the classification of States into three categories was adopted essentially as a transitional expedient and was not intended to be a permanent feature of the constitutional structure of India. Part B States, the Commission recommended, should be equated with Part A States by omitting Article 371 of the Constitution and by abolishing the

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6. Fourth Schedule, Article 80 (1) (b).

7. Article 81 (2).

8. Article 243 (2).

9. Article 246 (4).

10. Report of the States Reorganisation Commission, para 237.

institution of the Rajpramukh. The institution of the Rajpramukh, observed the Commission, "has a political aspect" and large sections of public opinion view its continuance with distavour on the ground that it "ill accords with the essentially democratic framework of the country."

With regard to Part C States, the Commission recommended that with the exception of Delhi, Manipur and Andaman and Nicobar Islands, which should be centrally administered, the remaining States in this category should, to the extent practicable, be merged in the adjoining States.<sup>1</sup> Such of the States as could not be merged in the adjoining areas for security and other imperative considerations should be administered by the Centre as Territories.<sup>2</sup>

According to the States Reorganisation Commission the component units of the Indian Union were, thus, to consist of two categories:

- (a) "States" forming primary federating units of the Union; and
- (b) "Territories" centrally administered.

The Government of India announced on January 16, 1956 its acceptance of the recommendations of the States Reorganisation Commission for the abolition of the constitutional disparity of the different States such as Part A, B and C States, and the abolition of the institution of the Rajpramukh.

### THE PROBLEM OF REORGANISATION OF STATES

**The Structure of the States.** The Provinces which later became States of the Union of India were not shaped by any rational or scientific planning. They were arbitrary creations, the result of expediency and administrative convenience. As the British victories enlarged and their sphere of influence extended the provincial organisation was so devised as to serve two purposes: to uphold the direct authority of the supreme power in areas of economic and strategic importance, and to establish political authority in areas acquired. Of these two, the first was, as the States Reorganisation Commission observed, "obviously the primary objective, and it required the suppression of the traditional, regional and dynastic loyalties. This was sought to be achieved by erasing old frontiers and by creating new provinces which ignored natural affinities and common economic interests."<sup>3</sup> The administrative organisation of the Provinces thus created was so devised as to secure their complete subordination to the Central Government, which acted as an agent of the Home Government in Britain and an instrument of furthering imperial interests.

This "conscious or deliberate design" in the demarcation of territories of administrative units continued till the beginning of the present century when it began to be appreciated that even administrative convenience required compact units with some measure of homogeneity. In the formation of new Provinces, therefore, various factors conducive to the

11. *Ibid.*, para 242.

12. *Ibid.*, para 268.

13. *Ibid.*, para 267.

14. *Ibid.*, para 15.

growth of natural units were given due consideration, although all such factors were subordinated to the prime considerations of administrative and military exigencies. Then, began the policy of 'balance and counterpoise' and as a result of that all subsequent territorial changes were made with a view to curbing the rising tide of nationalism in the country and to give to the Muslims, wherever possible, a position of approximate equality if not a position of superiority over the Hindus.

Thus, the Provinces were only, as the Indian Statutory Commission admitted in 1930, "a number of administrative areas which had grown up almost haphazard as the result of conquest, supersession of former rulers or administrative conveniences."<sup>15</sup> To these factors given by the Statutory Commission, may be added the policy of 'balance and counterpoise' so assiduously pursued by the British rulers.

India inherited these "ill-assorted" administrative units on attaining Independence in 1947. The geographical situation became still more confusing on the liquidation of the former Indian States which brought about the adventitious accretion of territories to some of the Provinces by the process of merger and formation of States, Union and Centrally administered areas. The structure of the States of the Union of India at the inauguration of the Republic was, therefore, as the States Reorganisation Commission observed, "partly the result of accident and circumstances and partly a by-product of the historic process of the integration of former Indian States."<sup>16</sup>

**Need for reorganising the States.** The Indian Statutory Commission in 1930 had fully realised the need for reorganising the Provinces before any scheme of federal government could be given a serious consideration. The Commission felt that "the adjustment of provincial boundaries and the creation of proper provincial areas should take place before the new process (of federating) has gone too far. Once the mould has set, any mal-distribution will be still more difficult to correct."<sup>17</sup> The States Reorganisation Commission approvingly referred to this observation of the Statutory Commission and remarked: "This applied in a greater measure to the ill-assorted units representing territories of some of the former Indian States whose future should be considered before vested interests get too strongly entrenched and reasonable settlement becomes difficult."<sup>18</sup> In fact, the resultant units of the Indian Union by the elimination of the former Indian States had become more illogical and their boundaries untenable than what they were even during the British period. The States Reorganisation Commission rightly observed that the desirability of reorganising the States was not only politic, but also emergent because "India, with her programme of large-scale planning, has to think in terms of enduring political units."<sup>19</sup>

**Rationale of reorganization.** The demand for the reorganization of States in the pre-independence days was largely related to the principle

15. Report of the Indian Statutory Commission, Vol. II, para 25.

16. Report of the States Reorganisation Commission, para 14.

17. Report of the Indian Statutory Commission, Vol. II, para 38.

18. Report of the States Reorganisation Commission, para 87.

19. *Ibid.*, para 85.



of linguistic homogeneity and almost for half a century was equated with it. "This is because", as the States Reorganization Commission observed, "the movement for redistribution of British Indian Provinces was, in a large measure, a direct outcome of the phenomenal development of regional languages in the nineteenth century which led to an emotional integration of different language groups and the development amongst them of a consciousness of being distinct cultural units. When progressive public opinion in India, therefore, crystallised in favour of rationalization of administrative units, the objective was conceived and sought in terms of linguistically homogeneous units." In certain parts of the country it led to the linguistic fanaticism. The mad frenzy exhibited by the people, immediately after the publication of the States Reorganization Report, bears testimony to the fact that linguistic divisions, if viewed in a narrow way, can also be a source of danger. There was a shift in the direction of the view that in considering reorganization of States linguistic principle should be balanced with other relevant factors, such as the unity and security of the country, administrative convenience, financial circumstances and economic progress under programme of national planning, so that the welfare of the people of each constituent unit as well as of the nation as a whole was promoted. But linguistic fanaticism had no end. Maharashtra and Gujarat States came into being on May 1, 1960. Vidarbha is still in the grips of linguistic frenzy and Punjab has been divided into Punjab and Haryana.

**The British approach.** As it has been observed earlier, during the British period the structure of the administrative units had been largely determined by the accidents and circumstances attending the expansion of the British rule in India. It had not any rational, cultural or economic basis, and all territorial changes were governed, mainly, by imperial interests. The linguistic principle for the formation of Provinces, however, figured "as an ostensible factor" in a letter from Sir Herbert Risley, Home Secretary to the Government of India, to the Government of Bengal, dated December 3, 1903. In this letter was first mooted the proposal for the partition of Bengal. The principle of language figured prominently in the Partition Resolution of 1905 and again in 1911 when Lord Hardinge's Government proposed to the Secretary of State for India the annulment of the partition. But the linguistic principle, as the States Reorganisation Commission correctly remarks, "was pressed into service on these occasions only as a measure of administrative convenience, and to the extent it fitted into a general pattern which was determined by political exigencies. In actual effects, the partition of Bengal involved a flagrant violation of linguistic affinities. The settlement of 1912 also showed little respect for the linguistic principle in that it drew a clear line of distinction between the Bengali Muslims and Bengali Hindus. Both the partitions thus ran counter to the assumption that different linguistic groups constituted distinct units of social feeling with common political and economic interests."<sup>20</sup>

The authors of the Montagu-Chelmsford Report, too, recognised the desirability of redistribution of provincial territories so as to constitute

20. *Ibid.*, para 46.

smaller and more homogeneous units, though they did not consider that the time was opportune "to unite the sufficiently difficult task of revising the Constitution of India with the highly controversial labour of simultaneously revising the entire political geography of the country."<sup>21</sup> While commending the objective of smaller and more homogeneous units, the authors of the Report observed, "We cannot doubt that the business of government would be simplified if administrative units were both smaller and more homogeneous; and when we bear in mind the prospect of the immense burdens of Government of India being transferred to comparatively inexperienced hands, such considerations acquire additional weight. It is also a strong argument in favour of linguistic or racial units of government that, by making it possible to conduct the business of legislation in the vernacular, they would contribute to draw into the arena of public affairs men who were not acquainted with English."<sup>22</sup> It is important to note that the Montagu-Chelmsford Report also examined the suggestion for the creation, within the existing Provinces, of sub-provinces on a linguistic and racial basis with a view to provide suitable units for experiments in responsible government. The suggestion was, however, rejected as impracticable, but in Orissa and Bihar, it was recommended that "the possibility of instituting sub-provinces need not be excluded from consideration at a very early date."

The question of redistribution of Provinces was examined by the Indian Statutory Commission. The Commission recognized that the provincial boundaries, as they then existed, embraced in many cases areas and population of no natural affinity and separated those who under any rational scheme of reorganization would be united. It, therefore, strongly recommended the reconstitution of the Provinces and considered it as a necessary preliminary step for setting up a federal system of government in the country. The Commission, no doubt, attached importance to the linguistic principle in the adjustment of the provincial boundaries, but did not regard it as the sole criterion for such a reconstitution. They placed more emphasis on other factors, particularly the agreement amongst the people affected by the changes. Dealing with the factors which should govern redistribution, the Commission observed, "If those who speak the same language form a compact and self-contained area, so situated and endowed as to be able to support its existence as a separate province, there is, no doubt, that the use of a common speech is a strong and natural basis for provincial individuality. But it is not the only test—race, religion, economic interest, geographical contiguity, a due balance between country and town and between coastline and interior, may all be relevant factors. Most important of all perhaps, for practical purposes, is the largest possible measure of general agreement on the changes, proposed, both on the side of the area that is gaining, and on the side of the area that is losing territory."<sup>23</sup>

Notwithstanding the qualified support which the Indian Statutory Commission gave to the linguistic principle, the Government of India ap-

21. Report on Indian Constitutional Reforms (1918), para 246.

22. *Ibid.*

23. Report of the Indian Statutory Commission, Vol. II, para 28.

pointed in September 1931, the Orissa Commission, under the Chairmanship of Sir Samuel O'Donnel, to examine and report on the administrative, financial and other consequences of setting up a separate administration for the Oriya-speaking people and to make recommendations regarding its boundaries in the event of separation. The Resolution of the Government of India, thus, accepted the linguistic principle in the creation of the Province of Orissa. But the Samuel O'Donnel Committee while making its recommendation took into consideration all the relevant factors, language, race, the attitude of the people, geographical position, economic interests and administrative convenience with particular emphasis on the wishes of the inhabitants where they could be ascertained. The Joint Parliamentary Committee (1933-34) disregarding all other factors observed that "a separate Province of Orissa would be a most homogeneous Province in the whole of British India, both racially and linguistically."<sup>24</sup> The Committee even discounted the financial difficulties involved in the creation of the Province of Orissa and remarked, "the main difficulty here is a financial one, since Orissa is now and may well remain a deficit area. It appears to us that any financial difficulty likely to be caused thereby is not serious enough to outweigh the advantages which will accrue from the separation."<sup>25</sup> The Government of India did not accept in entirety the boundaries suggested by the Samuel O'Donnel Committee and the Province of Orissa was created in 1936 with such modifications as were considered desirable.

Sind came into existence in 1936 and ostensibly it was another instance of the acceptance of the linguistic principle. The Indian Statutory Commission while rejecting the claim of Sind for separation from Bombay had observed that there were "grave administrative objections to isolating Sind and depriving it of the powerful backing of Bombay before the future of the Sukkur Barrage is assured and the major adjustments which it will entail have been effected."<sup>26</sup> But the Joint Parliamentary Committee accepted its separation on the plea that it had been pressed not merely by the Sindhi Muslims but also by Muslim leaders elsewhere in India. The Committee further observed that "apart from other considerations, the communal difficulties that would arise from attempting to administer Sind from Bombay would be no less great than those which may face a separate Sind administration."<sup>27</sup> The birth of Sind was, accordingly, the result of deliberate design of the British Government rather than the vindication of the linguistic principle.

**Linguistic Provinces and the Indian National Congress.** The Indian National Congress had indirectly supported the linguistic principle when it agitated for annulling the partition of Bengal which divided the Bengali-speaking people into two separate units. But it accepted the linguistic redistribution of Provinces as its official creed and a political objective at the Nagpur session in 1920. In pursuance of this policy the Congress adopted the linguistic basis for its own regional organisation in the follow-

24. J.P.C. Report, Vol I, para 60.

25. *Ibid*

26. Report of the *Indian Statutory Commission*, Vol. II, para 38.

27. J.P.C. Report, Vol. I, para 57.

ing year. In 1927 when the Indian Statutory Commission was appointed it adopted a resolution declaring that "the time has come for the redistribution of Provinces on linguistic basis" and proposed that as a step towards that direction Andhra, Utkal, Sind and Karnataka should be constituted into separate Provinces. Those who supported the resolution went to the extent of suggesting that it was the right of the people speaking the same language and following the same traditions and culture to determine their own future. The reference was, of course, to the peoples' right of self-determination.

The Nehru Committee (1928) of the All-Parties Conference gave to the linguistic principle its whole-hearted support and observed, "If a Province has to educate itself and do its daily work through the medium of its own language, it must necessarily be a linguistic area. If it happens to be a polyglot area difficulties will continually arise and the media of instruction and work will be two or even more languages. Here it becomes most desirable for Provinces to be regrouped on a linguistic basis. Language as a rule corresponds with a special variety of culture, of traditions and literature. In a linguistic area all these factors will help in the general progress of the Province."<sup>28</sup> The Committee, while analysing the factors—wishes of the people, language, geographical, economic and financial considerations—which should govern the reorganisation of Provinces, recommended that of all these factors "the main consideration must be the wishes of the people, and the linguistic unity of the area concerned."<sup>29</sup>

The Congress on three definite occasions between 1927 and 1945 reaffirmed its faith in the linguistic principle. At its Calcutta session in 1937, reiterating its political objective of the linguistic redistribution of Provinces, the Congress urged for the immediate formation of Andhra and Karnataka Provinces. In July 1938, the Congress Working Committee gave a clear assurance to the deputations from Andhra, Karnataka and Kerala that the Congress, when in power and position to do, would undertake the redistribution of Provinces on the basis of language.

But the Congress election manifesto of 1945 sounded a departure from its avowed policy and political objective. While repeating the past assurances, the manifesto declared that the administrative units should be constituted, **as far as possible**, on a linguistic and cultural basis. This qualification put on the linguistic principle meant that not all the Provinces, but **as far as possible**, conditions and circumstances permitting in each case, Provinces would be constituted on a linguistic and cultural basis.<sup>30</sup> This shift in the Congress policy found its echo in the Constituent Assembly (Legislature) on November 27, 1947 when the Prime Minister,

28. Report of the Nehru Committee, p. 62.

29. *Ibid.*, p. 61.

30. K.M. Munshi writes, "From early in 1946, I raised my voice against the danger of linguism as a distinct menace to national solidarity, and fought the danger as best I could. More powerful voices than mine also spoke about the danger of linguism." Sardar Vallabhbhai Patel characterised the impatient champions of redistribution of Provinces on linguistic basis as "assassins of nationalism." Jawaharlal Nehru said that the principle of linguistic Provinces "produced more conflict and trouble than any kind of peaceful solution to the problem." Munshi, K.M., *Indian Constitutional Documents*, Vol. I, p. 227.



while conceding the linguistic principle, remarked, "First things must come first and the thing is the security and stability of India." But the clamour inspired by linguism was difficult to resist, and on June 17, 1948, a Commission, presided over by Justice S.K. Dar was appointed by the President of the Constituent Assembly to examine and report on the formation of linguistic Provinces and on the administrative, financial and other consequences flowing therefrom. It will appear from the terms of reference of the Dar Commission that the linguistic principle was not the only basis on which the Commission was to recommend the redistribution of Provincial boundaries. Other factors were as much important as the linguistic factor.

The Dar Commission reported to the Constituent Assembly in December, 1948. It recommended that though the linguistic principle was an important consideration for the demarcation of provincial boundaries, yet it was neither the main nor the exclusive consideration. There were no less important factors of geographical, economic, financial and administrative considerations which must all be given an equal emphasis. After weighing all these factors, the Commission came to the conclusion that it would be inadvisable to undertake reorganisation of any kind in the prevailing circumstances. Linguistic homogeneity, the Commission observed, should be a part of administrative convenience. It further emphasised that all those factors which impeded the growth of nationalism must be outright rejected or should stand over. When the Indian States had completely integrated, the country fully stabilised and nationalism fully established, it was only then, the Commission observed, that the merit of some of the Provinces for reconstitution might be considered.<sup>31</sup>

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31. In a memorandum submitted to the Dar Commission, Dr. B.R. Ambedkar stated, "In discussing the question of creating such linguistic Provinces, it would be very short-sighted to omit from one's consideration the fact that the structure of the Government of India of the future is to be cast in a dual form (a) Central Government, and (b) a number of Provincial Governments inextricably inter-linked and interwoven in the discharge of their respective Legislative, Executive and Administrative functions. Before one could agree to the creation of the Linguistic Provinces, one must, therefore, consider the effects which Linguistic Provinces would have on the working of the Central Government.

Among the many effects that may be envisaged, following are obvious:—

(1) Linguistic Provinces will result in creating as many nations as there are groups, with pride in their race, language and literature. The Central Legislature will be a League of Nations and the Central Executive may become a meeting of separate and solidified nations filled with the consciousness of their being separate in culture and therefore in interests. They may develop the mentality of political insubordination, i.e., refusal to obey the majority or of staging walk out. The development of such a mentality is not to be altogether discounted. If such a mentality grows, it may easily make the working of the Central Government impossible.

(2) The creation of Linguistic Provinces would be fatal to the maintenance of the necessary administrative relations between the Centre and the Provinces. If each Province adopts its own language as its official language, the Central Government will have to correspond in as many official languages as there are linguistic Provinces. This must be accepted as an impossible task. How great a deadlock Linguistic Provinces will create in the working of the Government machine can be better understood by studying the effects of Lingu-

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Immediately after the Dar Commission had submitted its report, the Congress at its Jaipur session (December 1948) appointed a Committee, consisting of Jawaharlal Nehru, Sardar Vallabhbhai Patel and Dr. Pattabhi Sitaramayya, to consider and review in the light of the Dar Commission Report and the new problems that had arisen since Independence, the question of linguistic Provinces. The J.V.P. Committee, as it has come to be known, practically reiterated the recommendations of the Dar Commission. The Committee observed that the Indian National Congress accepted the linguistic principle as the basis of provincial redistribution when it was not in a position to face the implications of its practical application and hence it could not appreciate the consequences emerging therefrom. Now having actually seen the realities of administration and the consequential effects of independence the primary consideration, they emphasised, must be the security, unity and economic prosperity of India and every separatist and disruptive tendency should be rigorously discouraged. Language, the Committee remarked, was not only a binding force but also a separating one. "The old Congress policy of having linguistic Provinces could only be applied after careful thought had been given to each separate case and without creating serious administrative dislocation or mutual conflicts which would jeopardise the political and economic stability of the country."

The Committee, however, admitted that if public sentiment was insistent and overwhelming on the formation of linguistic Provinces, the practicability of such a demand with its implications and consequences must be examined, but subject to two limitations: first, that at least in the beginning the linguistic principle should be applied only to well-defined areas about which there was mutual agreement, and, secondly, that all proposals which had a merit behind them could not be implemented simultaneously. To make a beginning, the Committee proposed that Andhra should be created a separate Province. The Congress Working Committee accepted the J.V.P. Report in April 1949, and approved the formation of the Andhra State. The State of Andhra came into existence on October 1, 1953, and it was the precursor of the shape of things to come.

The Congress adhered to its policy expressed in the J.V.P. Report till 1953. The election manifesto of 1951 declared that the decision about the reorganisation of the States would ultimately depend upon the wishes of the people concerned. Language was, no doubt, the manifesto further stated, an important factor, but there were other factors also, economic,

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istic Provinces on Judiciary. In the new set up, each Province will have a High Court with the right to hear appeals against the decisions of the lower courts. On the basis of Linguistic Provinces, Courts of each Province, including the High Court, will conduct their proceedings in the language of the Province. What is the Supreme Court to do when its jurisdiction is invoked for rectifying a wrong done by a High Court? The Supreme Court will have to close down. For, if it is to function, every judge of the Supreme Court—I am omitting for the moment the lawyers practising therein—must know the language of every Province, which it is impossible to provide for. It may lead to a break up of India. Instead of remaining united, India may end in becoming Europe—faced with the prospect of chaos and disorder." Munshi, K.M., *Indian Constitutional Documents*, Vol. I, pp. 228-29.

administrative and financial, which must all be given equal weight. But a significant swing in the Congress policy was witnessed at its Hyderabad session in 1953. The First Five-Year Plan was initiated in 1951 and its successful implementation had become the most important concern of the Government of India and the Congress Party. Planning entailed integration of policy as it embraced the entire life of the nation. No State function, under the circumstances, could be compartmentalised. All were national in scope and though there was virtue in their local administration, yet they must be standardised at high level. All this meant a unified and concerted action. It was, therefore, natural that there should be a change in the Congress policy relating to the reorganisation of the States. The Hyderabad resolution of 1953, accordingly, declared that in considering the reorganisation of the States all relevant factors, such as the unity of India, national security and defence, cultural and linguistic affinities, financial considerations and economic progress both of the State and the Nation as a whole should be borne in mind. C. Rajagopalachari went to the extent as to declare that the linguistic Provinces ideal presented a primitive mentality.

The Congress Working Committee in its resolution in May, 1953, adopted the Congress policy as declared at the Hyderabad session. It was reaffirmed at the Kalyani session in January, 1954. The Kalyani resolution further declared that the unity of India and national security "must be given first priority."

**Appointment of the States Reorganisation Commission.** On December 22, 1953, the Prime Minister made a statement in Parliament that a "high level commission" would be appointed to "examine objectively and dispassionately" the question of the reorganisation of the States of the Indian Union "so that the welfare of the people of each constituent unit as well as the nation as a whole may be promoted." The Prime Minister while making this announcement referred to the important factors that should be taken into account by the Commission in the reorganisation of the States. He said, "The language and culture of an area have an undoubted importance as they represent a pattern of living which is common in that area. In considering a reorganisation of States, however, there were other important factors which have also to be borne in mind. The first essential consideration is the preservation and strengthening of the unity and security of India. Financial, economic and administrative considerations are almost equally important, not only from the point of view of each State but for the whole nation. India has embarked on a great ordered plan for her economic, cultural and moral progress. Changes which interfere with the successful prosecution of such a National Plan would be harmful to the national interest."<sup>32</sup>

The States Reorganisation Commission, consisting of Justice Syed Fazl Ali, Chairman, Dr. Hirday Nath Kunzru and Sardar K.M. Pannikar, members, was appointed under the Resolution of the Government of India in the Ministry of Home Affairs dated December 29, 1953. The

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32. *The Hindustan Times*, December 23, 1953. Also refer to para 4 of the Resolution, in the Ministry of Home Affairs, Government of India, dated 29th December, 1953.

terms of reference of the Commission were to "investigate the conditions of the problem, the historical background, the existing situation and the bearing of all important and relevant factors thereon. They will be free to consider any proposal relating to such reorganisation. The Government expect that the Commission would, in the first instance, not go into the details but make recommendations in regard to the broad principles which should govern the solution of this problem; and if they so choose, the broad lines on which particular States should be reorganised and submit interim reports for the consideration of Government."<sup>33</sup>

The Commission was required to report to the Government not later than June 30, 1955. The period was subsequently extended to September 30, 1955. The Commission visited 104 places throughout the country and interviewed over 9,000 persons besides receiving 1,52,250 memoranda from individuals, parties and associations denoting the wishes of particular localities to be included within one or the other unit. Out of this bewildering number, the number of "well-considered memoranda", according to the Commission, "did not exceed about 2,000."<sup>34</sup> The Commission went round virtually the entire country and "made every effort to get a complete cross-section of public opinion. Care was taken to see that all those who represent public opinion were heard unless they themselves were adverse to expressing any views. The people interviewed included members of political parties, public associations, social workers, journalists, municipal and district board representatives and other people representing cultural, educational, linguistic and local interests. The purpose of the all-India tour was not only to ascertain public opinion but also to make on-the-spot studies of different places and to understand the background of the problem and the popular sentiment on various aspects of reorganisation."<sup>35</sup>

The Commission submitted its report to the Government of India on September 30, 1955. It was, however, presented to the people on October 10, 1955. On the eve of the Report's publication broadcast, the Prime Minister said, "I was a little surprised at some of the recommendations. . . . I can well imagine that many others who read this report will feel in the same way." Continuing his broadcast, the Prime Minister maintained, "No report or recommendations could possibly satisfy everybody. We have thus to find what is good from the point of view of the country as a whole and has the largest measure of agreement and support."<sup>36</sup>

**Recommendations of the States Reorganisation Commission.** The Commission examined the arguments for and against the "appropriateness of the time for undertaking large-scale changes in the existing set-up" and concluded that "the task of redrawing the political map of India must be now undertaken and accomplished without avoidable delay, in the hope that the changes which are brought about will give satisfaction to a substantial majority of the Indian people."<sup>37</sup>

33. Paragraph 7 of the Resolution.

34. Report of the States Reorganisation Commission, para 5.

35. *Ibid.*, para 7.

36. *The Hindustan Times*, October 11, 1955.

37. *Ibid.*, para 91.

The perspective in which the Commission formulated their proposals were, thus, summed up by them: "It is the Union of India that is the basis of our nationality. It is in that Union that our hopes for the future are centred. The States are but the limbs of the Union and while we recognise that the limbs must be healthy and strong, and any element of weakness in them should be eradicated, it is the strength and stability of the Union and its capacity to develop and evolve that should be the governing consideration of all changes in the country." In framing their recommendations the Commission was guided by certain broad principles contained in its terms of reference. These were:

- (1) the preservation of the unity and security of India;
- (2) linguistic and cultural homogeneity;
- (3) financial, economic and administrative considerations; and
- (4) the successful working of the national plan.

The Commission examined all the relevant factors and came to the conclusion that it was neither possible nor desirable to reorganise States on the basis of a single test of either language or culture. Linguistic homogeneity, in the opinion of the Commission, was an important factor conducive to administrative efficiency, but it must not be considered as an exclusive and binding principle overriding all other considerations, administrative, financial or political. The Commission emphatically rejected the theory of "one language one State." The idea of a unilingual State breeds a particularist feeling and encourages exclusivism which may tend to blur, if not to obliterate, the feeling of national unity, which is yet to develop into a positive concept. Similarly, the Commission repudiated the "homeland" concept, which as the outcome of the linguistic units, and strongly emphasised "the dangerous character of this doctrine especially from the point of view of our national unity."

The Commission considered each individual case on its merits and the conclusions arrived at were based on the totality of circumstances. It, accordingly, recommended that the constitutional disparity between the constituent units of the Indian Union should disappear, because in any scheme of rational reorganisation the regrouping of territories cannot be undertaken by categories. This meant the equation of Part B States with Part A States and the abolition of the institution of the Rajpramukh. Part C States should be merged with the adjoining States and such as those could not be merged for security and other imperative considerations should be Centrally administered territories. The component units of the Indian Union should, therefore, comprise:

- (i) "States" forming the federating units of the Union; and
- (ii) "Territories" which were to be Centrally administered.

The States proposed by the Commission were: Andhra, Assam, Bihar, Bombay, Jammu and Kashmir, Karnataka, Kerala, Hyderabad, Madhya Pradesh, Madras, Orissa, Punjab, Rajasthan, Uttar Pradesh, Vidarbha and West Bengal; 16 in all. The three Territories proposed were Delhi, Manipur, and the Andaman and Nicobar Islands. The Chairman recommended that Himachal Pradesh should also be a Centrally administered terri-



tory, while Sardar Pannikar favoured the creation of a new State of Agra consisting of parts of Uttar Pradesh, Madhya Bharat and Vindhya Pradesh.

**Evaluation of the States Reorganisation Commission Report.** The first reactions published simultaneously with the Commission's findings were most unfavourable. Even the Prime Minister confessed, on the eve of the Report's publication broadcast, that he was a little surprised at some of the recommendations. Nehru added, "I should like to confer with my colleagues fully in order to clarify my own mind. I can well imagine that many others who read this report will feel the same way."<sup>35</sup> The Congress Working Committee's resolution of October 14, 1955, called upon the Congressmen to avoid "the agitational approach" to the Report and not to associate themselves with other parties or groups in any agitation or demands. The chief grouse expressed was the division of the Maharashtra into two States, Vidarbha and Bombay, and splitting of Telugus and residuary Hyderabad. With regard to the Commission's recommendations on Punjab, the Akali leader, Master Tara Singh, characterised them as "a decree of Sikh annihilation."<sup>36</sup> But for the moderate elements, all others, the Communists, the Trade Unionists, the Socialists, the Akalis, the Hindu Mahasabha and even Congress circles, were critical of the report.

The task entrusted to the Commission, was no doubt, complicated and controversial. The problem of redrawing States' boundaries so as to accommodate linguistic claims was entrusted to the Commission for solution because it was both distracting and demoralising to have each claim pressed by agitation and won or lost according to the circumstances of the moment. Andhra gave a cue to others and the aspirants for separate linguistic Provinces intensified the popular frenzy. It is true that after achievement of Independence the reorganisation of States had become inevitable. The Congress was committed to it and it had promised to organise Provinces on linguistic basis.<sup>37</sup> But the experience of eight years after Independence, emergence of new national and international problems, and the launching of the First Five-Year Plan, placed the Congress in a position to appreciate the realities and the actual requirements of the country. Consistent with that attitude the linguistic principle had to be toned down. Linguism cannot be the sole criterion for the formation for a State specially when that State happens to be a constituent unit of a federation. Other factors—geographical, historical, financial and administrative—must all be taken into account in order to produce not only a balance but a harmony which will make for the solidarity and strength of

38. *The Tribune*, Ambala Cantt., October 10, 1955, p. 1.

39. *Ibid.*

40. In his prayer speech on January 25, 1948, a few days before his assassination, Gandhi said, "The Congress had already adopted that principle (linguistic redistribution) and had declared its intention to give effect to it constitutionally as soon as they came to power, as such redistribution would be conducive to the cultural advancement of the country. But such redistribution should not militate against the organic unity of India. Autonomy did not and should not mean disruption, or that hereafter Provinces could go the way they choose, independent of one another and of the Centre. If each Province began to look upon itself as a separate, sovereign unit, India's independence would lose its meaning and with it would vanish the freedom of the various units". Munshi, K.M., *Indian Constitutional Documents*, Vol. I, pp. 229-30.



the nation, though there is bound to be different emphasis in different places. Examined from this canon, the States Reorganisation Commission submitted an impartial and balanced Report. It was based on the examination of many facts and the reconciliation of many factors. The Commission rightly observed that no proposals for reorganisation should be determined by a single test. But interested political parties and groups viewed the Report from one single test and that was why they did not see any good in it. The findings of the Commission need be judged and its conclusions appreciated by balancing various elements involved in the scheme of reorganisation while keeping the solidarity of the country as the chief. The problem of reorganisation of the States is really controversial and it is exceedingly difficult to obtain general consent on any aspect of it. The Congress Working Committee in its October 14, 1955 resolution asked for co-operative approach to the Report "and the problems dealt with in it, which should be seen in their entirety." Acharya Kripalani hailed the Report "as a piece of good job" and rightly maintained that no other Commission could have done a better job. It was not possible for the Commission to satisfy the conflicting and contradictory demands of the different lingual areas, when it has to be remembered that linguistic and other group loyalties have deep roots in the soil and history of India. That has ever been the bane of Indian politics.

**Implementation of the Commission's Report.** The Report of the Commission was released on October 10, 1955. Since the issues involved in the recommendations of the Commission had created widespread discontent often swayed by sentiments, the Government of India, before formulating their decisions, desired the fullest scope being given to a thorough-going discussion of the Report and opportunities being afforded to every interest concerned to express its views. This eliciting of the public opinion process inundated the Government of India with 1,22,150 memoranda and representations. Besides, the Report was referred, although it was not legally binding to do so, to the Legislatures of all the component units of the Union of India, including the Electoral Colleges of some Part C States, like Kutch, Manipur and Tripura, and discussed by them at length. Parliament gave its most fullest and comprehensive consideration to the Report exceeding 55 hours debate in the Lok Sabha and 41 hours in the Rajya Sabha in the course of which 244 members participated. After a marathon endeavour of discussion, consultation and persuasion, the Government of India was able to present a complete scheme for the reorganisation of the States incorporated in the three draft Bills, which were placed on the table of both Houses of Parliament on March 16, 1956. These Bills were passed in August and September of the same year. The reorganization scheme which came into operation on November 1, 1956, is embodied in the States Reorganisation Act, 1956, Bihar and West Bengal Transfer of Territories Act, 1956, and the Constitution (Seventh Amendment) Act, 1956.

**The New Political Map of India.** As a result of reorganisation the Union of India was to consist of 14 States and 6 Territories. The States were, Andhra Pradesh, Assam, Bihar, Bombay, Kerala, Madhya Pradesh,

41. *The Hindustan Times*, October 15, 1955, p. 1.

42. *The Tribune*, Ambala Cantt., October 15, 1955, p. 9.

Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh, West Bengal and Jammu and Kashmir. The six Territories were: Delhi, Himachal Pradesh, Manipur, Tripura, the Andaman and Nicobar Islands, and the Laccadive, Minicoy and Amindivi Islands. No territorial change was made in the case of Assam, Orissa, Uttar Pradesh and Jammu and Kashmir. Kerala was a new name, although it represented substantially the old State of Travancore-Cochin. The Kannada-speaking areas which had been brought together retained the name of Mysore. Andhra Pradesh was the combination of the States of Hyderabad and Andhra. The case for an enlarged Andhra State was forcefully stated by the Reorganisation Commission, though they favoured the formation of such a State five years hence. The formation of the new Bombay State was based on a formula suggested by the Commission, though its territorial complex had to be altered to some extent by Parliament so as to consolidate in one State all the Marathi and Gujarati-speaking people. The exclusion of Himachal Pradesh and Tripura from the States of the Punjab and Assam respectively was decided after taking into consideration the wishes of the people and the immediate needs of those areas regarding their economic development.

The political map of India redrawn in 1956 had to be changed on May 1, 1960, when the State of Bombay was bifurcated into Maharashtra and Gujarat. The Union of India, then, consisted of 15 States and 6 Territories. It was again changed on August 1, 1960 when the Prime Minister announced in Parliament the decision of the Government for the creation of Nagaland as a new State—the 16th in the Republic. This decision followed an agreement reached between the Prime Minister of India and the 19-member Naga delegation headed by Dr. Imkongliba Ao, President of the Naga People's Convention. The basis of the talks was 16-point draft constitutional proposals adopted by the Naga People's Convention held at Mokocheung from October 23 to 26, 1959. The Constitution (Thirteenth Amendment) Act, created the State of Nagaland, comprising the territory known as the Naga Hills Tuensang Area and covering an area of about 6,000 square miles inhabited by about 400,000 Nagas. For the present there is one common Governor both for Assam and Nagaland. Certain special powers in regard to financial matters had been vested in the Governor. Once again the political map was changed by creating the seventeenth State of Haryana on November 1, 1966. Punjab was divided into Punjab and Haryana with portions of territory going to Himachal Pradesh—a Union Territory.

Two new features of the scheme of reorganisation, not relatable to the Commission's Report, were the formation of the Zonal Councils and the setting up of Regional Committees of the Legislature in the Punjab and Andhra Pradesh. The Zonal Councils were intended to provide a forum for inter-State co-operation and an effort, in association with the Union Government, for the settlement of inter-State disputes and the formulation of inter-State development plans. The Regional Committees of the Legislature in Punjab and Andhra Pradesh were intended to be set up with the object of catering to the special needs of the regions concerned within the framework of a unified State structure.

**New Assam State.** The Government of India announced on Sep-

tember 11, 1968, its decision to constitute an autonomous State within the State of Assam consisting of the hill districts of Garo and Khasi and Jowai (Jaintia) in the first instance'. The autonomous districts of Mikir Hills and North Cachar Hills would be given option to join the autonomous State through a two-thirds majority vote in their respective District Councils. The autonomous State will have a Legislative Assembly and a Council of Ministers. The executive power of the autonomous State will be co-extensive with the subjects assigned to the autonomous State and will vest in the Governor of Assam who will act on the aid and advice of the Council of Ministers of the autonomous State. The subjects which will be transferred exclusively to the autonomous State will include agriculture, forests and fisheries, education (including university education), communications (other than highways important to the state as a whole), medical and public health, local bodies and co-operatives, land, mines, and mineral development, medium and small-scale industries, administration of justice and prison. Matters affecting tribals' interests, such as inheritance, marriages, social customs, appointment and succession of chiefs would also be within the purview of the autonomous state. The autonomous state will also have taxation powers in respect of the subjects assigned to it including land revenue and agricultural income-tax, excise duty, taxes on mineral rights, taxes on goods and passengers and entertainment tax. The autonomous state will also be assigned its relatable share out of the sales tax.

Bills passed by the legislature of the autonomous state will be submitted to the Governor of Assam for his assent and in this matter he will act on the aid and advice of the Council of Ministers of the autonomous State, except where it relates to subjects concurrent to both the legislatures and where its provisions are repugnant to a law passed by the legislature of Assam. The concurrent subjects are in respect of schemes of agriculture of common benefit to the autonomous state and the rest of Assam, conservation of forest in a catchment area of major irrigation, flood-control, hydro-electric and navigation projects, and a few subjects out of the Concurrent List, as provided for in the Constitution, such as acquisition and requisitioning of property, transfer of non-agricultural property, registration of documents, recovery of public dues. Other subjects in the Concurrent List will remain with the State of Assam.

The Government and the Legislature of Assam will continue to exercise all the powers of the State as hitherto in respect of areas other than those constituting the autonomous state. So far as the areas of autonomous state are concerned, the Government and Legislature of Assam will have jurisdiction in respect of certain subjects which are of common importance, such as State high-ways, major projects in the field of irrigation, flood control, drainage, water storage and water power, navigation and major industries. With a view to providing unified administration of public order and police (excluding village and town police assigned to the District Councils under the Constitution) these subjects will also rest with the State of Assam.

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43. Gori Hills, the Khasi Hills and the Jowai forming parts of the autonomous State cover a population of 7,90,000.

The hill areas of Assam, including those constituting the autonomous state, will have representation in the Assam Legislature as at present. In choosing the members of Assam Cabinet adequate representation will be given to the areas forming part of the autonomous state and other hill areas.

A Standing Committee consisting of the members of the Assam Legislature from the autonomous state and other hill areas, with a few other members of the Legislature, will be constituted. Bills (excluding Money Bills) in respect of subjects which are of common interest to the State of Assam as a whole, that is, other than the subjects assigned to the autonomous state, will be referred to the Standing Committee for consideration after introduction in the Assam Legislature. The views of the Committee will be taken into account when the Bills come up for consideration in the House.

The Assam High Court, the Assam State Public Service Commission and the Assam State Electricity Board will continue to have jurisdiction in the autonomous state, and there will be joint cadres of All-India Services and some of the higher state services.

One of the basic objectives of reorganisation has been to provide for a unified and co-ordinated approach to the security and development of the north-eastern region as a whole. With this end in view, the Government of India have decided to set up the North-Eastern Council (NEC) consisting of the Governor of Assam and Nagaland as Chairman, the Chief Ministers of Assam, Nagaland and the autonomous state, one Minister from each of these three States, and Chief Commissioners and Chief Ministers of Union Territories in the region. The Council is intended to provide for a unified and co-ordinated approach towards the development of inter-state communications, common irrigation and power and flood controls projects and co-ordinated plans for agricultural production, regional food self-sufficiency and balanced industrial development of the region. The Council will prepare, in respect of these, an integrated plan for the region as a whole. It will also discuss other matters of common interest to the region and suggest suitable measures including appropriate institutional arrangements.

The District Councils will continue with their present powers. In the autonomous state they will be under the control of the Government of that state. The Sixth Schedule of the Constitution will be amended in order to improve the procedures of the District Councils and to enable them to function efficiently and, if necessary, to give them more powers. Shillong will continue to serve as the Headquarters both of the State of Assam and the autonomous state.

The Lok Sabha on April 15, 1969 passed the Constitution (Twenty-second Amendment) Bill by 369 to 28 votes. Except for the Jan Sangh, all parties supported the Bill and all amendments were rejected by voice-vote. The Bill has now become the Constitution Amendment Act. Originally, the Bill was introduced in the Lok Sabha in January 1969. When it was put to vote on March 25, it failed to get the requisite majority and, accordingly, it had to be introduced *de novo*.

**Administration of Union Territories.** The Union Territories are

centrally administered. The Territorial Councils Act, 1956 provided for the establishment of Territorial Councils in Himachal Pradesh, Manipur and Tripura. These Councils, as also the Corporation of Delhi were elected on the basis of universal adult franchise and were responsible for the conduct of local affairs. They functioned under an elected Chairman and had the power of making bye-laws. They also constituted the Electoral Colleges for the elections to the Rajya Sabha for the Territories. To associate popular elements with the administration of the Centrally administered Territories Advisory Committees were established for the Territories of Himachal Pradesh, Delhi, Manipur and Tripura. The Union Government consulted these Committees in regard to (i) general questions of policy relating to administration of subjects in the State sphere, (ii) all legislative proposals in the State sphere pertaining to the Territories, and (iii) matters relating to the annual financial statement of the Territories.

The Constitution (Fourteenth) Amendment Act (1962) seeks to give Parliament the power to enact laws for the creation of Legislatures and Council of Ministers in the Territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry. The Home Minister, while moving the Bill in the Lok Sabha on September 5, 1962 for consideration said that the Government had come to the conclusion that it should give to the Union Territories the same status and the same position as under the old Part C States. Delhi and Andamans have been excluded, the former because of its special status as the national capital and the latter because the islands are still very backward and not in a position to shoulder the responsibilities of representative government. Dealing at length with the position of Delhi, the Home Minister said: 'I have always made it clear whenever I have said anything about the set up of Delhi that Delhi should be kept in a different category. I still think the same way.'

The Legislatures in these Territories are partly elected and partly nominated. The Councils of Ministers formed therefrom, accordingly, enjoy a limited autonomy and continue to be under the supervisory control of the Centre in financial and other matters. The Act, however, meets the demand of Himachal Pradesh for full status of a State more than half way. The merit of the new measure is that, unlike the old Part C States, some of which had legislatures and ministries and others only advisory councils, all the Union Territories now have an identical set up.

## ZONAL COUNCILS

**Zones and Zonal Councils.** The States Reorganisation Act, 1956 divided the States and the Territories as reorganised (excluding the Andaman and Nicobar Islands and the Laccadive, Minicoy and Amindivi Islands) into five Zones and established a permanent Zonal Council for each of them. The five Zones were:

- (1) the Northern Zone, comprising the States of Punjab, Rajasthan, Jammu and Kashmir, and the Union Territories of Delhi, and Himachal Pradesh;



- (2) the Central Zone, comprising the States of Uttar Pradesh and Madhya Pradesh;
- (3) the Eastern Zone, comprising the States of Bihar, West Bengal, Orissa, Assam and the Union Territories of Manipur and Tripura;
- (4) the Western Zone, comprising the States of Bombay and Mysore; and
- (5) the Southern Zone, comprising the States of Andhra Pradesh, Madras and Kerala with Mysore as a permanent invitee.

With the bifurcation of Bombay State in 1960 the Western Zone comprises Gujarat, Maharashtra and Mysore State. The Northern Zone, after the division of Punjab, now includes the States of Punjab, Haryana, Rajasthan, Jammu and Kashmir and the Union Territories of Delhi and Himachal Pradesh.

**Birth of the Idea of Zonal Councils.** The idea of Zonal Councils arose from the just and wholesome revulsions against the ugly passions disclosed by the reactions of linguistic communities in connection with the proposals of the States Reorganization Commission. Before concluding his speech on the States Reorganisation Report in the Lok Sabha, on December 21, 1955, the Prime Minister commended to the House the idea of dividing India after reorganisation of States into four or five big areas and setting up an advisory Zonal Council in each of them to "develop the habit of co-operative thinking." The Prime Minister made no secret of what he would do if left to himself. He said, "The more I have thought about it, the more I have been attracted to something which I used to reject previously and which I suppose, is not at all practicable now. That is the division of India into four, five or six major groups regardless of language, but always I will repeat, giving the greatest importance to the languages in those areas. I do not want this to be a step to suppress language, but rather to give it encouragement. That I fear, is a little difficult. We have gone too far in the contrary direction. But I would suggest for the consideration of this House a rather feeble imitation of that. That is, whatever final decisions Parliament arrives at in regard to these States, we may still have what I would call Zonal Councils, for four or five states, as the case may be, having a common council..." The Prime Minister indicated that the Zonal Councils would be advisory bodies. "Let us see how it develops," said Nehru. "Let the Centre be associated with it for dealing with economic problems as well as the multitude of border problems and other problems that might arise."

The feeler thrown by the Prime Minister was received by the House with enthusiastic cheers, and approving nods from some prominent members of the Opposition were also witnessed. The result was that the idea of the Zonal Councils had quick maturity and found expression in the resolution of the Government of India published on January 14, 1956, containing decisions on most of the States Reorganisation Commission's proposals. It stated that "the Government of India propose, simultaneously with the creation of the new States, to establish Zonal Councils, which may deal with matters of common concern to the States in different Zones, including economic planning and questions arising out of reorganisation."

Part III of the States Reorganization Act provided for five Zones and the composition and functions of the Zonal Councils.

A Zonal Council was, accordingly, established for each of the Zones. While forming the division of these Zones several factors, such as the natural divisions of the country, requirements of economic development, cultural and linguistic affinities, means of communications and requirements of security and law and order, were taken into account. The Northern Zone with its headquarters at New Delhi was inaugurated on April 24, 1957, Central Zone with its headquarters at Allahabad in May, 1957, the Eastern Zone with its headquarters at Calcutta on April 30, 1957, the Western Zone with its headquarters at Bombay on September 20, 1957, and the Southern Zone with its headquarters at Madras on July 11, 1957.

**Composition of the Zonal Councils.** The Zonal Council for each Zone consists of the following members:

- (i) a Union Minister appointed by the President;
- (ii) the Chief Minister of each of the States included in the Zone and two other Ministers of each such State to be nominated by the Governor;
- (iii) where any Union Territory is included in the Zone, one member for each such Territory to be nominated by the President;
- (iv) in the case of the Eastern Zone, the person for the time being holding the office of the Adviser to the Governor of Assam for Tribal Areas.

The Zonal Council for each Zone has also a body of Advisers consisting of:

- (a) one person nominated by the Planning Commission;
- (b) the Chief Secretaries in the States included in the Zone; and
- (c) the Development Commissioners in the States included in the Zone.

The Advisers assist the Zonal Council in the performance of its duties. They also have the right to take part in the discussions of the Council or of any Committee of the Council of which the adviser may be named a member. But no adviser has a right to vote at a meeting of the Council or of any such Committee.

**Power to Appoint Committees.** A Zonal Council may from time to time by resolution passed at a meeting appoint committees of its members and advisers for performing such functions as may be specified in the resolution. The Council may nominate and associate with any such Committee such Union Ministers or Ministers in the States included in the Zone and officers of the Union Government or State Governments as it may think appropriate. A person associated with a Committee of a Zonal Council has the right to take part in the discussions of the Committee, but without the right to vote. The Advisers of the Council, too, who are members of the Committees, have no right to vote. A Committee so appointed shall observe such rules of procedure in regard to trans-

action of business at its meetings as the Zonal Council may, with the approval of the Government of India, lay down from time to time.

**Staff and office of the Council.** The Union Minister nominated by the President to a Zonal Council is its Chairman. The Chief Ministers of the States included in the Zone act as Vice-Chairmen of the Council for that Zone by rotation each holding office for a period of one year at a time. Each Zonal Council has its own Secretariat consisting of a Secretary, a Joint Secretary and such other officers as the Chairman of the Council may consider necessary to appoint. The Chief Secretaries of the States represented in the Zonal Council shall each be the Secretary of the Council by rotation and hold office for a period of one year at a time. The Joint Secretary is chosen from amongst officers not in the service of the States represented in the Council and is appointed by the Chairman of the Council. The Secretariat of each Council is located at such place within the Zone as its Council may determine.

**Meetings of the Council.** Each Zonal Council meets when summoned by the Chairman. Unless otherwise determined by the Council itself, the Zonal Council for each Zone shall meet in the States included in that Zone by rotation. The Chairman presides at the meeting of the Council and in his absence the Vice-Chairman. If both the Chairman and Vice-Chairman remain absent, any other member chosen by the members present, from amongst themselves, shall preside at a meeting of the Council. The Chairman shall observe such rules of procedure in regard to transaction of business at its meetings as the Council may, with the approval of the Central Government, lay down from time to time.

All questions at a meeting of a Zonal Council are decided by a majority of votes of the members present. In the case of equality of votes, the Chairman or, in his absence, any other person presiding has a casting vote. The proceedings of every meeting of a Council are forwarded to the Union Government and also to each State Government concerned.

**Objectives of the Councils.** The Councils are deliberative and advisory bodies competent to discuss matters of common interest to some or all of the parties represented in them, namely, the Union, the States or the Union Territories. They may advise the Central Government and the Government of each State concerned as to the action taken on any such matter. It has been provided that the Zonal Councils may in particular discuss and make recommendations regarding:

- (a) any matter of common interest in the field of economic and social planning;
- (b) any matter concerning border disputes, linguistic minorities, and inter-State transport; and
- (c) any matter connected with or arising out of the reorganization of States.

Provision has also been made for the holding of joint meetings of two or more Zonal Councils.

**Main Objectives of the Zonal Scheme.** When the Constitution of

India was being framed some statesmen expressed the view that India should adopt a Unitary rather than a Federal system of Government. They pointed out that Federalism would encourage fissiparous tendencies, make economic planning difficult and prevent administrative uniformity. The framers of the Constitution preferred the Federal to the Unitary system, as they thought that Federalism alone could forge unity of the wide cultural and social diversity in the country and prevent heavy concentration of power which was incompatible with democratic practice. They were, however, not oblivious of the cogency of the arguments of the opponents of Federalism and provided, accordingly, for a federal polity with an exceptionally strong unitary bias.

Two factors have recently led to the revival of the demand for a Unitary form of Government—the bitter controversy and the ugly incidents which followed the publication of the States Reorganisation Report, and the realization that the presence of small States as constituent units of a Federation stands in the way of the effective implementation of development plans. Switching on to the Unitary system of Government is really not the panacea of India's ills at this stage. But to bring about the "emotional integration of India," as Prime Minister Nehru fervently appealed in Parliament, is no doubt the desideratum and the scheme of Zonal Councils is an inspired idea. The Zonal Councils are purely deliberative and advisory bodies intended to foster habits and institutions of economic co-operation and administrative co-ordination among the States within each Zone. The co-operation and co-ordination thus brought about is sure to contribute to the proper integration of the development programmes of the Zones by easing the rigidities and artificial barriers occasioned by the interference of State boundaries. And they may in time prove to be valuable correctives, on the psychological and emotional plane, to the rivalries and separatist tendencies promoted by the more extreme types of linguistic claims. Referring to the Zonal Councils, Pandit Govind Ballabh Pant rightly remarked in Parliament, "while the States have to be carved in accordance with their natural affinities, the supreme objective of strengthening the unity, the cohesion of the nation and the country, has to be given the first and foremost consideration.... So far as the economic and developmental requirements of the country are concerned, these linguistic affinities do not mark the bounds of the various territories. Rivers do not determine their course in accordance with the language of the people who make them their homes. The mines that lie deep down in the bosom of the earth do not follow any regional pattern, much less any linguistic pattern. So for the purpose of economic development at least, if not for anything else, it would be desirable to have councils of this type. Besides, they should serve to heal the wounds that separation may cause in some places." The scheme of Zonal Councils, in brief, is the test in the art of living together. They are the flexible instruments to develop inter-state co-operation and the best example of co-operative Federalism.

The main objectives of the Zonal Scheme can best be described in the words of Pandit Pant which he outlined at the inaugural meeting of Northern Zonal Council:

"(1) to achieve an emotional integration of the country;



- (2) to help in arresting the growth of acute State consciousness, regionalism, linguism and particularist trends;
- (3) to help in removing the after-effects of separation in some cases so that the processes of reorganisation, integration and economic advancement may coalesce and synchronise;
- (4) to enable the Centre and the States, which are dealing increasingly with matters economic and social, to co-operate and exchange ideas and experience in order that uniform policies for the common good of the community are evolved and the ideal of a **socialistic society** is achieved;
- (5) to co-operate with each other in the successful and speedy execution of major development projects; and
- (6) to secure some kind of political equilibrium between different regions of the country."

**Utility of the Zonal Councils.** While the scheme of the Zonal Councils has been received generally with enthusiasm, apprehensions have also been expressed that it was too idealistic a venture and that it might result in a Zonal Council either absorbing the participating States, or Councils developing into powerful bodies which would weaken the Centre. But this is not the correct appraisal of the Zonal Councils. The Zonal Councils are deliberative bodies whose task is to advise the Central Government and the participating State Governments for action to be taken in matters of common interest. Their advisory functions are confined to secure better co-ordination within the different Zones, promotion of collective approach and effort to solve problems common to all the units within a Zone. They are intended to foster inter-State concord and thereby strengthen and invigorate the Centre as well as the States. Pandit Pant, the Union Home Minister, clarified this point at the inaugural meeting of the Northern Zonal Council, when he said, "The Councils, as I have already observed, are advisory bodies. But if they are to serve the purpose for which they have been constituted, their recommendations will need to be treated with consideration and respect. The success of this experiment will depend to a large extent on the outlook which the State Governments bring to bear on their deliberations, their ability to appreciate each other's point of view and their readiness to reconcile the State aspect of different problems with their inter-State aspect." The creation of the Zonal Councils will not, therefore, in any way detract from the content of the legislative and executive of the States.

The idea of providing a meeting ground for inter-State co-operation in matters of common interest to States is by no means peculiar to India. In the United States of America, beginning with the inter-State Parole and Probation Compact of 1934, collective State action by means of compacts had been utilised to promote inter-State co-operation. Some agencies created to secure inter-State co-operation include a Legislative Reference Bureau, Inter-State Commissions, Conferences on current governmental problems, Conferences of State executives, administrators and judges and regional associations. In Australia, in the same way, inter-State co-operation had taken various forms.

In India the Zonal idea dates back to Coupland Plan, though it was



a device to give economic complexion to certain political plans. After Independence, a Joint Advisory Council for Punjab, PEPSU, and Himachal Pradesh was set up and it continued to be in existence till the Northern Zonal Council came into being. In fact, the Northern Zone, which includes the Punjab, the PEPSU merged into it as a result of the reorganisation of the States, and the Union Territory of Himachal Pradesh, was the pioneer in initiating the Zonal idea. Another such example of regional co-operation was the Bhakra Control Board on which Punjab, PEPSU, Rajasthan and Himachal Pradesh were represented. The Zonal Councils are an inter-State forum where the States are associated with each other to promote and facilitate co-operative efforts towards the economic and social development of each Zone and as a consequence of that towards the unity and welfare of the nation. The unity and welfare of the whole country is the essence of emotional integration of India. Pandit Pant epitomised the whole truth when he said that "no region could prosper unless the security and unity of India were completely ensured and generated for today, for tomorrow and for ever."

Generally, social and economic interests cut across State lines and are of either regional or national concern. Greater co-ordination of social and economic policies and the planned and orderly development of the resources of the country can only be ensured if major policy decisions are not compartmentalised in the State-moulds. They must be fully studied and discussed with their impact on territories contiguous and the people, who are sure to share the weal and woe resulting from such policy decisions. The Madras Finance Minister, C. Subramaniam, while inaugurating the quarterly meeting of the Southern Indian Chamber of Commerce on November 12, 1958, pleaded for Zonal approach while formulating the Third Five-Year Plan for the country. He suggested that instead of assessing the resources of each State separately and planning State-wise a combined and co-ordinated Zonal approach should be made to planning. This, he maintained, besides eliminating regional disparities, would avoid lopsided development of a particular State." Pandit Pant appealed to the Southern Zonal Council meeting to set the overall economy of the South, rather than of the individual States, as the guiding principle. Pandit Pant's appeal had an effect and the States of Andhra and Madras were knit into economic agreements, which hitherto had taken regional-political colour. Wider economic co-operation was envisaged in the proposal to set up a regional grid linking the power systems of Madras, Andhra, Mysore and Kerala. There are some who entertain serious doubts about the utility of the Zonal Councils in dealing with questions connected with, or arising out of the re-organisation of the States, such as, border disputes, linguistic minorities and inter-State transport. It is further contended that in such matters it is impossible for neighbours to come to agreement by mutual discussion. The Governments of Andhra and Madras have failed to settle even minor border disputes. Maharashtra and Mysore are still waging their endless controversy. A proposal that Nehru should convene a conference of the Chief Ministers of Andhra, Maharashtra and Mysore for a discussion of Krishna-Godavari waters dispute and then sug-

gest his own solution was mooted, but without any tangible result.' In fact, disputes, even minor, about persons and places arouse more passion and create a deep sense of regional loyalties which had ever been the bane of Indian politics. At one occasion Nehru went so far as to suggest that if there was a choice between national unity and the Third Plan he would abandon the plan rather than risk disunity.

The Congress President Sanjiva Reddy, in his address to the Congress Session at Bhavnagar, suggested that the separatist tendencies could best be countered by arming the five Zonal Councils, which had so far served as advisory bodies, with the authority to "back up their solutions and implement them." He maintained that "Decisions taken at Delhi may not take fully into account all the local needs... Decisions at the State level may not reflect fully the needs of national importance. It is obvious therefore that a *via media* establishment is needed to decide the problems at an intermediary level."

The first and somewhat critical reaction to the Congress President's suggestion of giving statutory powers to the Zonal Councils came from the Praja Socialist Party Chairman, Asoka Mehta.<sup>45</sup> He expressed the view that though seemingly attractive Sanjiva Reddy's proposal for stronger Zonal Councils was not without dangers. The alternative solution that Mehta offered was to build a strong centre with special powers to protect the rights of the linguistic minorities. "The proper approach, in our opinion," he maintained, "is to strengthen the Centre. The Union Government should have wider concurrent powers and be given direct responsibility in certain matters, such as protecting the legitimate rights of linguistic minorities in the States. The Union Government should have the powers and the will to arbitrate in inter-State disputes quickly and firmly..."

The Punjab delegates to the Bhavnagar Congress Session supported the idea of a non-official resolution recommending the division of India into five Zones superseding the existing constituent States. Recently, a few more have spoken up and asked for a reversal of the policy of linguistic states. Virendra Patel, the Chief Minister of Mysore, has suggested the formation of Zonal States; earlier S. Nijalingappa, the Congress President, had spoken of the disintegrating impact of linguism on India's unity. V.V. Giri, as Vice-President of India, expressed the opinion that linguistic States must go. The Working Committee of the Jan Sangh on April 24, 1969, demanded constitution of a States Reorganisation Commission to examine in its entirety the question of redemarcation of State boundaries to reconcile the regional aspirations with the paramount need of national unity and security.

This is, no doubt, a gigantic task and it is doubtful now if the States will agree to the redistribution of their boundaries on basis other than language or abdicate any of their powers to the Zonal Councils, as was suggested by Sanjiva Reddy. In any case the arming of the five Zonal Councils with wider powers is not likely to avert the main danger which

45. *The Times of India*, New Delhi, March 21, 1963.

46. *The Statesman*, New Delhi, January 9, 1963.

India faces today. The threat of the disruptive forces at work, and which is much wider than ever before, can be countered only by creating a national consciousness that cuts across communal, casteist and linguistic divisions.

## RELATIONS BETWEEN THE UNION AND THE STATES

**Legislative Relations.** The essence of federalism is the division of powers between the National Government and the State Governments. Within the sphere allotted to them, the National and State Governments are supreme and their authority is co-ordinate. Conflict of jurisdiction arising between the two sets of Government is decided by an independent judiciary, Federal or Supreme Court.

The scheme of distribution of powers in each federation is determined by the peculiar political conditions under which it comes into existence. In the United States when the sovereign States agreed to federate, they were anxious not to permit their complete subordination to the National Government. They would agree to vest it with certain specified powers of common concern and national importance retaining the rest for themselves. The Constitution of the United States, accordingly, contains only one List of subjects meant to be exercised by the Central Government and the residuary powers remain with the States.<sup>47</sup> Through interpretation of the Constitution a field of concurrent legislation has developed and the powers which have not been exclusively granted to the National Government, constitute the current field of legislation. On some matters such as bankruptcy, weights and measures, harbour regulations, etc., both Congress and the State Legislatures may legislate, but State legislation "shall take effect only in the absence of Federal legislation."<sup>48</sup> But the Canadian Constitution is just the other way. The Canadians had before them the experiences of the working of the American Federal system extending to nearly about a century. They had also witnessed the American Civil War of 1861, and carefully watched the long and bitter controversy over rights of the States which culminated in the tragic Civil War. It was natural, therefore, that they would have agreed to make the Centre strong and vest it with more powers. The North America Act, 1867, contains two Sections or Lists in which the powers of the Centre and the Units (Provinces) are enumerated, leaving the residuary powers to the Dominion Parliament. Besides, the Dominion Government is authorised by the opening para of Section 91 "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the class of subjects by the Act assigned exclusively to the Legislatures of Provinces..." Section 93 of the Act gives the Provinces control over education subject to the intervention of the Dominion Government in some specific cases. Section 92 specifies the exclusive powers of the Provinces. There is also

47. The Tenth Amendment reads, "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively." The prohibitions imposed on the National Government are stated in Article 1, Section 9, and first ten Amendments, and the restrictions imposed on the State Governments are enumerated in Article 1, Section 10.

48. Bryce, James, *The American Commonwealth*, Vol. I, pp. 313-318.

a small Concurrent List comprising agriculture, and immigration and in case of conflict the Dominion Law prevails. Old age pension was added in the Concurrent List in 1951, but the Dominion Law does not affect in any form the existing or any future Provincial Law. Australia broadly follows the American system, because the problem of federation there was different from that in Canada and much more like that of the United States. Political conditions prevailing there permitted its adoption. The Australian Constitution contains only one List enumerating the powers of the Federal Government and the powers of the States are residual.

The Government of India Act, 1935 contained three Lists—Federal, Provincial and Concurrent—and the residuary powers were given to the Governor-General in his discretion. The method of distribution of powers adopted was neither American nor Canadian. It was necessitated by the political conditions then prevailing in India. In the three Round Table Conferences preceding the enactment of the Act of 1935, there was a substantial difference of opinion between the Hindus and the Muslims with regard to the allocation of residuary powers. The Hindus favouring a strong Centre insisted that residuary powers should be given to it whereas the Muslims favoured strong Provinces and demanded that residuary powers should go to them. To solve these conflicting claims, the device adopted was to enumerate exhaustively the exclusive powers of the Centre and the Provinces so as to reduce "the residue to proportions so negligible that the apprehensions which have been felt on one side or the other are without foundations."<sup>49</sup> The Joint Parliamentary Committee explained the need for having a Concurrent List. It said, "Experience has shown, both in India and elsewhere, that there are certain matters which cannot be allocated exclusively either to a Central or to a Provincial Legislature, and for which, though it is often desirable that Provincial Legislature should make provision, it is equally necessary that the Central Legislature should also have a legislative jurisdiction, to enable it in some cases to secure **uniformity** in the main principles of law throughout the country, in others to **guide** and **encourage** provincial efforts, and in others, again to provide **remedies** for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province."<sup>50</sup>

The scheme and principle of distribution of powers in the Constitution of India substantially remain the same as it was under the Government of India Act, 1935. There are three Lists: the Union List, the State List and the Concurrent List. Parliament has the exclusive power of making laws with respect to matters which are enumerated in the Union List and contains 97 subjects. The State Legislatures have the exclusive powers of making laws with respect to matters enumerated in the State List and contains 66 subjects. As regards matters which are enumerated in the Concurrent List, 47 in number, both Parliament and State Legislatures have concurrent powers with the provision that, in case of a conflict, the Central Law must, to the extent of repugnancy, prevail over the State Law. If, however, the State Law has been reserved for, and receiv-

49. J.P.C. Report, para 49.

50. *Ibid.*, para 51.



ed the President's assent, it will prevail over the Central Law<sup>51</sup> unless and until Parliament passes a new law overruling the provisions of the State Law.<sup>52</sup>

The residuary powers, the Constitution gives to Parliament.<sup>53</sup> This is unlike the Government of India Act, 1935 which vested residuary powers in the Governor-General who could in his discretion assign to the Centre or the Provinces legislative power regarding subjects not mentioned in any List.

The enumeration of subjects in the three Lists is extremely detailed and an attempt has been made to exhaust all the activities of ordinary Government.

While the Constitution confers exclusive jurisdiction upon the State Legislatures to make laws with respect to matters enumerated in the State List,<sup>54</sup> Articles 249—253 provide certain cases in which Parliament is empowered to legislate on subjects contained in the State List. Normally, such a jurisdiction to Parliament is forbidden. Article 249 empowers Parliament to legislate with respect to a matter in the State List whenever the Rajya Sabha (Council of States) passes a resolution supported by a two thirds majority present and voting that such legislation by Parliament is necessary or expedient in the national interest. Laws so made by Parliament remain in force for a period not exceeding one year unless continued under a fresh resolution and shall cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force.

The division of powers in the American Constitution is rigid and no change can be made thereto without amending the Constitution. In Australia, too, amendment of the Constitution is required for transferring to Commonwealth Parliament any of the powers substantially given to the State by the Constitution. In Canada, the Dominion Parliament is competent to make laws on matters provincial or local when they assume a national importance. But it has no power to legislate on a matter which comes directly within the exclusive Provincial List. Whenever any matter assumes a national importance, the Dominion Parliament can legislate for "the peace, order and good Government of Canada"<sup>55</sup> and it is for the Courts, and not Parliament, to determine whether necessity for such assumption of powers by Parliament exists or not. In India, on the other hand, one of the Houses of Parliament determines that a subject has assumed national importance and when the Rajya Sabha passes a resolution to that effect with the requisite majority, Parliament becomes competent to invade the State List to the extent that the resolution goes. The power of Parliament in this respect is, no doubt, temporary, yet it is indicative of the tendency of the Constitution towards unitariness. No other federal Constitution makes a similar provision as it is not in conformity with the federal principle.

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51. Article 254 (2).

52. Proviso to Article 254.

53. Article 248.

54. Article 246.

55. Section\* 91, North America Act, 1867.



The Constitution reserves in the Union the power to invest itself with overriding powers in emergencies. Article 250 empowers Parliament to legislate with respect to any matter in the State List during the operation of the Proclamation of Emergency. The Proclamation of Emergency may be issued, if the President is satisfied that the security of India is threatened either by war or internal disturbance or even if the threat of either of these exists.<sup>56</sup> It is for Parliament, and not for Courts, to determine the expediency of Proclamation of Emergency. And once the Proclamation of Emergency comes into operation, the Constitution, for the period of Emergency, becomes in effect unitary and parliament can legislate on any matter in all the three Lists. The executive authority of the Union being co-ordinate with its legislative authority, during the operation of Emergency the Union Government has the power to give directions to the State Governments how they should exercise their executive authority.<sup>57</sup>

The Constitution, also, provides for emergency powers to deal with a breakdown of the Constitution in a State.<sup>58</sup> If the President is satisfied, on the report of a Governor, that Government cannot be carried on in his State in accordance with the Constitution or even if a State Government disobeys the direction of the Union Government,<sup>59</sup> the President may issue a Proclamation transferring the legislative powers of the State to Parliament. Such a Proclamation also requires Parliamentary approval, but this will give the Proclamation validity for six months unless a further resolution of Parliament has been passed within that period.

The exclusiveness of the State List is further modified by Article 252 which empowers Parliament to legislate on any subject in the State List, if the Legislatures of two or more States resolve to make a request to Parliament to that effect. The laws so made by Parliament can also apply to other States which may adopt them after expressing their request in the same manner. Once Parliament is empowered to legislate at the request of the State Legislatures, the jurisdiction of the latter is excluded from those matters. "This power", writes Joshi, "itself shows that the federal principle was not strong; otherwise such a power could not have been granted. It further indicates the diffidence of the State Legislatures even as regards their legislative sphere. This provision is another indication of the unitariness of the Constitution."<sup>60</sup>

Entry number 14 of the Union List confers on Parliament exclusive power to make laws with respect to "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." Article 253 empowers Parliament to make any law for the whole or any part of the territory, of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Thus, in order to implement any treaty or agreement with a foreign country, Parliament's power of legislation is not confined to mat-

56. Article 352 (1), (3).

57. Article 353 (a).

58. Article 356.

59. Article 365.

60. Joshi, G.N., *The Constitution of India*, p. 278.

ters on the Union List and the Concurrent List. It can pass an Act dealing with a matter on the State List if implementation of any kind of international agreement necessitates it. And the law so passed by Parliament shall not be invalidated on the ground that it contains some provisions relating to the matters on the State List. This is really a sweeping power and it has no parallel even in Canada. In *Attorney-General of Canada vs. Attorney-General of Ontario* the Privy Council held that "in a federal state where legislative authority is limited by a constitutional document or is divided up between different legislatures in accordance with the classes of subject-matter submitted for legislation... the obligation imposed by treaty may have to be performed, if at all, by several legislatures, and the executive have the task of obtaining the legislative assent not of the parliament to whom they may be responsible but possibly of several parliaments to whom they stand in no direct relation. The question is not how the obligation is formed, that is the function of the executive but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures."

### ADMINISTRATIVE RELATIONS

**Relation between Union and States and between States 'inter se'.** Co-operation and goodwill are the two essential prerequisites which minimise friction inherent in a dual system of government and ensure smooth and proper functioning of the administrative machinery. But there are always in every federal scheme of government certain forces, seen or unseen, at work which if unchecked by law encourage disruptive tendencies and jeopardise the solidarity of the State. Provision has also to be made for meeting emergencies, which either may emerge from the actual working of the federal scheme or to meet the new conditions and circumstances which may result from differences arising between the independent functioning of authority in the two sets of government. Finally, the National Government is responsible for the peace, order, good government and security of the country as a whole. All these factors necessitate co-ordination in the administrative sphere of the Centre and the States. In fact, the success and strength of the federal polity depends upon the maximum of co-operation and co-ordination between each set of authorities and between States *inter se*.

Administrative relations between the Union and the States of a federation may be examined under two headings: (1) techniques of Union control over States; and (2) inter-State comity.

**Techniques of Union Control over the States.** During emergencies the control of the Central Government over the States in India is complete in all respects, and the Constitution will work as if it were a unitary government. During normal times the Central Government exercises control over the States through different methods and agencies. This may be examined under the following heads: (i) directions to the State Governments, (ii) delegation of functions, and (iii) all-India services.

(i) **Directions to the State Governments.** The idea of the Central Government giving directions to the State Governments is foreign and repugnant to the Constitution of the United States. The framers of the Indian Constitution borrowed it from the Government of India Act, 1935.

The Constitution, accordingly, gives the Union Government the power to give directions to the State Governments.

(a) A constitutional obligation is placed on the State Governments (1) to ensure compliance with the laws made by Parliament,<sup>61</sup> and (2) not to impede or prejudice the exercise of the executive power of the Union within their respective territories.<sup>62</sup> In either case the Union Government may give for the purpose such directions to a State as may appear to it to be necessary. When both these provisions are put together they unprecedentedly widen the authority of the Government of India, for they restrict, both positively and negatively, the executive authority of the States and give ample scope to the Government of India for exercising its executive functions unrestricted in any way. The sanction behind the directions of the Government of India is the provision of Article 365 which reads, "where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution." It means that if a State has failed to comply with the directions of the Union, the President may declare that there has taken place a breakdown of the Constitution in the State under Article 356 and he may assume to himself all or any of the functions of the Government of the State.

But Kerala Government refused to comply with the provisions of the Essential Services Maintenance Ordinance 1968, and regretted its inability to issue instructions to district authorities to take suitable action, including arrest of and institution of cases, against persons instigating employees who were willing to work. The attention of the Kerala Government was thereupon invited to Article 256 of the Constitution. The State Government informed the Government of India that all action necessary and found suitable was being taken, keeping in view the provisions of Article 256. Clarifying the position taken by the Kerala Government, the Chief Minister, E.M.S. Namboodripad said that his Government had only used its discretion in the application of the Ordinance in regard to arrest and prosecution of those inciting or taking part in the September 19, 1968, token strike. The attitude of the State Government left no option for the Government of India but to post Central Reserve Police without previously intimating the State Government.

(b) The Union may give directions to a State as to the (1) construction and maintenance of the means of communications declared to be of national or military importance, and (2) measures to be taken for the protection of the railways in the States, provided that in either case compensation shall be paid to the States in respect of the extra cost incurred for the purpose.

Communications, generally, are a State subject, vide Entry 13, List II—State List. Article 257 (2) empowers the Union Government to give directions to a State to construct and maintain means of communication

61. Article 256.

62. Article 257.

which the former may declare to be of national or military importance. It means, that while the Government of India may itself construct and maintain means of communication necessary for the exercise of its powers over naval, military and air force works [Entry 4, List I—Union List and proviso to Article 257 (2)], it may also direct the States to construct and maintain such means of communication which may be important from the national or military standpoint.

Similarly, railways are a Union subject and Police, including Railway Police, is a State subject. The executive power of the Union to give directions to a State for the protection of the railways includes the power of the Government of India to give directions to a State Government to employ its police force for the proper protection of the railways and their property and, if necessary, to employ additional police subject to contribution by the Union as provided for in Article 257 (4).

(ii) **Delegation of functions.** Article 258 provides that the President may with the consent of the Government of a State entrust either conditionally or unconditionally to that Government or its officers functions in relation to any matter to which the executive power of the Union extends. Parliament may also by law entrust functions to the State Government or its officers in relation to any matter over which the State Legislature has no jurisdiction. In such a case there shall be paid to the State compensation for the extra cost of administration incurred by the State in connection with the exercise of those powers and duties.

According to Article 258-A, inserted by the Constitution (Seventh Amendment) Act, 1956, the Governor of a State may, with the consent of the Government of India, entrust to that Government or its officers functions in relation to any matter to which the executive power of the State extends. The Constitution, thus, provides for inter-level delegation of functions.

Mention may also be made that Article 355 imposes a duty on the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution.

(iii) **All-India Services.** As under a dual polity there are two sets of Government, it follows that there shall be two separate public services, one for the States and the other for the Union to administer their respective laws. The Constitution of India provides for separate public services to administer their respective affairs. But the Constitution also provides that the Indian Administrative Service and the Indian Police Service are common services to the Union and the States. Parliament is further empowered, under Article 312, to create more of such all-India Services whenever it is expedient in the national interest to create them.<sup>63</sup> This is an extraordinary feature of the Indian Constitution. Dr. Ambedkar explained the reasons for creating all-India services and his reasons also explained the extent of control which the Union Government can exercise over the administration of the States. Dr. Ambedkar said, "The dual

63. All India Health Services and Economic Services have since been created.



polity which is inherent in a federal system is followed in all federations by a dual service. In all federations, there is a Federal Civil Service and a State Civil Service. The Indian Federation, though a dual polity, will have a dual service, but with one exception. It is recognised that in every country there are certain posts in its administrative set-up which might be called strategic from the point of view of maintaining the standard of administration.... There can be no doubt that the standard of administration depends upon the calibre of the civil servants who are appointed to these strategic posts.... The Constitution provides that without depriving the States of their right to form their own civil services there shall be an all-India service recruited on an all-India basis with common qualifications, with uniform scale of pay and members of which alone could be appointed to these strategic posts throughout the Union."

The service conditions of All-India Services are regulated by Central Rules and Regulations, and their ultimate responsibility lies to the Government of India. But they hold key posts in both Central and State Governments and, thus, help to ensure integration of administration throughout the Union of India. It is, accordingly, a device to exercise certain control over the State Government so that they do not "run in flat contradiction to the spirit of the constitution or the important national policies."<sup>64</sup>

**Grants-in-aid.** The general principle of federal finance is that both the Union Government and the State Governments should be independent of each other as regards their financial resources. But such a rigid application of this principle is not possible and every federal constitution provides for the division of the proceeds of certain taxes between the federal government and the federating governments. Even such an arrangement has not been found adequate to meet the ever-expanding needs of the federating governments and they have to rely upon the grants-in-aid from the Central Government. Article 275 of the Constitution authorizes Parliament to make such grants as it may deem necessary to any State which is in need of assistance and such sums of grants are charged on the Consolidated Fund of India. Apart from the general power of making grants by Parliament to States in need of financial assistance, the Constitution itself provides for specific grants on two matters: (1) grants-in-aid charged on the Consolidated Fund of India for schemes of development, for the welfare of the Scheduled Tribes and for raising the level of administration of Scheduled Areas, as may have been undertaken by a State with the approval of the Government of India; and (2) grants-in-aid to the State of Assam for the development of the Tribal Areas in that State.

Financial assistance or the grants-in-aid are a prolific source of Central control and direction. They are made subject to conditions and are followed by regulatory authority of the Union Government. It is a matter of common experience that one who gives money has a loud voice in calling the tune.

**Inter-State Comity.** Though the federating units are autonomous



within their own territorial limits, no unit can lead an unconnected and isolated life from the rest. In fact, the very exercise of its autonomy requires recognition of certain principles of mutual co-operation. All federal Constitutions, accordingly, lay down certain rules of comity which the units must observe in their relation to one another. The Constitution of India empowers Parliament to provide for the adjudication of any dispute or complaint with respect to the use, distribution, or control of the waters of, or in, any inter-State river or river valley. Parliament may by law also provide that neither the Supreme Court nor any other Court shall exercise any jurisdiction in respect of any such dispute or complaint.<sup>65</sup> Provision has also been made for the creation of Inter-State Councils.<sup>66</sup> If at any time it appears to the President that public interests would be served by establishing an Inter-State Council charged with the duty of (a) inquiring into and advising upon disputes which may have arisen between States; (b) investigating and discussing subjects in which some or all the States, or the Union and one or more of the States, have a common interest; or (c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the President to establish such a Council and define its duties, its organisation and the procedure to be followed therein.

Article 261 provides that full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and every State. But Parliament lays down by law the mode of proof and the effects of such acts and proceedings in other States. It is further provided that final judgments or orders delivered or passed by civil courts in any part of India are executable anywhere within India according to law.<sup>67</sup>

The Constitution prescribes that trade, commerce and intercourse throughout the territory of the Union shall be free.<sup>68</sup> But like all other freedoms, the freedom of trade, commerce and intercourse is also not absolute. Parliament is empowered to impose restrictions that it deems necessary in public interest.<sup>69</sup> Article 303 prohibits Parliament and State Legislatures from enacting legislation giving preference to one State over another or making discrimination between one State and another by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. But the same Article also authorises Parliament to make any law giving preference to one State over the other or making discrimination between States if it is declared by such law that it is necessary to do so to meet a situation arising from scarcity of goods. It may be noted here that while this Article empowers Parliament to give preference or make discrimination, provided it is necessary for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India, there is no exception in the case of a State Legis-

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65. Article 262.

66. Article 263.

67. Article 261 (3).

68. Article 301.

69. Article 302.

lature on the ground of scarcity of goods. There is a definite and specific prohibition upon the State Legislature against preference and discrimination.

But State Legislatures have the power to impose by law non-discriminatory taxes on goods imported from other States and Union Territories provided goods manufactured or produced in that State are subjected to such taxes.<sup>70</sup> It may also impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in public interest. No Bill or amendment for this purpose, however, can be introduced or moved in the State Legislatures without the previous sanction of the President.<sup>71</sup> These provisions are analogous to the American doctrine of "police powers" of the States to impose restrictions on inter-State commerce.<sup>72</sup> But the power of the States in America is authorised by Courts and, therefore, it emanates from the judicial doctrine. In India, on the other hand, it carries the constitutional sanction. Moreover, the provisions of the Indian Constitution are much wider in scope than the application of the doctrine of "police power" in the United States.

Article 307 empowers Parliament to establish such authority as it considers appropriate for enforcing the provisions of the Constitution with regard to inter-State trade and commerce and confers on it such duties as it thinks fit. Such an authority in India, when established, will be similar to the Inter-State Commerce Commission of the U.S.A.

## FINANCIAL RELATIONS

**Fiscal autonomy of the units.** The system of federal finance essentially differs from the one obtainable under a unitary system of government. The essence of federalism is the distribution of functions, but the distribution of functions must be accompanied with distribution of resources if those functions are to be adequately and efficiently performed. The first requisite of a federal finance, therefore, is that the national government and the governments of the units constituting the federation must have under their independent control financial resources adequate to perform functions assigned to their executive jurisdictions. Each government should command the fullest possible freedom "of initiative and operation", in tapping its resources and meeting its expenditure. Financial authority, in brief, like political authority, under a federal scheme of government, must be fully decentralised as "financial independence is a large part of general independence." Without fiscal autonomy of the units there can be no political autonomy for them. The proper relation between the national government and governments of the States should only be that of co-ordination and control. Professor Adarkar, dealing with this complex problem of federal finance, says: "Freedom of operation must be extended to both the federal and State governments in order

70. Article 304 (a).

71. Proviso to Article 304 (b).

72. In Canada, too, it has been held that the Provincial Legislature has power to make police or municipal or sanitary regulations of merely local character though Parliament has wide power to regulate trade and commerce.

that they do not suffer from a feeling of cramp in the discharge of their normal activities and in the achievement of their legitimate aspirations for the promotion of their social and economic advancement.<sup>73</sup>

But no federation has followed the rigid application on this principle. It has been so modified as to meet the particular economic and financial needs of the country concerned. The recent developments in the theory of federalism, too, have necessitated modification in its application. The basis of distribution of financial resources, accordingly, differs from federation to federation. In the United States, Congress has the power to levy and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States and to borrow money on the credit of the United States. In Canada, the Union Parliament has the power to raise money by any mode or system of taxation and to borrow money on public credit. In Australia, the Centre and the States have concurrent powers of taxation except that the imposition of duties of customs and excise belong exclusively to the Commonwealth.

The Drafting Committee had recommended that in view of the unstable conditions prevailing in India in 1948, the existing distribution of the sources of revenue under the Government of India Act, 1935, should continue for at least five years after which a Finance Commission be appointed to review the position. The Constitution makes a provision for the appointment within two years of the inauguration of the Republic, or thereafter at the expiration of every fifth year or earlier, a Finance Commission consisting of a Chairman and four other members. The duties of the Commission are to recommend to the President the distribution of the taxes which are distributable between the Centre and the units, and the principles on which grants should be made out of the Union revenues to the States.<sup>74</sup> The Constitution of India, thus provides for a new solution to the problem of distributing the public revenues. It is a flexible method and the whole division comes under review after every fifth year and even earlier. The First Finance Commission, with K.C. Neogy as Chairman, was appointed in November 1951, and submitted its report in February 1953. The Second Finance Commission, with K. Santhanam as Chairman, was appointed in 1956. The Third Finance Commission was set up in December 1960, with A.K. Chanda as Chairman and submitted its report in December, 1961. The Fourth Finance Commission was constituted in 1964 with Dr. P.V. Rajamannar as Chairman and submitted its report in August, 1965. Again, in 1967 another Commission was set up under the Chairmanship of Mahavir Tyagi and it has since submitted its report.

**Allocation of Revenues.** The taxes on the Legislative Lists remain much the same as under the 1935 Act. The States are absolutely entitled to the proceeds of taxes on the State List and the Union takes the proceeds of taxes on the Union List and of any tax not mentioned in any List. There<sup>\*</sup> are no taxes on the Concurrent List. While the proceeds on the taxes within the State List are entirely retained by the States, the

73. Adarkar, B.P., *The Principles and Problems of Federal Finance*, p. 219.

74. Article 280.

proceeds of some of the taxes in the Union List are to be assigned, or may be assigned wholly or partly to the States. The residuary taxing authority rests with the Union. The Constitution distinguishes four categories of Union taxes which are available, whole or in part, to the States.

(i) Duties levied by the Union but collected and wholly appropriated by the States: Stamp duties in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, and excise on medicines and toilet preparations containing alcohol.<sup>75</sup>

(ii) Taxes levied and collected by the Union but whose net proceeds are wholly assigned to the States. These include.<sup>76</sup>

- (a) duties in respect of succession to property other than agricultural land;
- (b) estate duty in respect of property other than agricultural land;
- (c) terminal taxes on goods and passengers carried by railway, sea or air;
- (d) taxes on railway fares and freights;
- (e) taxes other than stamp duties on transactions in stock exchanges and future markets;
- (f) taxes on the sale or purchase of newspapers and advertisements published therein; and
- (g) taxes on the sale and purchase of goods in the course of inter-State commerce and trade.

(iii) Taxes levied and collected by the Union but whose net proceeds are shared between the Union and the States. The only tax which comes under this category is the Income Tax. The Corporation Tax is not shared, but belongs exclusively to the Union. Agricultural Income Tax is a State subject and, therefore, does not come under this category. After deduction of sums attributable to the Union Territories and to Union emoluments, the net proceeds of Income Tax are divided between the Union and the States, and among the different States as prescribed by the orders of the President after considering the report of the Finance Commission.<sup>77</sup>

Parliament may, for Union purposes, impose surcharges on those taxes which are available for distribution,<sup>78</sup> but it may not alter the rates of taxes in which States are interested except on the recommendation of the President.<sup>79</sup>

(iv) Taxes which are levied and collected by the Union but whose net proceeds are shared between the Union and the States. Under this category come Union excise duties other than those on medicinal and

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75. Article 268.

76. Article 269.

77. Article 270.

78. Article 271.

79. Article 274.

toilet preparation." The excise duties on medicinal and toilet preparations are wholly, as said in item (i), assigned to the States."

**Grants-in-aid.** The Constitution provides for three kinds of grants to the States from the Union resources. Under Article 273 the States of Assam, Bihar, Orissa and West Bengal are given grants in lieu of export duty on jute and jute products. The sums of such grants-in-aid may be those as prescribed by the President. These sums are to be paid to the States so long as the export duty on jute and jute products continues to be levied by the Government of India or until the expiration of ten years since the inauguration of the Republic, whichever is earlier.

There is a general provision of grants to the States in Article 275. Parliament is empowered to make such grants as it may deem necessary to give financial assistance to any State which is in need of assistance. It is for Parliament to determine the extent of the grant and it may vary according to the needs of the different States. Apart from this, it is the constitutional duty of the Union to finance schemes it has approved for the welfare of the Scheduled Tribes and for raising the level of administration of the Scheduled Areas. There is a special provision for a grant to Assam in respect of its tribal areas.

Under Article 282 the Union and the State Governments are given the general power to make grants for any public purpose even if it is not within their respective legislative competence.

**Exemption from Taxation.** The Constitution also follows the general provisions of the Government of India Act, 1935 and exempts the property of one Government from taxation by another. Article 285 provides that unless Parliament declares otherwise, Union property is not subject to State taxation, but shall continue to pay existing dues to local authorities until Parliament stops it. A State may not tax electricity supplied to the Government of India or a railway unless permitted to do so by Parliament.<sup>81</sup> Without the consent of the President, a State may not tax water or electricity supplied or controlled by any authority established for regulating or developing any inter-State river or river-valley.<sup>82</sup>

The property and income of a State are exempt from Union taxation, but this exemption does not extend to a trade or business carried on by the Government of a State, unless Parliament declares by law such trade or business incidental to the ordinary functions of Government.<sup>83</sup>

**Powers of Borrowing.** Generally, the power of borrowing is only incidental to the powers of the Government and no specific provision is made in a Constitution as regards the limits and modes of borrowing. But the Constitution of India makes a specific provision in this respect. The Union Government is empowered to borrow upon the security of the Consolidated Fund of India, subject to the limits and conditions as Parlia-

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80. Article 272.

81. Article 268.

82. Article 287.

83. Article 288.

84. Article 289.



ment may impose.<sup>85</sup> Thus, the power of borrowing of the Union is subject to the limits as prescribed by an Act of Parliament. But the Constitution itself imposes limitations on the borrowing powers of the States in addition to conditions which the State Legislature may impose. A State can borrow only within India and cannot raise a new loan without the consent of the Union Government if there is outstanding any part of a previous loan guaranteed by the Union or owed to it. The Union Government may make loans to States subject to the conditions made by Parliament, or may guarantee loans to States, provided that the limits set by Parliament to Union loans are not exceeded.<sup>86</sup>

**Financial Emergency Powers.** The Financial Emergency powers, as provided for in Article 360 and to which a detailed reference has already been made, has as far reaching effects as those relating to legislative and administrative spheres. A Proclamation of Financial Emergency may leave the States with no other resources than those available from taxes on the State List, for the President may, while the Proclamation is in operation, suspend any of the provisions of the Constitution relating to grants and to the sharing of Union taxes.<sup>87</sup> If the President is satisfied that the financial stability of India or any part thereof is threatened, he may issue a proclamation empowering the Union to give directions controlling a State's financial activities,<sup>88</sup> and requires State Money Bills to be reserved for consideration by the President.<sup>89</sup>

**Control by the Comptroller and Auditor-General of India.** The Comptroller and Auditor-General of India is appointed by the President,<sup>90</sup> and Parliament may impose such duties and grant him such powers in relation to State accounts as it may prescribe.<sup>91</sup> Without any such legislation the Comptroller and Auditor-General of India, with the approval of the President, prescribes the form in which State accounts are to be kept.<sup>92</sup>

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85. Article 292.

86. Article 293.

87. Article 354.

88. Article 360 (2).

89. Article 360 (4) (ii).

90. Article 149.

91. Article 149.

92. Article 150.

## CHAPTER VIII

# THE STATE EXECUTIVE

**Appointment of a Governor.** The Governor of a State is appointed by the President by warrant under his hand and seal. His term of office is five years, but he holds it at the pleasure of the President. The Provincial Constitution Committee, appointed by the Constituent Assembly, had recommended that the Governor should be elected by the people. But the Drafting Committee did not accept the proposal as, it remarked, "the co-existence of a Governor elected by the people and a Chief Minister responsible to the Legislature might lead to friction." The Committee suggested an alternative mode of appointing Governors: "the Legislature should elect a panel of four persons (who need not be the residents of the State) and the President of the Union should appoint one of the four as Governors." The Constituent Assembly rejected both these proposals in favour of nomination by the President.

The Governor is, thus, an appointee of the Union Government and is removable from office at any time by the same authority. This is a clear departure from the federal principle underlying the Constitution of the United States of America. The State Governor in the United States is directly elected by the people of the State and he is not subject to removal except by impeachment by the State Legislature. The Governor of an Australian State is appointed by the Crown on the advice of the British Cabinet. But the British Cabinet before tendering such an advice consults the Prime Minister of the State concerned. The Governor holds office during the pleasure of the Crown and is in no way responsible to the Governor-General. The Governors of the Australian States, therefore, are as much representatives of His Majesty for State purposes as the Governor-General of the Commonwealth is for Commonwealth purpose. The Lieutenant-Governors of the Canadian Provinces, on the other hand, are appointed by the Governor-General in Council, that is, by the Governor-General acting on the advice of the Dominion Ministry, and may be removed by the Governor-General "for cause assigned." Although the Lieutenant Governor is appointed by the Union Government and is removable by the same authority, yet he is not the "executive servant of the Dominion or the passive instrument of the Dominion Cabinet." Once appointed by the Union Government his position becomes similar to the Governor of an Australian State. He is the representative of the Crown and not the agent of the Union Government and exercises complete authority for "carrying on the Government of the Province in accordance

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1. *Draft Constitution of India*, p. vii.

2. *Ibid.*

3. *Liquidators of Maritime v. Receiver General*,

with the established principles of the parliamentary system of government. The mode of appointment of the Provincial Head, therefore, "does not impair the federal principle in Canada."

The Constitution of India follows Canada in providing for appointment of the Governor of a State by the Head of the Union. But, unlike Canada, the Governor of an Indian State feels himself and acts in many respects as an agent of the Union Government. Even the convention that in appointing the Governor, the Union Government consults the Chief Minister of the State for which appointment is made, does not change the situation. The Governor cannot be made to forget that he is the appointee of the dominant Party at the helm of affairs in the Union, and that his normal term of five years is subject to holding his office during the pleasure of the President, which for all intents and purposes means the pleasure of the Union Ministry. The Ministry can secure the removal of a Governor even during his normal term on a ground which may as well be political for no cause need be assigned for such removal. The Constitution also vests in the Governor the power to decide in his discretion.<sup>4</sup> The Governor, being a nominee of the Central Government, may act at variance with his Council of Ministers particularly in cases of conflict of interests between the State and the Centre. Article 356 clearly emphasises the responsibilities of the Governor as an agent of the Centre when on the report of the Governor the President may declare the failure of the constitutional machinery in the State.

It was unequivocally made clear in the Constituent Assembly that the Governor would not be an instrument of the Central Government. The Drafting Committee, too, expected the same as is evident from the speech of T.T. Krishnamachari which he made in the Constituent Assembly. He said, "I would at once disclaim all ideas. . . that we in this House want the future Governor to be nominated by the President to be in any sense an agent of the Central Government. I would like that point to be made very clear, because such an idea finds no place in the scheme of government we envisage for the future."<sup>5</sup> But the future could not sustain Krishnamachari's claim. The unusual procedure adopted in Commander Nanavati's Case in suspending the sentence passed by the Bombay High Court pending the disposal of his application for leave to appeal to the Supreme Court proves that the Governor and the State Ministry, when it belongs to the same ruling Party, may be made to succumb to the wishes of the Central Government. When the representatives of Commander Nanavati appealed to the Bombay Government to suspend his sentence, it felt that it was an unusual procedure and decided to seek Centre's advice. The opinion given by the Centre might not be interpreted as a direction, and it might not have even violated any legal or constitutional provisions, but it does show how the Centre can dictate its mind. When the Bombay Government was hesitant to adopt the unusual procedure, the Centre should have given its thought, whatever considerations might have

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4. Refer to Kennedy, *Some Aspects of the Constitutional Law*, p. 79, and Dawson, *Government of Canada*, p. 37.

5. Article 163.

6. *Constituent Assembly Debates*, Vol. VIII, p. 460.

weighed with it, to that aspect of the matter before tendering the necessary advice. The Full Bench of the Bombay High Court held that the order of the Bombay Government suspending the life sentence on Commander Nanavati had not been shown to be "unconstitutional or contrary to law." All the same, the Court expressed its profound regret at the use of extraordinary powers in the Nanavati Case.

The essential idea of having a nominated Governor is to have a person as the Head of the State who should maintain himself at a higher plane and should hold the scales even without any political considerations, and, if necessary, to stand up on his own against the State Government as well as against the Central Government. The Governor "is the representative not of a party," rightly observed the Chairman of the Drafting Committee, "he is the representative of the people as a whole of the State. It is in the name of the people that he carries on the administration. He must see that the administration is carried on a level which may be regarded as good, efficient, honest administration." The Governor is, therefore, neither expected to be a puppet in the hands of the State Ministry nor should he become a mere instrument in the hands of the Central Ministry. "But how far party men specially if they happen to be candidates defeated at parliamentary elections," pertinently puts Dr. N.R. Deshpande, "can stand squarely against Cabinets whether in the States or at the Centre, particularly against the latter, is highly problematical." Hitherto, barring a few appointments, Governors have been appointed purely on party considerations. And, then, Governorship is interchangeable with the State Chief Ministership or Ministership at the Centre at any time when deemed politically expedient.<sup>7</sup>

**Qualifications and conditions of office.** A Governor must be a citizen of India and at least thirty-five years of age. He must not be a member of either House of Parliament or of the House of the Legislature of any State. If he is a member of any Legislature he automatically vacates his seat on assuming office. Nor shall the Governor hold any other office of profit. He is entitled, without payment of rent, to the use of his official residences and is also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law. Until provision is so made by Parliament the salary of the Governor has been fixed by the Constitution at Rs. 5,500 per mensem plus such allowances and privileges as the Governor of the corresponding Province was entitled to immediately before the commencement of the Constitution.

7. *Constituent Assembly Debates*, Vol. VIII, p. 546.

8. "The Role of the Governor," *The Indian Journal of Political Science* January-March, 1960, p. 21.

9. For instance, K.M. Munshi, Sri Prakasa, N.V. Gadgil, V.V. Giri and K.N. Katju. E.M.S. Namboodiripad is among the few who think the Governors should be elected. Jawaharlal Nehru expressed the fear that the election of Governors would encourage "a narrow, provincial way of thinking and functioning in each State." It would be infinitely better, he said, if a Governor was not intimately connected with the local politics and functions in a State, but was a more detached figure, acceptable to the State no doubt, but not known to be a part of its party machine. *Constituent Assembly Debates*, Vol. VIII, pp. 454-56. •

ly before the commencement of the Constitution.<sup>10</sup> His emoluments and allowances are not to be diminished during his term of office.<sup>11</sup>

Two conventions are now well established with regard to the appointment of the Governor. In the first place, the Governor must be acceptable to the State to which he is likely to be appointed. The practice is that the Union Government consults the Chief Minister of the State concerned prior to the appointment of a new Governor. Secondly, the person selected must normally be an outsider, that is, resident of another State. So far there had been only two exceptions to this practice, the late Governor of West Bengal, H.P. Mukerjee and the Governor of Mysore, who was formerly the ruler of the Mysore State and later Rajpramukh of the State of Mysore.

Every Governor and every person discharging the functions of the Governor has, before entering upon his office, to make and subscribe in the presence of the Chief Justice of the High Court of the State concerned an oath or affirmation in the prescribed form.<sup>12</sup>

The Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done by him in the exercise and performance of those powers and duties. No criminal proceedings can be instituted or continued against the Governor of a State in any Court during his term of office. Nor any process for the arrest or imprisonment of the Governor shall be issued from any Court during his term of office. No civil proceedings shall be instituted against a Governor in any Court in respect of any act done in his personal capacity, during his term of office, until the expiration of two months after a notice in writing has been delivered to him stating the nature of the proceedings, the cause of action, the name of the party intending to sue him, and the relief claimed.

A Governor holds office for a period of five years and it is subject to extension. But he may resign sooner and may be removed earlier.<sup>13</sup> In

10. Second Schedule Part A. Allowances vary between Rs. 1,53,400 in the case of Orissa and Rs. 492,500. The Governors are entitled to the use of a railway saloon. They are further entitled to customs privileges in respect of articles imported by them for their use. In most States Governors enjoy the privilege of disbursing money placed at their disposal and this they do at their discretion. A sum varying between Rs. 10,000, as in the case of Punjab, and Rs. 1,13,000, as in the case of Bombay, has been fixed for furnishing the Raj Bhavans (Government Houses).

11. Article 158 (4).

12. Article 159. The form prescribed is:

"I, A.B., do swear in the name of God/solemnly affirm that I will faithfully execute the office of the Governor (or discharge the functions of the Governor of...*(name of the State)* and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people....*(name of the State)*."

13. The West Bengal Cabinet demanded for the immediate recall of the Governor, Dharam Vira, before the formal inauguration of the new Legislative Assembly on March 6, 1969. The Government of India categorically rejected the demand. Since the Governor himself had requested the Prime Minister towards the end of October 1968 for a change on personal grounds Dharam Vira proceeded on leave and afterwards appointed Governor of Mysore. To yield to



case of a casual vacancy the President may make such provision as he thinks fit. The Provincial Constitution Committee had proposed for the appointment of a Deputy Governor in each State but the Drafting Committee did not accept the proposal. It was thought that it was not necessary "to make any provision for Deputy Governors, because a Deputy Governor will have no function to perform so long as the Governor is there. At the Centre, the position is different, because the Vice-President is also the *ex-officio* Chairman of the Council of States, but in most of the States there will be no Upper House and it will not be possible to give the Deputy Governor functions similar to the Vice-President." The Drafting Committee was of the view that it would be sufficient to include a provision in the Constitution enabling the State Legislature, or the President if the Governor was to be appointed by him, to make the necessary arrangements to discharge the functions of the Governor in an unforeseen contingency and, accordingly, inserted a provision to this effect in the Draft Constitution. The Committee made a specific suggestion that it could be laid down in advance that the Chief Justice of the State would fill in the casual vacancy.<sup>14</sup> It is now a well-established convention to appoint the Chief Justice of the High Court of the State where the vacancy suddenly occurs. But Sri Prakasa regards it a bad convention.<sup>15</sup>

The Constitution (Seventh) Amendment Act, 1955, makes provision, in Article 153, of the appointment of one Governor for two or more States if necessary. The States with a common Governor retain their own separate Legislatures and Councils of Ministers, and they function separately of each other. The Common Head is the only link between them so far as their individuality is concerned. The President may also appoint the Governor of a State as the administrator of an adjoining Union Territory, and in this case the Governor shall act as administrator independently of his Council of Ministers.<sup>16</sup> Except in the case of Assam and Nagaland and for some time for the States of Punjab and Haryana, a common Governor for two or more States has not been appointed. The Nagaland Legislative Assembly has since passed a resolution for the appointment of a separate Governor for that State.

## POSITION OF THE GOVERNOR

**Constitutional position of the Governor.** The form of Government in the States, as in the Centre, is parliamentary. The Constitution provides that there shall be a Council of Ministers "to aid and advise the Governor in the exercise of his functions except insofar as he is by or under this Constitution required to exercise his functions or any of them

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a demand for recall virtually amounts to the exercise of a right to dismissal of the Governor by the State Government. In terms of the Constitution the Governor holds office during the pleasure of the President, not that of the Ministry of the State.

14. *Draft Constitution of India*, pp. vii-viii, and footnote to Article 138.

15. Sri Prakasa, *State Governors in India*.

16. Article 239.

in his discretion."<sup>17</sup> The Constitution makes no attempt to define the discretionary powers of the Governor except for the only instance that the Governor of Assam is to act in his discretion in respect of administration of certain frontier tracts,<sup>18</sup> which he is required to administer as the agent of the President, and in respect of any dispute as to the share of mining royalties between the Government of Assam and the District Council of a Tribal Area.<sup>19</sup> At the same time, the Constitution provides that whether the Governor is entitled to act in his discretion in any matter is decided by him in his discretion and his decision is final. The validity of anything done by the Governor cannot be called into question on the ground that he ought or ought not to have acted in his discretion.<sup>20</sup>

Here the position of the President of India and the Governor of a State differs, although the pattern which appears in the structure of the Union is apparently reproduced in the States. Whereas the President acts on the advice of his Ministers and the Constitution does not empower him to exercise any function in his discretion, the Constitution authorises the Governor to act in his discretion and in the exercise of his discretionary functions, the Governor is not required to act according to the advice of his Ministers or even to seek their advice. There is, for instance, no provision for a Presidential take-over of the Union Government, in case the constitutional machinery fails or breaks down at the Centre. It is doubtful if the President can dismiss his Council of Ministers in the manner the Governor can the State Ministry. And it would seem the President cannot omit passages from the address he delivers to Parliament placed in his hands by the Prime Minister.<sup>21</sup> The use of the phrase "in his discretion" is reminiscent of the similar phrase in the Government of India Act, 1935. But the Act of 1935 clearly specified the discretionary field of the Governor whereas the present Constitution does not do so. On the other hand, it vests in the Governor the power to decide whether any matter should be decided by him in his discretion and his decision in that respect is final. It has generally been observed that no other Governor, except of Assam, has any authority to act in his discretion and the discretionary authority of the Governor of Assam, too, is limited to matters relating to the administration of the Tribal areas in respect of the share of mining royalties. Durga Das Basu, accordingly, maintains, "To a certain extent, therefore, the retention of the words 'in his discretion' in the present Article (163) may be said to be a drafting anomaly."<sup>22</sup>

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17. Article 163 (1).

18. Schedule Sixth, para 18 (3).

19. *Ibid.*, para 9 (2).

20. Article 163 (2).

21. Dharam Vira, Governor of West Bengal, skipped over certain passages from his address on the inaugural session of the Legislature on March 6, 1969. The passages which he skipped over contained some strongly worded criticism of the Governor and of the Central Government for dismissing the United Front Ministry, for inducting a minority Government and, finally, for dissolving the Assembly instead of reinstating the United Front Government when the minority Government had collapsed. The Governor of Punjab, Dr. D.C. Pavate, on the other hand, read the address as a whole although it contained passages criticising him for inducting Laellhman Singh Gill's minority Government and the manner in which the Budget was passed.

22. *Commentary on the Constitution of India*, p. 475.

The Calcutta High Court in *Sunil Kumar Bose and others v. The Chief Secretary to the Government of West Bengal* observed, "The Governor under the present Constitution cannot act except in accordance with the advice of his ministers. Under the Government of India Act, 1935, the position was different. The Governor could do certain acts in his discretion, that is, without asking for the advice of any minister: he could do certain acts in his individual capacity, that is, only after consulting his ministers but he was not bound when acting in his individual capacity to follow the advice of his ministers. Under the present Constitution, the power to act in his discretion or in his individual capacity has been taken away and the Governor, therefore, must act on the advice of his ministers. This is the constitutional position as explained to us by the Advocate-General and we accept this view." The opinion expressed by the Calcutta High Court was upheld by the Travancore-Cochin High Court in 1953. The Court declared that the "retention of the words in Articles 163 and 166 may be said to be a drafting anomaly, as no Governor, except the Governor of Assam acting under Sections 6 paras 9(2) and 18(3) has any authority to act in his discretion."<sup>23</sup>

But this is not the exact position. Under the Government of India Act, 1935, the Governor was required to comply with the instructions of the Governor-General in the exercise of his discretionary functions. The Constitution of India, too, contemplates many sets of circumstances in which the Governor will receive instructions from the President which he must carry out whatever advice his Ministers may offer in that connection. The Governor, as K.M. Munshi puts it, "is the watchdog of constitutional propriety and the link which binds the State to the Centre thus securing the constitutional unity of India."<sup>24</sup> Jawaharlal Nehru, too, emphasised the importance of this link between the States and the Centre. Discussing the mode of appointment of the Governor, Nehru said in the Constituent Assembly that "An elected Governor would to some extent encourage that separatist provincial tendency more than otherwise. There will be far fewer common links with the Centre."<sup>25</sup> That the Governor is an instrument of Central vigilance and control and, accordingly, in possession of certain discretionary powers was authoritatively elaborated by Dr. Ambedkar in the Constituent Assembly. He said, "The provincial Governments are required to work in subordination to the Central Government, and, therefore, in order to see that they do act in subordination to the Central Government, the Governor will reserve certain things in order to give the President the opportunity to see that the rules under which the provincial governments are supposed to act according to the Constitution or in subordination to the Central Government are observed."<sup>26</sup>

23. A.I.R. 1953, pp. 145-46.

24. Kulapati's Letter No. 103 to Bhartiya Vidya Bhavan, Bombay.

25. *Constituent Assembly Debates*, Vol. VIII, p. 455.

26. Mahavir Tyagi said in the Constituent Assembly, "These Governors are not to be there for nothing. After all we are to see that the policy of the Centre is carried out. We have to help the States linked together and the Governor is the agent or rather he is the agency which will press for and guard

It is the constitutional duty of the Governor, as a representative of the President, to send a report to the President if any serious emergency including the breakdown of the Constitution appeared. What that serious emergency can possibly be, it is for the Governor to determine and report to the President, without consulting his Council of Ministers and keeping the report secret, and to act in accordance with the instructions issued by the President thereupon. No doubt the President can proclaim emergency in a State if he is "otherwise"<sup>27</sup> satisfied, but, the report of the Governor is decisive as he is the President's representative on the spot.

Sri Prakasa, who himself had been a Governor, says "that a Governor has four main duties to perform."<sup>28</sup> "A Governor's first duty", he says, "is to know that he is the representative of the Centre, and that he must keep the Centre informed of the affairs of his State whenever he should feel that such things are going on which can endanger the unity of the country." He further adds, "In any case, whether right or wrong, the Governor must tell the Centre what his own reactions are over the events that he sees around him. It would be the Centre's duty to act or not to act in the peculiar circumstances as presented by the Governor." The second duty of the Governor "is to look after the interests of the State", which he heads, "and if he feels that the Centre must step in to help in this way or in that, to meet any difficulty which the State itself is in no position to do, then he must tell the Centre as much. The Governor's third duty is "to stand in human form, as the symbol of the State before representatives of foreign people... A Governor must be prepared to meet them on their own level, however high they may be, and represent his own State and country in the best light possible." Finally, "in case the Constitution should break down—whatever the reasons may be—he must be prepared to take charge of the administration of the State."

Dr. Kailash Nath Katju, who had been for four years Governor

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the central policy. The Governor being the agency of the Centre is the only guarantee to integrate the various provinces or States. The Governor must remain as the guardian of the central policy on the one side, and the Constitution on the other." *Constituent Assembly Debates*, Vol. VIII, pp. 494-95.

27. The expression 'otherwise' in Article 356 of the Constitution did not occur originally in the corresponding Article (278) of the Draft Constitution. It was inserted later on, and Dr. Ambedkar justified its insertion. He said in the Constituent Assembly, "with regard to Article 278, the first change that is to be noted is that the President is to act on a report from the Governor or otherwise. The original Article 188 provided that the President should act on the report made by the Governor. The word 'otherwise' was not there. Now it is felt that in view of the fact that Article 277-A which precedes Article 278 imposes a duty and an obligation upon the Centre, it would be improper to restrict and confine the action of the President, which undoubtedly will be taken in fulfilment of the duty, to the report made by the Governor of the Province. It may be that the Governor does not make a report. Nonetheless, the facts are such that the President feels that his intervention is necessary and imminent. I think as a necessary consequence to the introduction of Article 277-A, we must also give liberty to the President to act even where there is no report by the Governor and when the President has got certain facts within his knowledge on which he thinks he ought to set in fulfilment of his duty."

28. Sri Prakasa, *State Governors in India*, p. 5.



of two States, Bihar and Orissa, sidetracks the issue while dealing with the constitutional position of the Governor. He wrote, "It is said that every Governor of a State has to watch the course of political events and of administration in the State and keep the Central Government informed of what is happening there. That may be perfectly correct. But I think the Governor has much more to do. Governors are invited to social and ceremonial functions."<sup>29</sup> Dharam Vira, whose tenure as Governor of West Bengal saw many controversies involving constitutional and other issues, is of the opinion that in normal times the Governor is a mere constitutional head. "However, when a Governor takes the oath of office, he undertakes to safeguard and protect the Constitution. Therefore in certain circumstances, particularly in emergency, the Governor's duties in regard to safeguarding and protecting the Constitution make it imperative for him to act in his discretion, of course, within the four corners of the constitutional provisions."<sup>30</sup>

The exact constitutional position of the Governor figured prominently in the deliberations of the Constituent Assembly. While none advocated that he should be an autocrat, it was widely felt that he should be invested with adequate powers to ensure the maintenance of high standards of Government. This view was upheld by Jawaharlal Nehru and Sardar Vallabhbhai Patel.

In his Memorandum on the Principles of a Model Provincial Constitution prepared by the Constitutional Adviser, it was provided that there "shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."<sup>31</sup> In a Note appended thereto, B.N. Rau observed that, while for the most part the Governor would act on the advice of his Ministers, there were certain functions which even a responsible Head had to exercise in his discretion, namely the choice of the Prime (now Chief) Minister, the dissolution of the Legislature (in certain events), and so on.<sup>32</sup> The Memorandum on the Principles of a Model Provincial Constitution presented to the Constituent Assembly by Sardar Vallabhbhai Patel on July 15 1947,<sup>33</sup> envisaged the conferment of "special responsibilities"<sup>34</sup> on the Governor, besides discretionary powers.<sup>35</sup> Calling the attention of the Assembly to

29. "Governor's Advisory Role". *The Tribune, Ambala Cantt.*, October 22, 1962.

30. "Interview with Dharam Vira." *The Hindustan Times*, New Delhi, October 11, 1969.

31. Cl. 5. Memorandum, May 30, 1947. *The Framing of India's Constitution, Select Documents*, Vol. II, p. 634.

32. *Ibid.*

33. *Ibid.*, pp. 657-63.

34. Cl. 15.

35. Cl. 9. In a Note appended to this clause it was stated that for the most part, the Governor would act on advice, but he was required to act in his discretion in the following matters:

(1) the prevention of any grave menace to the peace and tranquillity of the Province or any part thereof;

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the dilemma of the Constitution-makers, Sardar Patel said that if the Governor was granted discretionary powers it would amount to a derogation from the powers of the Ministry.<sup>35</sup> And yet it was felt imperative to clothe the Governor with adequate authority. He pointed out that, in view of the conditions obtaining in the country, "some special provision should be made for giving special responsibilities (to the Governor), to meet the difficult situation." He recalled that many Prime Ministers of the Provinces and others with long experiences in administration considered it dangerous not to provide for an emergency. Jawaharlal Nehru fully subscribed to this point of view.

That it was not the intention of the Constitution-makers that a Governor should be a "rubber-stamp" of his Ministry is clear from the opinion expressed by Dr. Ambedkar in the Constituent Assembly on June 1, 1949. He said, "the retention in or vesting the Governor with certain discretionary powers is in no sense the negation of the responsible Government." The Constitution, therefore, vests in the Governor the following discretionary powers:

- (1) The appointment of the Chief Minister;
- (2) Dismissal of the Council of Ministers;
- (3) Dissolution of the Assembly;
- (4) Requiring the Chief Minister to submit information relating to legislative and administrative matters;
- (5) Requiring the Chief Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council of Ministers;
- (6) Withholding the assent to a Bill passed by the Legislature and sending it back for re-consideration;
- (7) Reserving a Bill duly passed by the State Legislature for the assent of the President;
- (8) Seeking instructions from the President before promulgating an ordinance dealing with certain matters;
- (9) Submission of a Report to the President advising breakdown of constitutional machinery in the State;
- (10) In the case of Governor of Assam, certain administrative matters connected with the Tribal Areas and settlement of disputes between the Government of Assam and the District Council of an autonomous district with respect to mining royalties.

But acting in discretion does not mean acting arbitrarily or capri-

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- (2) the summoning and dissolving of the Provincial Legislature;
- (3) the superintendence, direction and control of elections,
- (4) the appointment of the Chairman and the members of the Provincial Public Service Commission.

ciously. Discretion in its ordinary meaning signifies unrestricted exercise of choice or will; freedom to act according to one's own judgment. "But when applied to public administration, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment or conscience uncontrolled by the conscience or judgment of others. Discretion is to discern between right and wrong, and therefore whoever hath power to act at discretion is bound by the rule of reason and law." Discretion, thus, must be exercised honestly on judicial grounds and substantial reasons. The Constitution meant the Governor to act generally on ministerial advice but reserving to himself certain discretionary powers to be exercised by him untrammelled by ministerial control. At the recent Governors' Conference, Mrs. Indira Gandhi cryptically remarked, "You can be the guide, philosopher and friend to your respective governments, while also discharging your constitutional responsibilities." Some of these responsibilities are in expressed terms whereas others flow ineluctably from the Governor's position as a constitution Head of the State functioning under a Parliamentary system.

### POWERS OF THE GOVERNOR

Keeping in view his constitutional position, the powers of the Governor may be divided under the usual four heads: (1) Executive Powers; (2) Legislative Powers; (3) Financial Powers; and (4) Judicial Powers.

(1) **Executive Powers.** The executive power of the State is vested in the Governor and is exercised by him either directly or through officers subordinate to him, and according to the Constitution. All executive action of the State shall be expressed to be taken in the name of the Governor. Orders and instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules made by the Governor, and the validity of such an order or instrument shall not be called in question in any Court on the ground that it is not an order or instrument made or executed by the Governor.<sup>37</sup>

The Governor appoints a Council of Ministers with the Chief Minister at the head to aid and advise him in the exercise of his functions except in matters where the Governor acts in his discretion.<sup>38</sup> It is for the Governor to decide whether any matter should be decided in his discretion. His decision is final and the validity of such a decision cannot be questioned in a Court of Law.<sup>39</sup> The advice tendered by the Council of Ministers is confidential and cannot be enquired into by any Court.<sup>40</sup> The Governor also makes rules for the more convenient transaction of the business of the Government of the State and for the allocation amongst Ministers of the said business.<sup>41</sup> The Ministers hold office at the

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37. Tomlin's *Law Dictionary*.

38. Article 166 (2).<sup>40</sup>

39. Article 163 (1).

40. Article 163 (2).

41. Article 163 (3).

42. Article 166 (3).

pleasure of the Governor, though in actual practice, it means the pleasure of the State Legislative Assembly (Vidhan Sabha).

The Constitution provides that it shall be the duty of the Chief Minister to communicate to the Governor all decisions of the Council of Ministers relating to administration of the affairs of the State and proposals for legislation.<sup>43</sup> He may also call for such other information relating to administration of the affairs of the State and proposals for legislation as he may deem necessary.<sup>44</sup> He can direct the Chief Minister to submit to the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council of Ministers.<sup>45</sup>

The Governor does not appoint the Judges of the High Court, but he is entitled to be consulted before the President makes such appointments.<sup>46</sup> He appoints the Advocate-General of the State, and members of the State Public Service Commission, if there is one.

(2) **Legislative Powers.** The Governor is a part of the State Legislature just as President is a part of Parliament. The Governor has the right to summon the House or each House of the State Legislature, if it has two Chambers, to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. He may prorogue the House<sup>47</sup> or either House and dissolve the Legislative Assembly. He may address the House or both Houses assembled together. He may also send messages to the House or Houses on a Bill pending in the Legislature or otherwise. The House to which a message is sent shall with all convenient dispatch consider any matter required by the message to be taken into consideration. He must address the Assembly or, in case there is a Council, both Houses assembled at the commencement of the first session after each general election and at the commencement of the first session of each year.

After a Bill is passed by the House or the Houses of the State Legislature, it is presented to the Governor for his assent. He may assent to the Bill or withhold it or may reserve it for the consideration of the President. He may return the Bill (if it is not a Money Bill) for the reconsideration of the House or Houses, but if it is again passed with or without amendments he must give his assent thereto.

The Governor has a similar power of making ordinances, as the President has, during the recess of the Legislature. The ordinances so promulgated cease to operate at the expiration of six weeks from the reassembly of the Legislature or earlier, if a resolution disapproving such

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43. Article 167 (a).

44. Article 167 (b).

45. Article 167 (c).

46. Article 217 (i).

47. The Supreme Court in *The State of Punjab vs. Baldev Prakash and Satyapal Dang* held that Article 174(2) of the Constitution "which enabled the Governor to prorogue the Legislature, did not indicate any restriction on his power....The Governor's power being untrammelled by the Constitution and an emergency having arisen, the action was perfectly understandable."

an ordinance is passed by the Legislative Assembly and agreed to by the Legislative Council, if any. The Constitution, however, provides that the Governor shall not without instructions from the President promulgate any such ordinance: (1) if a Bill containing the same provisions would have required the previous sanction of the President for introduction into the Legislature; or (2) if the Governor would have reserved a Bill containing the same provisions for the President, or (3) if an act of the State Legislature containing the same provisions would have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(3) **Financial Powers.** The Governor has the same responsibilities and powers with regard to Money and Financial Bills as the President. No Money Bill or other Financial Bills can be introduced in the Legislative Assembly except on the recommendations of the Governor. Amendments making provision for financial matters, also, cannot be moved except on the recommendations of the Governor. But no such recommendation is necessary to amendments making provision for the reduction or abolition of a tax.

The Governor is required, in respect of every financial year, to see that the annual financial statement or Budget of the State is laid before the House or Houses of the Legislature. No demand for grant can be made except on the recommendation of the Governor. The Governor has also been empowered to ask for supplementary, additional, or excess grants from the Legislature.

(4) **Judicial Powers.** The Governor has the power to pardon, commute and suspend sentence of any person convicted of any offence against any law relating to matters to which the executive power of the State extends. The right of the Governor's power to pardon, commute and suspend sentence of any person was considered by the Bombay High Court in Commander Nanavati's case. The Court held that this power vested in the Governor is similar to the power of pardon, reprieve, and clemency both in its nature and effect as was possessed by the Sovereign in Great Britain and the President in the United States. This power, therefore, in the opinion of their Lordships, could be exercised by the Governor either before, during or after trial. At the same time, their Lordships said that wide and unfettered as the powers referred to in Article 161 were, they were not intended to be exercised arbitrarily and except for good and sufficient reasons.

**Miscellaneous functions.** The Governor receives the annual report of the State Public Service Commission and sends it to the Council of Ministers for comments. After the comments have been received, he transmits both the documents to the Speaker of the Assembly for being placed before the legislature. Similarly, the Governor deals with the report of the Auditor-General regarding the income and expenditure of the State. Prof. Sri Ram Sharma suggests that it would be in the fitness of things if the High Court were to send to the President for transmission to the Governor a report on the judicial appointments, particularly the appointments of the District Judges who are supposed to be appointed on the recommendation of the High Court.<sup>48</sup>

48. *Some Aspects of the Indian Constitution*, op. cit., p. 267.

**Role of the Governor.** The role of the constitutional Head of the State is self-evident. Bagehot's exposition has now become classical. In his oft-quoted phrase, the Sovereign has "three rights: the right to be consulted, the right to encourage, and the right to warn." And "a King of great sense and sagacity", he further adds, "would want no others. He would find that his having no others, would enable him to use these with singular effect."<sup>49</sup> The same truth was stated by Sir Winston Churchill. He said, "under the British constitutional system the Sovereign has right to be acquainted with everything for which his Ministers are responsible and has an unlimited right of giving counsel to his government."<sup>50</sup> Dr. Ambedkar, too, expressed like opinion with regard to the functions of a Governor in India. He pointed out two types of duties a Governor was to perform. In the first type, he assigns him the duty to see "whether and when he should exercise his pleasure against the ministry," that is, the Governor has to see that the Ministry continues to run the administration. Secondly, it is the duty of a Governor to advise his Ministers, to warn them, to suggest an alternative and to ask the Government to reconsider the whole issue.<sup>51</sup>

The Governor being not a representative of a party, but as Dr. Ambedkar said, "the representative of the people as a whole in the State," should keep himself off politics. As an impartial umpire his work is to see that the game of politics is played according to rules; leaving the politicians fight out the disputes amongst themselves. He should not conduct himself in a manner which suggests that he is inclined to support one party at the expense of another.<sup>52</sup> "After all, the ruling set up of the State should hold at least one functionary to whom all parties and interests can look up for disinterested advice and impartial support. And no one can perform this function better than the Governor whose office, in some of its responsibilities, has been conceived and created for this purpose." Generally speaking, a Governor is an elderly person who has had experi-

49. Bagehot, W., *The British Constitution* (The World Classics ed.), pp. 6-7.

50. Churchill, Winston, *Their Finest Hour*, p. 379.

51. *Constituent Assembly Debates*, Vol. VIII, p. 546.

52. In the General Elections of 1957 no Party could secure a majority in the Orissa State Legislature. The Jharkand Party promised continued support to the Congress Party and the Governor, Bhim Sain Sachar, called upon Dr. H.K. Mahatab to form the Government. During the swearing in ceremony, the Governor was reported to have made a 'political speech'. According to Surendranath Dwivedi, Chairman Utkal Praja-Socialist Party, the Governor had said that he would watch with "personal interest" the endeavours of the Chief Minister for securing a maximum of co-operation of others besides his present supporters. *The Hindustan Times*, New Delhi, April 16, 1957. The Governor of Orissa, Y.N. Sukthekar, in 1958 in his anxiety to keep the Congress Party in office kept the resignation of Mahatab Ministry under consideration and subsequently allowed Dr. Mahatab to withdraw the resignation of his Ministry. The Governor had asked the Leader of the Opposition to produce a list of the members of the Assembly who would support him. He, then, went to New Delhi to meet the President, the Prime Minister and the Home Minister to apprise them fully and give them his views on the situation and, finally, rejected the claim of the Leader of the Opposition that he commanded a majority on the ground that no names of his supporters were supplied. *The Hindustan Times*, New Delhi, May 25, 1958.



ence of life in various departments of national activity, and who is ordinarily capable of giving advice. Dr. Karlash Nath Katju succinctly said, "Non-possession by you of any political powers makes no difference at all. I think the Governor of a State under the Constitution can easily gain that respect and affection from the people under his care, if he himself leads an extremely dedicated life."<sup>53</sup> Being the Head of the State, the Governor is everybody's man, and, accordingly, he should hold himself at the disposal of and be available to all people of his State regardless of what they are and regardless of their political alliances or affinities. "From my experience", to quote Dr. Katju again, "I can say that the Governor should take no active interest in the day to day politics of the State, and should not interfere with what I may call service matters and should only be anxious by his advice and by his conduct and experience to assist the Chief Minister and his colleagues in removing all people's grievances and in bettering the administration."

The role of the Governor, as a positive and effective role, under normal conditions, may thus be summed up:

1. The first task of the Governor is to see that the stability and efficiency of administration, which really means good and honest administration, is assured. The Constitution empowers the Governor to call for any information relating to administration and proposals for legislation.

2. Then, he must give his consent, though it is just a formality, to all decisions of the Council of Ministers relating to affairs of the administration of the State and proposals for legislation. He can direct the Chief Minister to submit to the consideration of the Council of Ministers any matter on which a decision had been taken by a Minister, but which has not been considered by the Council of Ministers.

3. The Governor is the custodian of the interests of the minorities and it is his duty to bring it to the serious notice of the State Government if some genuine grievance of theirs remains unredressed. In a sense it is the constitutional duty of the Governor. The Governor is required by the Oath of his Office to "preserve, protect and defend the Constitution" and the Constitution aims to promote Justice, Liberty, Equality and Fraternity.

4. In the nation-building schemes, the Governor can play a vital role by providing a non-partisan leadership. He is the one functionary to whom all parties and interests can look up for disinterested advice and impartial support.

Article 160 of the Constitution, which is seldom noted, highlights the potentialities of the office of the Governor. It provides that the President may make such provisions as he thinks fit for the discharge of the functions of the Governor of a State for any contingency not provided for by the Constitution. In the hands of an astute Governor all these powers can assume great significance. The Governor is, thus, "at once the conscience-keeper of the Chief Minister and the eyes and ears of the President. It is unenviable position."<sup>54</sup>

53. *The Tribune*, Ambala Cantt., October 22, 1957.

54. Noorani, A.G., "The Governor", *The Indian Express*, New Delhi, December 3, 1967.

But during the past few years much discussion has agitated the public mind on the place of a Governor in the constitutional structure of India. It is suggested that he plays no useful role, and he is a non-entity: the office may as well be abolished. In Parliament, in State Legislatures, in the Press and in the public meetings much criticism has also been directed towards the extent and equipment of Raj Bhavans (Government Houses), and the elaborate arrangements that are made for a Governor when he goes out on tour. The position becomes more embarrassing when open criticism comes from ex-Governors and the Chief Ministers of the States. Mrs. Vijaya Lakshmi Pandit, who resigned from the Governorship of Maharashtra, expressed her views in an Article which was widely published in the press. She thinks that the office of the Governor is entirely useless and should be abolished and feels that the only thing that can induce a person to accept a Governorship is the salary that it carries. She also expresses her dissatisfaction with everything that the Governor and the Raj Bhavan stand for. Sometimes the criticism has been indecorous. A Chief Minister once described the Governors "nothing but expensive irritations." Sri Prakasa rightly said, "It is the duty of us all to maintain the self-respect of one another. If anyone should think that he maintains his self-respect when he insults someone, then he is making a serious mistake."<sup>55</sup> Commenting upon the observations of Mrs. Pandit, Sri Prakasa says, "it would indeed be a pity if any office is maintained in a democracy that serves no useful purpose and it will be a greater pity if the only thing that can induce any person to accept the office is its salary."<sup>56</sup> He also rebuts the criticism directed towards the extent and equipment of the Raj Bhavans and says, that "the Governor draws a salary which after the deduction of income-tax is really not very much higher than that of a Judge or a Secretary. If, therefore, the Governorship is abolished and all the paraphernalia maintained, then the saving to the public exchequer will be very little, if at all.

There are others who plead for the enlargement of Governors' political activities and scope of their functions. Sri Prakasa is one of them. He maintains that Governors should have defined functions so that they may be able to play effective part in the State administration. Two of the former Governors, K.N. Katju and N.V. Gadgil, are not in favour of granting more powers to the Governor, although Gadgil's statement is sophisticated. In the course of the Press interview before relinquishing the Punjab Governorship, Gadgil was asked if there were limitations on the powers of the Governor? He said, "In a sense they are not. In a sense they are." Elaborating his point, he said, "The Constitution provides that the Ministers should hold office during the pleasure of the Governor, that means full power to deal with the Ministers individually and collectively, but he must see that he is given sufficient support by the President if he (Governor) takes the extreme steps."<sup>57</sup> In practice, however, Gadgil added, "there are limitations and the exact extent of limitations depends on the particular issue and the circumstances in which it has arisen." Gadgil had been a controversial figure throughout his stay

55. "Are Governors Necessary?" *The Indian Express*, New Delhi October 1, 1962.

56. Sri Prakasa, *State Governors in India*, pp. 63-64.

57. As reported in *The Tribune*, Ambala Cantt., October 1, 1962.

in the Punjab and he was probably the first Governor since the inauguration of the Constitution to have resigned for political reasons. Dr. K.N. Katju, on the other hand, was of the opinion that "the Chief Minister and his associates in the Ministry are subordinate to the people and are liable to dismissal by them. There is no such power of dismissal in the people over the Governor. That being so, no power of responsibility can be or should be assigned to the Governor. He should have merely advisory functions."<sup>58</sup>

Dharam Vira, who had been the Governor of Punjab and West Bengal and now occupies the Raj Bhavan of the Mysore State, says, "In the early period after independence, when there were one-party stable governments all over the country, the responsibilities of the Governor were merely those of a constitutional head. But in the present context when political loyalties are shifting fast and when multi-party Governments and Governments different politically from that operating at the Centre are functioning his responsibilities have greatly increased."<sup>59</sup> He, therefore, suggests that in the present context it would be desirable to define more precisely the powers of the Governor. This would obviate to a great extent conflicting reaction by different Governors on identical circumstances. "There can, however, be no guiding lines," he says, "which can cover all situations and in these circumstances a Governor will have in any case to exercise his own discretion and judgment. While it should not be necessary at all for a Governor to exercise his discretion in any matter other than that of the formation of a Government, under the present conditions it has become necessary for him to do so because of certain lacuna either in the Constitution or in the rules or conventions governing the working of the Governments." Dharam Vira's proposal is that if a number of constitutional experts and jurists sit together and think over the problem, they may be able to work out the various circumstances under which it would be necessary to have greater clarity in regard to the functions and duties of a Governor. Sri Prakasa goes to the extent as to maintain that "the only official emblem today of the unity of the country is the Governor. I have a feeling that even the President is not so."<sup>60</sup>

The question of abolition of the office of the Governor does not arise. Even if it is abolished the day to day duties pertaining to the office of the Head of the State, that is, the 'dignified' functions will have to be fulfilled by some one. The Governor's office is really one of the important offices in the Indian Constitution. In the beginning things went smoothly and the relations between the Governors and the Chief Ministers were happy and cordial. The Central authorities too extended to the Governors the regard and consideration consistent with the dignity of their office. The people at large gave them the same respect and courtesy as in the past. But soon they were relegated to a position derogatory to their

58. *The Tribune*, Ambala Cantt., October 22, 1962.

59. "Interview with Dharam Vira." *The Hindustan Times*, New Delhi, October 11, 1969.

60. "Governor's Lot worsening: Reappraisal overdue." *The Tribune*, Chandigarh, April 17, 1969.

power and position.<sup>61</sup> The Governorship was converted into the last refuge of politicians who were either rejected at the polls or pushed out of leadership by more dynamic rivals in the Party. The Governorship was also treated as a sort of cold storage for politicians who could be brought back to active politics when expedient. If Governors become active politicians and even partisans, like Ajit Prasad Jain, Governorship forfeits popular confidence and the dignity of the office disappears.<sup>62</sup> Sri Prakasa has rightly maintained that however irksome the limitations of the office of Governor may be to a person who had been an active politician for more than 45 years, "he has to submit to them. Though one can sympathise with Mr. Jain, one cannot help feeling that it was not proper on his part to participate in controversial politics while he held the office of Governor."<sup>63</sup>

61. Sri Prakasa gives a matter of fact analysis of the change. He says, "...things began to change. Jawaharlal Nehru was the Prime Minister. He quickly grew to be a world figure during his office, and with his personality and influence, he could carry everything before him. In fact, he became the virtual and all-powerful ruler of the land. Even the President had to take a second place not only in matters pertaining to administration, but also in official and social celebrations. It was given out, for instance, that the highest in the station should take the salute on ceremonial occasions, but on Independence Day it was always the Prime Minister who took it at the Red Fort in Delhi. The President, Dr. Rajendra Prasad, who should ordinarily have done so, used to leave Delhi on that day, and receive the salute at a State capital instead. The position of the Governors also deteriorated...." Sri Prakasa, "Governor's Lot worsening: Reappraisal overdue." *The Tribune*, Chandigarh, April 27, 1969.

62. Ajit Prasad Jain, Governor of Kerala, took active part in canvassing for Mrs. Indira Gandhi for the Prime Ministership as against Morarji Desai, the other candidate for the office. Jain realised the anomaly of his position and sent in his resignation. There was a wave of indignation in the whole country. Under the caption 'Impropriety Plus', the *Statesman* wrote editorially, "It is difficult to find any mitigating circumstances in the affairs of Mr. Jain's resignation from the Governorship of Kerala, except for its prompt acceptance by the President... The fact remains that Shri AP. Jain was canvassing for a contender in the contest for the Prime Ministership while still the Governor of a State; if this is not a deplorable departure from the non-existent but widely understood code of conduct for Governors, it would be interesting to know what it is. Mr. Jain crowned his grave impropriety with something indistinguishable from irresponsibility. He took the plane to Delhi at a time when the rice ration for the people of Kerala had come down to four ounces a day, which is well below subsistence level. Distress was spreading fast; and this was the moment chosen by Mr. Jain, the Chief Executive under President's Rule, for political work in the capital; not even party political work but partisan political work."

N.V. Gadgil, Punjab Governor, publicly made certain remarks deploring the movement of direct action against the Communist Government in Kerala. *The Tribune*, Ambala Cantt., July 7, 1959. The Punjab Governor also said that the Communist Government in Kerala was entitled to continue in office for five years unless it was voted out or it resigned of its own accord. Prime Minister Jawaharlal Nehru said in his Press conference on July 7, 1959, that some of Governors who had led an active political life before their appointment and are familiar with the responsibilities and limitations which their office entails, set up "unhappy precedents". *The Hindustan Times*, New Delhi, July 8 1959. On another occasion Gadgil publicly criticised the creed of the Swatantra Party and the Chairmen of the Punjab organisation of the Party criticised in the press the Governor's participation in active politics.

63. Sri Prakasa, *State Governors in India*, p. 66.



When "the defeated Generals of a victorious army" are raised to the position of authority and dignity as a consolation for their electoral and other discomfiture, it is small wonder that such men are least concerned with their duties and obligations and readily surrender themselves to the donkeying Chief Ministers in their respective States and to their benefactors in New Delhi. Sri Prakasa says that Jawaharlal Nehru "not only dealt with the Chief Ministers over the heads of the Governors, but in some cases, to my personal knowledge, he gave authority to non-officials—particularly ladies—to do things in the Raj Bhavans which were the Governor's residence, and over which he was supposed to have full authority—without as much as consulting or even informing the Governor." Sri Prakasa takes another instance. He says, "In the beginning, the Central Ministers took the place of the old Executive Councillors of the Viceroy whose place in the warrant of precedence was below that of the Governors. The Prime Minister, however, decreed that the Governors, except in their own States, were lower than the Central Cabinet Ministers."

It is on record that many of the Chief Ministers ignored their constitutional obligations under Article 167 to keep their Governors fully informed about the affairs of their States. Complaints to Jawaharlal Nehru "about their high-handedness" yielded no results. Every time, writes Dr. K.M. Munshi, "the matter was mentioned at the Governors' conference, Jawaharlal Nehru laughed it out." In one State, the Chief Minister sent direct to the President, mercy petitions from condemned prisoners, although it was incumbent upon him, before rejecting or forwarding them, to obtain the verdict of the Governor. The Chief Ministers were, thus, if not encouraged certainly they were allowed to keep in direct touch with the Central authorities on the heads of the Governors.

Thus, the whole purpose of the Governorship was nullified. With the coming into power of non-Congress coalition of parties consisting of eight or nine units even fourteen, and professing different ideologies and pursuing different objectives, after the General Elections in 1967 in a good many States, and more especially after what had happened in Bengal, it is of the utmost importance that the role of the Governor should be precisely appreciated. One of the former Union Ministers, who was also the Governor of a State, has asked the Governors "to recover their constitutional status" as the Centre and the States are no longer controlled by a single Party. Dharam Vira, now the Mysore Governor, has also said that it is the responsibility of the Governor to see that the Government of the State "is run in accordance with the letter as well as with the spirit of the Constitution. When political complexions of political parties change on account of shifting loyalties it becomes very necessary that the Governor should be very vigilant in order to ensure that the government is run by a party or collection of parties which have the majority in their favour. He has to ensure that by taking shelter behind certain constitutional lacuna a minority government does not continue to function indefinitely. He has also to exercise considerable discretion at the time of the formation of a government. If there are multi-party groups coming together this dis-

64. "Governor's Lot worsening: Reappraisal Overdue". *The Tribune*, Chandigarh, April 17, 1969.

65. *Ibid.*<sup>6</sup>



cretion has to be exercised very carefully to ensure that the group or the party which wants to form the Government is really in a majority and can form a stable Government.<sup>66</sup>

The constitutional position of the Governor has been reinforced by the recent decisions of the West Bengal High Court and the Supreme Court. Mr. Justice B.C. Mitra, rejecting the application filed by M.P. Sharma challenging the West Bengal Governor's order dismissing the United Front Ministry and appointing a Ministry headed by P.C. Ghosh, declared that the Governor had absolute, exclusive, unrestricted and unquestionable discretionary power to dismiss a Ministry and appoint a new Council of Ministers.<sup>67</sup> The Supreme Court, in the *State of Punjab vs. Baldev Prakash and Satpal Dang*, held that "the Governor's powers being untrammelled by the Constitution and an emergency having arisen, the action (of the Governor) was perfectly understandable" and, consequently, the resumption of the Legislature by the Governor was a step in the right direction and upheld the constitutional validity of the two Appropriation Acts of the Punjab which the Punjab and Haryana High Court had earlier struck down.

The makers of the Constitution had anticipated emergencies to happen in the life of the nation and the history of India was their practical guide. They had, accordingly, adequately provided for that. As is clear from the debates of the Constituent Assembly, particularly rivetting on Article 163(2), it was not their intention to make it obligatory on the Governor under all circumstances to act on the advice of his Council of Ministers. Had they attempted it, they would have irreparably undermined the federal basis of Indian polity. Their one aim was to make the Centre strong which should be capable of arresting aggressive assertion of State rights to the point of even breaking away from the Federal Centre. This tendency is very much in evidence since the 1967 General Elections. The Deputy Chief Minister of West Bengal, Joyti Basu, declared at the 44th session of All-Bengal Teachers Annual General Conference on April 13, 1969, that the Government would place their demands before the Central Government and if they refused to provide "adequate funds to meet our special problems, there will be agitation in West Bengal." The Deputy Chief Minister also said, "we will need your (teachers) help and co-operation in the event of an agitation against the Centre."<sup>68</sup> A few days earlier the United Front Government had officially sponsored West Bengal **Bandh** on the plea that the incident at Cossipore was part of a political conspiracy by a malevolent Centre to bring it into public disfavour and eventually to pull it down.<sup>69</sup> The Chief Minister of Kerala and the Deputy Chief Minister

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66. "Interview with Dharam Vira." *The Hindustan Times*, New Delhi, October 11, 1969.

67. As reported in *The Statesman*, New Delhi, February 8, 1968.

68. As reported in *The Hindustan Times*, New Delhi, April 14, 1969.

69. The security guards at the Cossipore Gun and Shell Factory opened fire when a violent mob of workers tried to force entry into the premises, after the gates for the morning shift were closed, and seized a rifle from one of the security personnel. Five persons were killed in the resultant firing. The State

of West Bengal later publicly declared that their Governments would wreck the Constitution from within. It is, under the circumstances, the vigilance of the Governor and his assertiveness which can protect the Constitution and save the country from disintegration. Parliamentary democracy does not rule out the existence of discretionary powers in the Head of the State and the exercise of these powers under exceptional circumstances does not make him a despot. After all the Governors are appointed by the Centre and they are answerable to that authority and the Centre derives its authority and strength from the people. Public opinion is sure to become assertive if any Governor tries to become an autocrat. Let it be made clear that the Governor exercises his special and discretionary powers only under exceptional circumstances.

But it must be emphasised that if the Governor is to judiciously exercise his powers, the President should appoint only those persons who are truly worthy of the office. He should be knowledgeable and energetic with a mind of his own. In the Constituent Assembly it was proposed that the State Legislature might elect a panel from out of which alone the President would select and appoint a Governor. The proposal was not accepted as it would have given a virtual veto to the States. The appointment of the Governor by the President was widely favoured as he has to act on behalf of the Centre on many matters and situations. But in view of the appointments which the Centre has generally made, it is necessary that the Governor's appointment should not be left to the caprice of the Union Home Ministry. Nor should it be left to the predilections of the State Chief Minister. Nath Pai, a Member of Parliament, has recently suggested that the appointment of a Governor should be subject to the ratification by Parliament. The proposal merits serious consideration though the Central Government does not seem to be in a mood to accept it. In the alternative, it may be suggested that there should be a **real** consultation with the President and others whose advice is considered valuable and is respected by the people.

### THE COUNCIL OF MINISTERS

**The Council of Ministers.** The Constitution provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions except insofar as he is by or under the Constitution required to act in his discretion.<sup>7</sup> The Constitution, as said before, does not attempt to define the discretionary powers of the Governor except in the case of Assam Governor who acts in his discretion, in respect of the administration of tribal area, as the agent of the President. But what matters fall within his discretion are decided by the Governor in his discretion and his decision in final.

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Government produced another set of facts and alleged that the firing was unprovoked and unwarranted. The Central Government ordered a judicial inquiry into the incident. This too was criticised by the State Government and indicated that it might set up a separate Inquiry Commission of its own. The West Bengal Government organised a massive agitation against the Central Government and officially declared West Bengal *bandh* day a closed day.

The Governor appoints the Chief Minister and other Ministers are appointed by the Governor on the advice of the Chief Minister.<sup>71</sup> While the Council of Ministers is collectively responsible to the Legislative Assembly of the State, Ministers hold office during the pleasure of the Governor. There is no provision in the Constitution for individual responsibility of the Ministers to the Legislative Assembly. Individual responsibility is covered by the provision that Ministers hold office during the pleasure of the Governor and the pleasure of the Governor really means the pleasure of the Chief Minister. When a Minister does not agree with the policy of the Council of Ministers, or he does anything else which compromises the solidarity and stability of the Government, constitutional propriety as well as a duty demand that he should immediately resign when a hint is given by the Chief Minister. If he does not resign, then, it is the right of the Chief Minister to advise the Governor his dismissal. Dr. Ambedkar emphasised this point in the Constituent Assembly.

Joint responsibility is the first necessity of a responsible Government and the most essential fact for a successful democratic administration. The Ministry is one and indivisible and its solidarity demands a "common front" both within and outside the Legislature. A Minister differing from the policy determined by the Cabinet must resign from the Government. If he does not resign, then, the decision of the Cabinet is as much his decision as that of his colleagues even if he protested against it in the Cabinet. It means that the Minister cannot rebut the criticism of his opponents on the plea that he did not agree in the decision when the matter was being discussed in the Cabinet. And for that matter all Cabinet secrets must be most scrupulously guarded. This strict discipline the system of responsible Government insists if mature, rational and independent contribution to the policy-making is desired from men who are engaged in a common cause and who come together for the purpose of reaching an agreement. "It is, however, not unusual in our country", says K.M. Munshi, "to find a differing Minister's views appearing in the daily papers on the morning after a Cabinet meeting."<sup>72</sup> In the States differences among the Ministers and among some Ministers and the Chief Minister are more frequent and pronounced than at the Centre. "Faction among State parliamentary parties", observes Prof. Sri Ram Sharma, "have been a rule rather than an exception. Intrigues against other colleagues and the Chief Minister have followed factious struggles. In almost all the States these have been furthered by the rift between the head of the political party in the State and the Chief Minister."<sup>73</sup> When Ministers contradict each other, cracks appear in the Government fabric which are injurious and possibly fatal to good government. When intrigues and factious struggle amongst the Ministers enter the body politic that is the

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71. Article 164 (1).

72. Article 164 (1).

73. Kulpatri's Letter No. 103 to Bhartiya Vidya Bhavan, "Bombay, *op. cit.*"

74. *Aspects of Indian Constitution, op. cit.*, p. 267. There is a current debate in the council of the Congress Party on the respective spheres of authority of its Organizational wing headed by the President, and the Parliamentary wing, led by the leader of the Parliamentary Party, and, therefore, the Prime Minister.

end of responsible government and this is the hard lesson Indians have learnt by years of experience.

The number of the Ministers is not fixed. It is for the Chief Minister to determine the size of the Council of Ministers and he does so as the requirements of the occasion may demand. The only constitutional requirement is that in the States of Bihar, Madhya Pradesh and Orissa the Council of Ministers must have a Minister in charge of Tribal welfare and the same Minister may also be entrusted with the welfare of the Scheduled Castes and Backward Classes in the State.

It has often been complained that the Councils of Ministers in the States are unduly large and it heavily burdens their exchequers. Prior to 1962, this criticism was untenable. Their number was nowhere larger than the actual needs of a good and efficient administration. The necessities of a Welfare State incredibly expand the functions of Government and correspondingly the number of the departments of the government. Responsible Government demands that all departments must be presided over by a political chief to see the proper implementation of policy and be answerable to the Legislature for its work. But not in the manner which coalition Governments, after 1967 General Elections, have done in a good number of the States. In a new and small State like Haryana, for instance, every legislator was an aspirant for Ministership and he defected from his parent party to be sworn-in the same day. In fact, Ministership was a bait to defect and crossing of floor had become a normal feature of the political life of the State raising the total number of the Council of Ministers to a staggering figure of 34 out of a total State Assembly membership of 81.

Before a Minister enters upon his office, the Governor shall administer to him the Oaths of Office and Secrecy according to the prescribed form in the Third Schedule. A Minister must be a member of one or the other House, if there are two Chambers, of the State Legislature. If he is not, he ceases to be a Minister after the expiration of six months.<sup>75</sup> The salaries and allowances of Ministers are to be such as the State Legislature may determine by law. The question whether any, and if so what, advice was tendered by Ministers to the Governor cannot be inquired into by any Court.<sup>76</sup> The question of ministerial advice, as such, cannot be brought before Courts. This provision also establishes that the relations between the Governor and his Ministers are confidential.

The Constitution nowhere mentions, both in respect to the Union and the States, the word Cabinet. It provides for a Council of Ministers at both the levels. But the Cabinet has an extra-constitutional growth at the Centre. The Council of Ministers so far formed at the Centre made definite distinction between 'Ministers of Cabinet' and 'Ministers of Cabinet rank', that is, Ministers of State. No such distinction was made in the States till after 1962 General Elections. Now this categorisation of

75. Article 164 (1).

76. Refer to the unwieldy size of the Ministries in nearly all the States after 1962 elections.

77. Article 164 (4).

78. Article 163 (3).



Ministers of different status is complete in the States too. Even Deputy Chief Ministers have been appointed in some of the States. But it is the Cabinet Ministers alone who meet in a body, deliberate and formulate policy and constitute a Cabinet. The Cabinet Ministers preside over the different Departments of Government and see that the policy collectively determined by the Cabinet is properly implemented. If a Minister of State (Minister of Cabinet rank) holds an independent charge of a Department, he attends the meetings of the Cabinet and participates in its deliberations when problems relating to his Department are under discussion. Deputy Ministers and Parliamentary Secretaries have no berth in the Cabinet. The Deputy Ministers have no charge of a separate Department and they receive lesser salary than the Cabinet Ministers and Ministers of Cabinet rank. Their task is to assist the Ministers, with whom they are attached, in their administrative and Parliamentary duties. The Parliamentary Secretaries are neither Ministers nor do they exercise any powers. They are assigned duties as the Minister in charge of the Department to which they are attached may consider necessary. But all of them, who make the Council of Ministers, are members of the State Legislature, belong to the majority party of the Legislative Assembly and are collectively responsible to it. They remain in office so long as they can retain the confidence of the Legislative Assembly.

**Dismissal of Ministry.** Dismissal of a Ministry by the Head of the State is not an accepted axiom of Parliamentary Government under normal conditions. But if the Governor is convinced that the Ministry was indulging in political manoeuvring to keep itself in office thereby jeopardising the interests of the State, or that it was engaged in activities which were likely to endanger national security or unity, the Governor can in his discretion dismiss such a Ministry. Dr. B. R. Ambedkar's clarification on the issue leaves no room for controversy. Speaking on June 2, 1949, he said, "My submission is that although the Governor has no function still, even the constitutional Governor, that he is, has certain duties to perform. His duties, according to me, may be classified in two parts. One is, that he has to retain the Ministry in office. Because the Ministry is to hold office during his pleasure, he has to see whether and when he should exercise his pleasure against the Ministry...." Rejecting the application filed by M.P. Sharma under Article 226 challenging the West Bengal Governor's order dismissing United Front Ministry headed by Ajoy Mukherjee, Mr. Justice B.C. Mitter held that withdrawal of "pleasure" was entirely at the discretion of the Governor. The provision of Article 164(2) that the Ministers should be collectively responsible to the Legislative Assembly of the State, Justice Mitter declared, did not in any manner fetter or restrict the Governor's power to withdraw the "pleasure" during which the Ministers held office. Collective responsibility contemplated in Article 164(2), in his Lordship's opinion, meant that the Council of Ministers was answerable to the Legislative Assembly of the State.<sup>79</sup>

79. As reported in *The Statesman*, New Delhi, February 8, 1968. This is how Bhupen Vira, the then Governor of West Bengal, gives the explanation of his dismissing Ajoy Mukherjee Ministry. He says, "So far as the formation of a new Government the discretion of a Governor is more or less absolute. But difficulty arises when a Government in power through some reason or the other



After a careful consideration of the constitutional position the Kerala Enquiry Committee of the Indian Commission of Jurists<sup>80</sup> opined, "where, therefore, the Governor is satisfied that the Ministerial orders are in violation of the law, it is not only his right, but his duty as the guardian of the Constitution, which he has sworn to preserve, protect and defend, to correct and rectify, and, in the last resort, to dismiss the Ministry, if recalcitrant. A Governor who fails in his duty, must be deemed to be privy to the violation of the law; and his position would become wholly untenable. It may be that on the dismissal of the Ministry, the Governor might be unable to find an alternative Ministry commanding a majority in the Legislature. But, in that event, he has the right to order a dissolution of the Legislative Assembly and direct fresh elections."

The opinion expressed on November 11, 1967, by a spokesman on behalf of the Union Government on the point is perfectly sound. He said, "when in his judgment, the Governor is duly satisfied that the Chief Minister no longer commands support of the Majority of the MLAs, he would be justified in the exercise of his discretionary functions to dismiss the Council of Ministers. In such a case there can be no question of his acting on the advice of his Council of Ministers. This action, he elaborated, can be taken on the basis of any material or information available to him, even if such material or information might be extraneous to the proceedings of the Legislative Assembly. The Home Minister asserted in the Rajya Sabha that the discretion of a Governor was not justiciable.<sup>81</sup> The Union Law Minister endorsed in the Lok Sabha the opinion expressed on behalf of the Home Ministry and opined that in dismissing the Ajoy Kumar Mukherjee Ministry in West Bengal, the Governor had acted "in the interest of the country, the democracy and the Constitution."<sup>82</sup>

The Presiding officers of the Legislative bodies of India assembled in a conference on April 6-7, 1968 at New Delhi, adopted a resolution recommending to the Government of India to take urgent and suitable steps to evolve conventions in regard to the powers of the Governors to summon or prorogue the Legislatures and to dismiss Ministries. By implication the resolution had disapproved of the action of the Bengal Governor in assuming to himself the power to judge the support of the Ministry. The resolution stated that the question whether a Chief Minister has lost the confidence of the Assembly shall, at all time, be decided in

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appears to have lost its majority. Normally it should be for the Assembly to decide as to whether the Government enjoys majority support or not, but in order to decide the point it should also be possible for the Assembly to be called at the earliest possible date." Interview with Dharam Vira. *The Tribune*, Chandigarh, October 11, 1969.

80. The Committee consisted of Mr. N.H. Bhagwati, former Judge of the Supreme Court, Mr. M.P. Amin, former Advocate-General of Bombay, and Mr. N.K. Nambiar, an eminent constitutional lawyer.

81. Speech in the Rajya Sabha, November 20, 1967. As reported in *The Indian Express*, New Delhi, November 21, 1967.

82. Speech in the Lok Sabha, December 4, 1967. As reported in *The Times of India*, New Delhi, December 5, 1967.

the Assembly.<sup>83</sup> The resolution of the conference runs contrary to the stand of the Union Home Ministry that a Chief Minister holds office at the pleasure of the Governor. But the constitutional competence of a Governor's action in dismissing an elected government is not open to question today. Both the West Bengal High Court and, later, the Supreme Court—which dealt with similar questions arising from the Governor-Speaker controversy in Punjab—clearly upheld the Governor's actions in the two situations as constitutionally competent.

**The Chief Minister.** At the head of the Council of Ministers in a State is the Chief Minister. He is appointed by the Governor, but other Ministers are appointed by the Governor on the advice of the Chief Minister. The advice of the Chief Minister is really the selection of his colleagues and the Governor simply endorses his choice. The appointment of Ministers by the Governor, therefore, is only technical. The Council of Ministers, as a body, is responsible to the State Legislative Assembly, but individual Ministers can be dismissed by the Governor which again, as said before, means the right of the Chief Minister. The Chief Minister, like the Prime Minister of India, is the keystone of the State Constitution, central to the formation of the Council of Ministers. He can make or unmake it or he may shuffle his pack as he likes and whenever it pleases him.

This simple analysis of the functions and position of the Chief Minister conforms to the working of the Cabinet system of government in its traditional form and as obtainable in Britain. These practices have been, to a considerable extent, followed in the working of the Union Government in India, and the position of the Indian Prime Minister, like the Prime Minister of Britain, is unchallengeable which no other colleague of his can rival. But the Chief Ministers in a majority of the States do not enjoy that unique position of exceptional and peculiar authority. Members of the majority party in the State Legislatures and the Ministers have not exhibited sufficient discipline of solidarity and team work. Personal differences, intra-party conflicts, clamour for offices, favouritism and even communalism, casteism and regionalism are so prominently in operation that the career of a Ministry is always in jeopardy. So long as one single-party reigned supreme in nearly all the States major splits between the groups within the Party were avoided by the stern hand of the Congress Central Parliamentary Board. But after the 1967 General Elections, when the stronghold of the Congress loosened, the splits hitherto curbed violently re-appeared. In fact, there was an open revolt. Even ambitious veterans left the Congress either to form a new party or joined hands with other groups with whom they had nothing in common except to oust the Congress from power. One of the main factors responsible for the disintegration of the Congress was the mighty hand of the Central Parliamentary Board which always dictated and imposed its decisions on the State Legislative Party. The Board seldom allowed the Party to elect its leader to become a Chief Minister and select his colleagues. The Chief Ministers were very often directed in the replacement of Ministers and even the Chief Minister. For instance, in Punjab Bhim Sain Sachar

83. *The Statesman*, New Delhi, April 8, 1968.

was replaced by Pratap Singh Kairon. Ram Kishen was not the State Party's choice and the Chief Minister *ad nauseam* proclaimed that he was the "driver" of the High Command. The practices established by the Congress neither helped to uphold the authority of the Chief Minister nor sustained collective responsibility. In reality it helped to aggravate group manipulations and created conditions of schism in the Cabinet utterly damaging the authority and prestige of the Chief Minister. A Party must freely elect its own leader and the leader should be free in shaping his Government according to his own view of what is likely to work best. An imposed leader from above cannot command the spontaneous esteem and loyalty of his colleagues and his colleagues in the Capital should be only those who owe to their chief personal as well as party allegiance.

**Governor's power to appoint a Chief Minister.** The conventions of responsible Government in respect of appointment of Ministers are clear and matter of fact. The Head of the State summons the accredited leader of the majority party and commissions him to form the Ministry. The choice is obvious when there is one single party commanding a majority in the Legislature and it has a leader. If no party commands a real majority, the choice of the Chief Minister is not easy and the Head of the State exercises some discretion. If the government is defeated on a hostile vote in the representative Chamber, the Head of the State summons the leader of the Opposition and commissions him to form the Government. It is, also, a well-settled convention that the Chief Minister must belong to the Chamber to which the Ministry is responsible. The reasons for it are convincing and of practical utility.

Referring to the discretion of the King in Britain in the choice of the Prime Minister when no party commands a real majority in the House of Commons or when a Prime Minister dies in office or retires or when a political party has, at the crucial moment, no recognised leader, Herbert Morrison says, "The Sovereign's choice in these conditions has much constitutional significance. The choice may be a very delicate one and involve embarrassing complications. The Sovereign would, of course, take all relevant considerations into account, and be at great pains not only to be constitutionally correct, but make every effort to see that the correctness is likely to be recognised."<sup>84</sup> It means that acting in discretion in this respect must be according to the rules of reason and justice and not according to private opinion. Discretion must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself." But there have been glaring violations of the conventions of responsible government in some of the States in India in respect to the appointment of the Chief Ministers and ministerial imbroglio in Orissa produced unsavoury repercussions generally on the political life of the country and on the evolution of democratic practices and traditions.

In Madras the outgoing Congress Ministry, which did not command a majority in the new State Assembly, after the general elections of 1952, recommended to the Governor to nominate C. Rajagopalachari, a mem-

84. *Government and Parliament*, p. 77.

85. *Lord Halsbury, L.C. Sharp vs. Wakefield* (1891), 61 L.T.

ber of the Legislative Council, under Article 171(3)(c) and (5) of the Constitution. After nominating him a member of the Legislative Council, the Governor invited Rajaji, who was then the "prospective head" of the Congress Party in the State Legislature, to form the Government. The appointment of Rajaji, as Chief Minister, was widely criticised and the enraged political opinion sought the intervention of the State High Court through two petitions challenging the validity of his nomination. In Bombay, too, the Chief Minister was a nominated member of the Legislative Council. But the nomination of Morarji Desai and his appointment as Chief Minister was an utter violation of constitutional conventions and even constitutional propriety inasmuch as Morarji Desai had been defeated in the General Elections as a candidate for the Legislative Assembly seat.

What happened in Travancore-Cochin is yet another example of the working of responsible government in India. The State suffered in 1953, a breakdown of its Congress Party Government. The Chief Minister asked the State Assembly for a vote of confidence which was refused by a vote of 56 to 51. The leader of the Opposition asked the Head of the State (the Rajpramukh) to allow him to form a Coalition Government of the United Front of Leftists, excluding the Praja Socialist Party. The Rajpramukh did not agree and dissolved the Assembly. No party could get an absolute majority at the elections and the Rajpramukh had to decide which of the three major parties in the Assembly should form the government. His choice fell upon the Praja-Socialist Party, the smallest among the three, with 19 members out of a total membership of 118 in the Assembly. This was bad enough, but the Governor's action in commissioning Achyuta Menon, a member of Parliament, to form a ministry after the resignation of the Namboodiripad's Ministry in November 1969 was a worse constitutional impropriety.

The formation of the Congress Ministry in Orissa after the general elections of 1957 and the swearing in ceremony speech of the State Governor, which was characterised as a promise for an effort to secure a continued support of the Congress Ministry, has already been referred to. Reference has also been made to the action of the Orissa Government in April, 1958 to keep the Mahatab Government in office, although the Chief Minister had submitted to the Governor the resignation of his Ministry and expressly suggested to him the dissolution of the Assembly under Article 174. Summing up the whole issue of the resignation of Mahatab Ministry and its subsequent withdrawal, the Leader of the Opposition could well claim that "The fortnight-old political stalemate and constitutional deadlock was ended at last over the graveyard of constitutional principles, proprieties and conventions."<sup>86</sup> The conventions of the Constitution, Burke wrote, "determine the manner in which the rule of law, which they pre-suppose, is applied, so that they are, in fact, the motive power of the Constitution." He further added that "these conventions are always directed to secure that the Constitution works in practice in accordance with the prevailing constitutional theory."<sup>87</sup>

86. *The Hindustan Times*, New Delhi, May 25, 1958.

87. As quoted by H.J. Laski in his *Parliamentary Government in England*, p. 52.



After the 1967 General Elections a piquant situation arose in some of the States. In these States no single Party could claim a clear majority to form the Government, although the Congress had emerged as the largest single Party. It has been contended that under such circumstances, the Governor must invite the Opposition to form the Ministry. If Opposition fails to form the Ministry after being called upon to do so first, the Governor should next carry out his "soundings" as to who will command the requisite majority in the Legislature. This is not a correct approach. The discretion of the Governor so far as the formation of a new Government is concerned is more or less absolute. Dharam Viri rightly says, "If there are multi-party groups coming together, this discretion has to be exercised carefully to ensure that the group or the party which wants to form a government is really in a majority and can form a stable government."<sup>88</sup>

**Duties of the Chief Minister.** The Constitution prescribes<sup>89</sup> that it shall be the duty of the Chief Minister:

- (a) to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation;
- (b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for; and
- (c) if the Governor so requires to submit for the consideration of the Council of Ministers any matter on which decision has been taken by a Minister but which has not been considered by the Council.

But once the matter so referred is approved by the Council of Ministers it becomes binding on the Governor. The Constitution nowhere empowers the Governor to re-open any decision already taken by the Council of Ministers. It is only the decision of an individual Minister that can be referred to the consideration of the Council of Ministers. It has been asserted that the provision empowering the Governor to direct the Chief Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister is not in accord with the principle of collective responsibility. But it is not exactly so. So long as one single party commands a clear majority in the State Legislature and the Council of Ministers is a homogeneous team, the possibility of a Minister taking a decision on any matter of policy independently of the Council of Ministers or taking an action on an important matter upon which there is no Cabinet decision or his acting contrary to the decision already taken by the Cabinet, is very rare. But when it is a coalition Government, in which many groups combine without having any common basis of policy, such an eventuality may happen, as it did happen in Uttar Pradesh,<sup>90</sup> Madhya Pradesh and West Bengal, when a Minister takes action on an important matter upon which there is no Cabinet decision or makes

<sup>88</sup> "Interview with Dharam Viri." *The Hindustan Times*, New Delhi, October 11, 1969.

<sup>89</sup> Article 167.



a declaration of policy which may be contrary to the decision of the Cabinet. It is only here that the intervention of the Governor will be needed to safeguard the principle of collective responsibility enshrined in the Constitution. Dealing with this aspect K.M. Munshi said in the Constituent Assembly, "there is no harm, but there is great advantage if the Governor exercises his influence over his Cabinet. As I have said we have single parties in the provinces now but a time might come when there will be many parties, when the Premier might fail to bring about a compromise between the parties and harmonious policies during a crisis. At that time the value of the Governor would be immense and from this point of view, I submit, that the powers that are given here are legitimate powers given to a constitutional Head and they are essential for working out a smooth democracy and they will be most beneficial to the Ministers themselves, because then they will be able to get confidential information and advice from a person who has completely identified himself with them and get accessible to other parties."<sup>90</sup>

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90. *Constituent Assembly Debates*, Vol. VII, p. 130.

## CHAPTER IX

# THE STATE LEGISLATURE

**The State Legislature.** The Legislature of a State consists of a Governor and a House or two Houses as the case may be. Originally, Bihar, Bombay, Madras, Punjab, Uttar Pradesh and West Bengal among Part A States and Mysore among Part B States had bicameral Legislatures. Of the fourteen reorganised States ten were to have a bicameral legislature: Andhra Pradesh, Bihar, Bombay, Madhya Pradesh, Madras, Mysore, Punjab, Uttar Pradesh, West Bengal, and Jammu and Kashmir. But the second Chamber has not yet been constituted in Madhya Pradesh. With the creation of Maharashtra and Gujarat States in 1960, Gujarat opted for a single Chamber and so did Haryana on the division of Punjab in 1966. In Punjab and West Bengal the Legislative Councils were abolished in 1969 and early 1970 respectively. At present bicameral Legislatures exist in Andhra Pradesh, Bihar, Jammu and Kashmir, Maharashtra, Mysore, Tamil Nadu (Madras) and Uttar Pradesh, seven in all.

**Bicameral Legislature.** The Memorandum on the principles of a model Provincial Constitution circulated on May 30, 1947, by the constitutional Adviser provided for a single Chamber, called the Legislative Assembly in all the States. The note added to the Memorandum pointed out that under the Government of India Act, 1935, the Provinces of Assam, West Bengal, Bihar, Bombay, Madras and the United Provinces had bicameral Legislatures and whether any State was to have a bicameral Legislature or not would probably have to be left to the decision of the representatives of that State in the Constituent Assembly. In case any State decided to have two Chambers, the second Chamber would be called the Legislative Council.

The Provincial Constitution Committee decided that as a general rule, there should be only a single Chamber Legislature in all the States. But the Committee agreed that two Chamber Legislatures might be constituted in States where special circumstances existed.<sup>1</sup> In a note added to the Report, the Committee proposed that the members representing the different States in the Constituent Assembly should meet separately and come to a final decision whether to have a second Chamber for their State or not.<sup>2</sup> A sub-Committee consisting of B.G. Kher, Dr. Pattabhi Sitaram-

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1. As in January, 1970.

2. In earlier stages of the drafting of the Constitution, the units were described as Provinces. It was only in the Draft Constitution of February 1948, that the Drafting Committee adopted the expression States for Provinces.

3. Minutes, June 6, 1947. *The Framing of India's Constitution, Select Documents*, Vol. II, p. 647.

4. Report, June 27, 1947, *Ibid.*, p. 660.

ava, P. Subaravan, and Dr. Kailash Nath Katju was constituted to determine the composition and the mode of representation of the members of the Legislative Council in case a State decided to have a second Chamber. The sub-Committee recommended that the membership of the second Chamber in a State which decided to have one should not be more than a quarter of the total membership of the Legislative Assembly, and that there should be, within certain limits, functional representation on the lines of the Constitution of Ireland. It was, accordingly, recommended that the composition of the Legislative Council should be one-half to be elected on functional representation on the Irish pattern, one-third to be elected by the Legislative Assembly of the State by the method of the proportional representation, and one-sixth to be nominated by the Governor on the advice of his Ministers.<sup>6</sup>

These proposals of the sub-Committee were accepted by the Provincial Constitution Committee.<sup>6</sup> The Constituent Assembly discussed the recommendations of the Provincial Constitution Committee on July 18 and 21, 1947 and were adopted with some amendments.<sup>7</sup> The Constitution, thus, provides for a divergent practice of bicameral Legislature in the States. It also provides for the abolition of the Legislative Council in a State which has one, or for its creation in a State without one. The abolition or creation of the Legislative Council does not involve the amendment of the Constitution. The change can be brought about by the law of Parliament, passed like an ordinary law, in deference to the wishes of the State Legislative Assembly expressed in a resolution passed by a majority of the total membership and by two-thirds majority of those present and voting.<sup>8</sup> That is to say, if the Legislative Assembly of a State expresses in a resolution, passed by a majority of its total membership and by two-thirds majority of those present and voting, a desire either for the creation or the abolition of the Legislative Council, Parliament will enact a law accordingly. The procedure regarding the creation or abolition of the Legislative Council is similar to the one provided in the Government of India Act, 1935. Dr. Ambedkar, while explaining the reasons for adopting this procedure, maintained, "The provisions of this Article follow very closely the provisions contained in the Government of India Act, Section 60, for the creation of the Legislative Council and Section 308 which provides for the abolition. The procedure adopted here for the creation and abolition is that the matter is really left with the Lower Chamber, which by a resolution may recommend either of the two courses that it may decide upon. In order to facilitate any change made either in the abolition of the Second Chamber or in the creation of a Second Chamber provision is made that such a law shall not be deemed to be an amendment of the Constitution, in order to obviate the difficult procedure which has been provided in the Draft Constitution for the amendment of the Constitution."<sup>9</sup>

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5. Sub-Committee Minutes, *Ibid.*, p. 652.

6. Report, *Ibid.*, pp. 660-61.

7. *Constituent Assembly Debates*, Vol. IV, pp. 579 ff.

8. Article 169 (1).

9. *Constituent Assembly Debates*, Vol. IX, p. 14.

**Utility of the Legislative Councils.** Whatever reasons might have weighed with the Provincial Constitution Committee to recommend such a procedure for the adoption of bicameralism it is, undoubtedly, clear that the makers of the Constitution were themselves in favour of the utility of the Legislative Councils. By providing for their abolition they gave the Councils only a very subordinate and tentative place in the scheme of State Government. The Legislative Councils are not only Second Chambers, but also secondary Chambers. They have practically no control over Money Bills. A Money Bill must originate in the Legislative Assembly and having passed therefrom, it is transmitted to the Legislative Council for its recommendations. The Council must return the Bill to the Legislative Assembly within fourteen days of its receipt either with or without its recommendations. But the recommendations of the Council are not binding on the Assembly. If the Assembly rejects those recommendations or the Council does not make any recommendation within fourteen days, the Bill becomes law on receiving the assent of the Governor. All that the Council can do is to delay the Money Bill for fourteen days. Nor are its powers effective with respect to non-Money Bills. The Council can only delay the passage of a non-Money Bill for a period of four months. The Constitution does not even make a provision for joint sittings in case of disagreement between the two Houses of the State Legislature. The views of the Legislative Assembly must ultimately prevail.

There are many staunch advocates of bicameral Legislatures in the States. Bicameralism they do not regard a futile institution. They argue for it as a democratic necessity; a check on the hasty and ill-considered legislation. Legislative Councils, they say, adequately fulfil this purpose. From the performances of the Legislative Councils from the various States of India, they authenticate their usefulness as revisory Chambers. The amendments proposed to the bills by the Councils, they assert, have generally been accepted by the Legislative Assemblies and the speeches of elder statesmen and veteran politicians, who compose the membership of the Councils, are heard with keen attention and respect. Their opinions help to mould public opinion and the Government cannot remain oblivious of their views. In India, respect to age, experience and maturer judgment, they emphasise, is a heritage and their impact on public opinion is immense.

The atmosphere in the Councils, it is further maintained, is serene and it is particularly suited for initiating non-controversial legislation. Passions do not run high there and political antagonism does not assume so much bitterness as in the popular Chamber because the Legislative Council cannot bring a crisis in the Government. The result is a high order of debates and full consideration of the pros and cons of the legislation under discussion or matter under review. In financial matters, too, Legislative Councils have their own contribution to make which by no means is negligible. The Constitution provides that the Annual Budget is to be laid before both the Houses of the Legislature of a State if it is bicameral. It is discussed in both Houses. The report of the Comptroller

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10. Refer to Sri Prakasa, "Abolition of Upper Houses: The other side of Issue." *The Tribune*, Chandigarh, June 6, 1969.

and Auditor-General is also required to be laid before both Houses. The Second Chamber is also represented in the Public Accounts Committee.

But the critics of bicameral legislature in the States assert that the Councils are composed of diverse elements, differently elected and including nominated members. A Chamber so heterogeneously constituted, they urge, can neither properly serve the purpose of a revising Chamber nor can it act as an effective brake against the hasty and ill-considered legislation. It is further argued that there is dearth of representatives for both the Houses in every State and the Legislative Councils being what they are have not been able to attract whatever talent and experience is available. Moreover, the Party in power has used Legislative Council as a spring-board for its own power and patronage rather than to establish it as a forum of talent and eminence. Sometimes nominations are made to enable certain persons to become Ministers or even Chief Ministers, for instance, C. Rajagopalachari in Madras, Morarji Desai in the erstwhile Bombay State and Gyani Gurmukh Singh Mussafir in the re-organised Punjab State in 1966. The installation of Mr. Mandal as Chief Minister of Bihar after the defeat of M.M. Sinha's Ministry was rather dramatic. In a majority of cases nominations have seldom fulfilled the requirements of the Constitution that the members nominated shall consist of persons having special knowledge or practical experience in respect of such matters as literature, science, art, co-operative movement and social service.<sup>11</sup>

If the Legislative Councils do not fulfil the democratic demands of a double Chamber it is a sheer hoax of democracy to continue with them. As far back as 1953, the Bombay State Assembly voted for the abolition of its Legislative Council by 182 votes to 31. Conformably to the United Front's 32-point programme the West Bengal Government announced its intention in March 1969 to seek the abolition of the Legislative Council. A similar announcement of intention was made in Punjab Governor's speech after the mid-term elections of 1969. No one, including the Opposition, in the West Bengal Legislative Assembly had a good word for the West Bengal Legislative Council and the resolution for its abolition was passed unanimously. It now stands abolished. Similar had been the fate of the Punjab Legislative Council. Many other States, in which Legislative Councils exist, have begun to appreciate that the scheme of bicameralism is completely out of accord with any sense of constitutional proportion or propriety. It is an expensive experiment and an unnecessary drain on the meagre resources of the States.<sup>12</sup> The Secretary, Punjab Legislative Council, an admirer of bicameralism in States, says, "If the Second Chamber is to fulfil its desired object it should be the endeavour of all parties to return therein men of eminence who have long and varied experience of life and maintain a good position in society and have got the strength of character and also capacity to render service to the nation."<sup>13</sup> For its proper

11. Article 171 (3) (e) and (5).

12. The Governments in West Bengal and Punjab while pleading for the abolition of their Legislative Councils laid public stress on the cost, about Rs. 6 lakhs annually in each of the two States.

13. Nirola, R.L., "Second Chambers under Indian Constitution." *The Tribune*, Ambala Cantt., December 30, 1957.



functioning he further adds "its programme of business should be properly planned so that the attention may be given by every member to every matter coming up for consideration." But that has not happened. Unfortunately, the Legislative Councils have been largely used as a dumping ground either for politicians who could not get elected to the Legislative Assembly or for politically discarded individuals who had to be shown some consideration. The blame for abusing the Upper Chambers in this way lies mainly on the Congress Party which controlled the lever of power in almost all the States for two decades after Independence. The Congress bosses seemed to look upon the Councils as a source of patronage. It is significant that in 1967 while the United Front Government in Punjab initiated moves for abolishing the Legislative Council, D.P. Mishra, Chief Minister of Madhya Pradesh, sought to saddle the State with an Upper Chamber.

**Composition of the Councils.** The Constitution simply lays down the maximum and the minimum limits for the membership of the Legislative Council of each State. Originally, the Constitution provided that a Legislative Council must not have less than forty members and its maximum membership must not exceed one-fourth of the number of the members in the State Legislative Assembly. The Constitution (Seventh Amendment) Act, seeking to carry out a number of amendments to the Constitution, principally arising out of the reorganisation of States, provided that the total number of members in the Council shall not exceed one-third of the total number of members of the Legislative Assembly of that State and in no case less than 40. It means that the strength of a Legislative Council for a State depends upon the number of members of the Legislative Assembly of that State. The composition of the members is as follows:

(1) One-third of such number of the members of the Legislative Council are elected by the members of the Legislative Assembly of the State who are not members of the Assembly.

(2) One-third are elected by electorates consisting of members of municipalities, district boards and other local authorities in the State which Parliament may by law specify;

(3) One-twelfth are elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any University in India;

(4) One-twelfth are elected by electorates consisting of persons who have been for three years engaged in teaching in schools not lower in standard than that of a secondary school; and

(5) The remainder to be nominated by the Governor from among persons having special knowledge or practical experience in respect of matters such as literature, science, art, co-operative movement and social service.

The system of election prescribed for all such categories is that of proportional representation by means of a single transferable vote.

A candidate for election to the Legislative Council must be a citizen of India, not less than thirty years of age and should possess all such other

qualifications as may be prescribed by Parliament. A member of the Legislative Council who remains absent for a period of sixty days from all its meetings without permission vacates his seat.

**Organisation of the Legislative Council.** The Legislative Council is a permanent body and is not subject to dissolution. One-third of its members retire every second year and, thus, the term of an individual member comes to six years. The Council along with the Assembly must be summoned at least twice a year and not more than six months should intervene between the last sitting and the first sitting in the next session. The Governor prorogues the Legislative Council. He may address the Council separately or both the Houses together and may require the attendance of members for that purpose. He may send messages to the Council either in respect of a Bill pending before it suggesting any changes or modifications which he deems necessary and such messages must be considered at the earliest possible opportunity. At the first session after the General Elections to the Legislative Assembly and at the commencement of the first session of each year, the Governor has to address the Assembly or, in the case of a State having a Council, both Houses assembled together and inform the Legislature of the causes of its summons. The Council is required to provide in its rules for the allotment of time for discussion of the matters referred to in such address. Every Minister and the Advocate-General for a State has the right to speak in, and otherwise to take part in the proceedings of both Houses and any Committee of the Legislature of which he may be named a member. But a Minister is entitled to vote only in that House of which he is a member.

The Legislative Council choose its own Chairman and a Deputy Chairman. The Chairman and the Deputy Chairman vacate their offices if they cease to be members of the Council. They can also be removed from office by a resolution of the Council passed by a majority of all the then members of the Council. All questions at a sitting of the Council are decided by a majority vote of the members present and voting other than the Chairman. The Chairman exercises a casting vote in case of equality of votes.

**Legislative functions of the Council.** A Bill, other than a Money Bill or Finance Bill, may originate in either House of the State Legislature which has a Legislative Council. A Bill is not deemed to have been passed by the State Legislature having a Legislative Council unless it has been agreed to by both the Houses. But if a Bill (except a Money Bill) passed by the Legislative Assembly and transmitted to the Legislative Council is (a) either rejected by the Council or (b) more than three months elapse from the date of the receipt of the Bill by the Council without the Bill being passed by it, or (c) a Bill is passed by the Council with such amendments to which the Assembly does not agree, the Legislative Assembly may again pass the Bill with or without amendments suggested by the Council and then, transmit the Bill as so passed to the Legislative Council. If now the Legislative Council either (a) rejects the Bill for the second time, or (b) is not passed within one month from the date of the receipt of the Bill by the Council, or (c) is passed by the Council with such amendments to which the Assembly does not agree, then, the Bill shall be deemed to have been passed by both the Houses of the Legislature in

the form in which it was passed by the Assembly. There is no provision for a joint sitting of both Houses in case of disagreement. The Legislative Council can only delay the passage of the Bill for a period of four months.

The original Draft of the Constitution provided for a joint sitting of both Houses in cases of difference, but it was dropped in the Constituent Assembly. Dr. Ambedkar explaining the amendment said that they were following the procedure of the British Parliament according to the Parliament Act of 1911. He maintained that the procedure laid down in the Parliament Act for the resolution of differences between the House of Commons and the House of Lords was more appropriate for the resolution of differences between the two Houses in the State of the Indian Union. The Article itself (197) was modelled on Article 57 in the Australian Constitution.

**Financial Functions of the Council.** The functions of a Legislative Council with respect to Money Bills are similar to those of the Council of States (Rajya Sabha). No Money Bill shall be introduced in a Legislative Council. After a Money Bill has been passed by the Legislative Assembly, it is transmitted to the Legislative Council for its recommendations. The Legislative Council is required within fourteen days of the receipt of the Bill to return the Bill to the Legislative Assembly with its recommendations. The Assembly may either accept or reject the recommendations of the Council. If it rejects, the Bill is deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly. If the Bill is not returned to the Assembly with its recommendations within fourteen days of its receipt by the Council, it is deemed to have been passed by both the Houses at the expiration of the said period in the form in which it was passed by the Assembly.

It will, accordingly, appear that in money or financial matters the Legislative Council has neither the initiative nor any effective voice. It can only make recommendations and it is for the Legislative Assembly to accept those recommendations or not. If the Council makes no recommendations within fourteen days after receiving the Bill, it is deemed to have been passed by both the Houses of the Legislature in the form as it was passed by the Legislative Assembly. The real power in money matters belongs to the Assembly.

**Administrative Functions of the Council.** The Council does not control the Ministry. The Constitution definitely provides that the Council of Ministers is collectively responsible to the Legislative Assembly. The Council can, however, put questions and supplementaries on matters connected with public administration, move, discuss and pass resolutions on any matter of public importance and relating to the administration of the State.

## THE LEGISLATIVE ASSEMBLY

**Composition of the Legislative Assembly.** The Legislative Assembly is the popular Chamber and the real centre of power in a State. It is

composed of members directly elected by the people in territorial constituencies in which the State is divided. The suffrage is universal, that is, every adult citizen of twenty-one and above irrespective of his race, caste, creed or sex has the right to vote, provided he is not otherwise disqualified on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice. The electoral rolls are prepared and revised annually under the direction and supervision of the Election Commission.

The Constitution provides that the maximum strength of a Legislative Assembly must not exceed 500 or its minimum strength fall below 60. The actual work of delimiting the constituencies is left to Parliament. After the completion of each census representation of the several territorial constituencies must be readjusted by such authority and in such manner as Parliament may by law determine. The demarcation of territorial constituencies is to be done in such a manner that the ratio between the population of each constituency and the number of seats allotted to it is, as far as practicable, the same throughout the State.

Apart from these general provisions, the Constitution makes special provisions regarding the representation of the Scheduled Castes and the Scheduled Tribes except the Scheduled Tribes in the Tribal Area of Assam and the reservation of seats for the Autonomous Districts in the Legislative Assembly of the State of Assam.<sup>15</sup> Provision has also been made for the nomination of the members of the Anglo-Indian community. If the Governor is of the opinion that the Anglo-Indian community<sup>16</sup> is not adequately represented in the Legislative Assembly, he may nominate such number of members of the community to the Assembly as he may consider appropriate. Originally, all such reservations of seats for the Scheduled Castes and the Scheduled Tribes and the representation of the Anglo-Indian community by nomination were to cease after ten years from the commencement of the Constitution.<sup>17</sup> But the Constitution (Eighth Amendment) Act extended all such reservations and nominations to the various State Assemblies for another ten years. The original Bill amending the Constitution sought to restrict the nomination of the Anglo-Indians to the State Assemblies. It provided that not more than two members in the case of West Bengal and one in the case of other States could be nominated to the State Legislature, but this provision had to be deleted as it failed to secure the requisite representation. The number of Anglo-Indians to be nominated was left, as before, to the discretion of the Governor. The Constitution (Twenty-third) Amendment Act now extends the reservations and nominations to another ten years.

**Qualifications for Membership of the Legislative Assembly.** The conditions of eligibility for membership of the Legislative Assembly are the same as for members of the House of the People (Lok Sabha). Candidates should be citizens of India, not less than twenty-five years of age and possess such other qualifications as may be prescribed by Parliament. No person can be a member of both Houses of the State Legislature, if there is a Legislative Council. No person can also be a member of the Legislatures of two or more States. The House may declare vacant the

15. Article 332.

16. Article 333.

17. Article 324.

seat of any member who absents himself from all meetings for sixty days without the permission of the Legislative Assembly.

A person is disqualified for being chosen as, and for being a member of the Legislative Assembly of a State: (a) if he holds any office of profit under the Government of India or the Government of any State other than an office declared by the State Legislature by law not to disqualify its holder; (b) if he is of unsound mind and stands so declared by competent Court; (c) if he is an undischarged insolvent; (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State; (e) if he is so disqualified by or under any law made by Parliament. A person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Government of India or for any State Government. If any question arises as to whether a member of the State Legislature is subject to any of the disqualifications aforementioned, the decision of the Governor shall be final. But before giving any decision on any such question, the Governor must obtain the opinion of the Election Commission and he is required to act according to such opinion.' The decision of the Governor, therefore, is really the opinion of the Election Commission.

The term of the Legislative Assembly is five years, unless sooner dissolved from the date of its first meeting. But its life may be extended, while the Proclamation of Emergency is in operation, by a law of Parliament for a period not exceeding one year at a time. Such an extension, however, must not be extended beyond six months after the Proclamation of Emergency has ceased to operate.

**Sessions, Prorogation and Dissolution.** The Governor summons the State Legislature to meet at such time and place as he thinks fit. But not more than six months should intervene between its last sitting in one session and its first sitting in the next session. The Governor prorogues the Legislature and may dissolve the Assembly even before the expiry of its normal term of five years.

The Governor may address the Assembly or, in the case of a State having a Legislative Council, either House or both Houses assembled together. He may send messages to either House, on a Bill pending in the Legislature suggesting any changes or modifications which he deems necessary and it is the duty of the House to which such a message is sent to consider it with all possible dispatch. The Constitution imposes a duty on the Governor to address the new Legislature after the General Elections and at the commencement of its first session every year and inform the Legislature of the causes of its summons. The Legislature is required to provide in its rules for the allotment of time for the discussion of the Governor's address. The debate and voting on the address, in fact, constitutes an annual vote of confidence in the Council of Ministers.

Every Minister and the Advocate-General for a State have the right to speak in both Houses, if there is a Legislative Council, and to take part



in their proceedings as well as in their Committees. But a Minister is entitled to vote only in that House of which he is a member.

The quorum to constitute a meeting of a House of the State Legislature is ten members or one-tenth of the total number of members of the House, whichever is greater, until the State Legislature by law otherwise provides.

**The Speaker.** Every Legislative Assembly of a State chooses two of its members as the Speaker and the Deputy Speaker. In case of vacancy in the office of the Speaker or in the Deputy Speaker the Assembly has to choose another member to fill the office. A member holding office as Speaker or Deputy Speaker vacates his office if he ceases to be a member of the Assembly. He may, also, resign his office at any time. If the Speaker resigns, the letter of resignation is required to be addressed to the Deputy Speaker, and if the Deputy Speaker resigns, then, it is addressed to the Speaker. He may be removed from office by a resolution of the Assembly passed by a majority of all the then members of the Assembly after fourteen days' notice of the intention to move such a resolution. But the Speaker does not vacate his office on the dissolution of the Assembly. He continues to be the Speaker until immediately before the first meeting of the Assembly after the dissolution. While the office of the Speaker is vacant, the Deputy Speaker performs his duties. If the offices of both the Speaker and the Deputy Speaker are vacant, the Governor appoints a member of the Assembly to perform the duties of the office for the time being. If the Speaker and the Deputy Speaker are both absent from any sitting of the Assembly, such person as may be determined by the rules of the Assembly acts as Speaker. If no such person is present, then, any other person which the Assembly may determine acts as Speaker. The Speaker or the Deputy Speaker is not to preside at any sitting of the Assembly while any resolution for his removal is under consideration. But he has the right to be present in the House and take part in its proceedings and is entitled to vote in the first instance on such a resolution. That is, he votes on such an occasion like an ordinary member and, consequently, he has no casting vote. The Speaker and the Deputy Speaker are paid such salaries and allowances as may be fixed by the State Legislature by law and are charged on the Consolidated Fund of the State.

The duties and powers of the Speaker and the Deputy Speaker of a Legislative Assembly are, broadly speaking, the same as those of the Speaker and the Deputy Speaker of the House of the People (Lok Sabha). The Speaker is an 'independent and impartial' presiding officer and he has been vested with all the powers consistent with dignity of the Chair and necessary to ensure the orderly conduct of the business of the Assembly. He is empowered to admit questions, resolutions and motions and allots time to the different kinds of business before the Assembly. He determines, in consultation with the Leader of the House, the order of business and fixes the time-limits to speeches. He maintains proper order and decorum in the House and has the power to ask a member to withdraw from the House for any violation of the rules of the House or to suspend him for a whole session if his conduct is grossly disorderly or is in flagrant disregard of the authority and the rulings of the Chair. In the event of grave disorder the Speaker may adjourn the House or suspend its session.

the Speaker nominates the panel of Chairmen and the Chairmen of the Select Committees on Bills as well as of other Committees of the Assembly. He interprets the rules of the Assembly and decides all points of order and questions of procedure. His ruling cannot be contested, it is final.

The Speaker, in brief, is the impartial custodian of the rights of the members of the House. But the high traditions of the office and the great reverence with which the members hold the Speaker of the House of Commons are altogether absent in the States of India. The Speaker in the House of Commons, says Herbert Morrison, 'has no bell with which to restore order, not even a gavel. When he rises in his place and says "Order, O der", it is rare for the House not to come to order at once. And if some members should be noisy a large proportion of the House will aid the Speaker by crying "Order, Order", until the noisy, and disorderly ones are quietened, or a member standing at the same time as the Speaker rises resumes his seat." But in India, exchanges of hot words between the Speaker and some members are not infrequent. There have been some good number of cases in which a member who is "named" has refused to apologise or quit the Chamber on being called upon by the Speaker to do so. In some cases the services of the Marshal have also been requisitioned to make a recalcitrant member to leave the House in obedience to the instructions of the Speaker. The Uttar Pradesh Vidhan Sabha provided the unprecedented instance on September 8, 1958, in which the Marshal was compelled to requisition the help of the armed constabulary to turn out the leader and members of the Socialist group who defied the Speaker's order to quit. But what happened in West Bengal's Vidhan Sabha on September 21, 1959 was recklessly disgraceful. Not only did members of the Congress Party and the Opposition, notably the Communists, indulged in shouting down one another, but also hurled shoes at one another. As if this was not enough three mikes were pulled from their sockets and thrown at the occupants of the Treasury benches. Two members challenged each other on the floor of the House and later exchanged blows at the lobbies until they were separated by the sober colleagues. A Pakistani correspondent, who was present in the Vidhan Sabha to report the proceedings, whispered to an Indian correspondent, "I was there when the Deputy Speaker was murdered in the East Pakistan Assembly."<sup>19</sup>

The Opposition members of the Jan Sangh and Socialist Parties of the Uttar Pradesh Vidhan Sabha again lost balance on September 27, 1962 when they continually thumped their tables to obstruct the business of the House at the consideration stage of the Land Holding Tax Bill. They gesticulated, they raised their hands and their voices and changed their tactics of obstruction as it suited them. The Speaker named five Jan Sangh and two Socialist members and suspended them for a month for defying his authority. Such a kind of demonstration has become all too frequent a feature of the proceedings of the U.P. Vidhan Sabha. And

19. *Government and Parliament*, op. cit., p. 204.

20. *The Tribune*, Ambala Cantt., September 22, 1959.

21. *The Hindustan Times*, New Delhi, September 26, 1959.

22. *The Times of India*, September 28, 1962.

the Socialist members of that House, as also of others including Parliament, have been specializing in this variety of parliamentary performance. They dare offer an insult to the President of India and the Governor, when the former addressed Parliament and the later U.P. Legislature, on the opening day of 1963 Budget Sessions. The duty of the Opposition, no doubt, is to oppose. In doing so, it may find scope for guerilla tactics. But all this must be done in accordance with the rules of the parliamentary game. Otherwise, the whole parliamentary process will be reduced to a farce, nay, even to fascism or anarchy. There is no rule of the game more vital than the one which enjoins obedience to the Chair.

The Speakers, too, have very often not acted with due discretion. The Speaker of the PEPHU Legislative Assembly was saved from removal from office by the prorogation of the House by the Rajpramukh. Another Speaker apologised to the House when his conduct was sought to be discussed by a privilege motion. Yet another tried to explain away the offending remarks and even offered to expunge them from the proceedings. In Andhra Pradesh the leave to move the resolution against the Speaker was refused because the requisite support of the members, under the rules, was not forthcoming.

But what happened in West Bengal and Punjab perhaps shall ever remain unprecedented. The Speaker of the West Bengal Assembly, Bijoy Kumar Banerjee, adjourned the House *sine die* soon after it met on November 29, 1967. Speaker Banerjee said in his ruling, "This House meets under extraordinary circumstances. I am *prima facie* satisfied that the dissolution of the Ministry headed by Mr. Ajoy Kumar Mukerjee, the appointment of Dr. P.C. Ghosh as Chief Minister and the summoning of this House on his advice are unconstitutional and invalid since it has been effected behind the back of this House." In an interview Speaker Bijoy Kumar Banerjee said in Calcutta on November 30, 1967 that he might again adjourn the Assembly *sine die*, if it was re-convened by the Governor "unless, of course, I change my view that the appointment of Dr. P.C. Ghosh as Chief Minister and the summoning of the House on his advice is unconstitutional and invalid."<sup>23</sup> The Speaker did for the second time when the House met for the Budget Session.

In Punjab, the Minority Party supported by the Congress Party formed the Government headed by Lachman Singh Gill. On behalf of the United Front, Satya Pal Dang questioned the legality and constitutionality of the new Government. Speaker Joginder Singh Mann upheld the constitutional validity of the Gill Government in a ruling delivered in the Punjab Assembly on December 5, 1967. But during its Budget Session, when the Annual Financial Statement had already been laid before the House and the financial business was about to be gone through, the Speaker adjourned the House for two months as he had to face two motions expressing no-confidence in himself. This was palpably done to escape or evade the consequences of no confidence motions.

Later, the Governor prorogued the House and issued an Ordinance directing the House to transact the financial business without any adjourn-

23. *The Indian Express*, New Delhi, December 1, 1967.

24. *The Statesman*, New Delhi, December 2, 1967.

ment. Former Finance Minister Baldev Prakash and Satvapal Dang, another former Minister, challenged the validity of the subsequent proceedings of the House as well as the Governor's ordinance in the High Court. They contended that the Governor could not issue an Ordinance when the House was in session. A Special Bench of the High Court of Punjab and Haryana unanimously held that the two Appropriations Acts, passed after the Governor re-summoned the House, were unconstitutional and void.

The Punjab Government appealed to the Supreme Court. Referring to the Speaker's ruling that the adjourned House could only be reconvened by him, the Supreme Court, in its unanimous judgment, held that it was based on a wrong assumption. The Court said "If ever there was an occasion for regulation of financial business by law, it was this. The Legislature could not be allowed to hibernate for two months while financial business languished and constitutional democracy and machinery itself were wrecked." It was declared that the Speaker was not competent to pronounce on the legality of the sitting of the House. Such a pronouncement was, therefore, null and void. The Speaker, the Court added, had asserted against the law which was binding upon him.

Has the Speaker the power to adjourn the House? The Constitution is silent on the point. It merely states that every Legislative Assembly shall choose a member to be a Speaker. Article 208 empowers a House of Legislature to make rules for "regulating its procedure and the conduct of its business". Under this Article, Rules or Standing Orders have been made and it is here that we find the Speaker being given the authority to adjourn the House from time to time. But the Speaker's power of adjournment is limited. He can control disorder in the House, but cannot adjourn for a long period in anticipation of disorderly situations. M. Ananthasayanam Ayyangar, former Speaker of the House of the People (Lok Sabha), said in an interview on the Punjab situation that it "is the privilege of the House to decide how long it should sit and what business it should transact. It, therefore, means that the governing party, which is the majority party in the House, decides the sitting or adjourning the House". Sanjiva Reddy, the then Speaker of the Lok Sabha, aptly observed at the conference of the Presiding Officers that it was the "first duty of the Speaker to enable the Legislature to function and not to shut it out." He further observed that it was not the Speaker's function to decide on the legality of a Ministry. "This lies within the province of the country's courts."<sup>25</sup>

Such actions on the part of the Speakers neither add to the dignity of the Chair nor do they help the growth of traditions associated with the office of the Speaker. India has not in the last two decades evolved any concept of non-partisan Speakerships. There have been numerous instances of Speakers becoming Chief Ministers or Ministers. One was appointed a member of the Union Public Service Commission. The result is what is happening in the Chambers of the State Legislatures. In August 1969, the Speaker of Assam Legislative Assembly was **gheraoed** and

25. *The Indian Express*, New Delhi, March 12, 1968.

26. *The Tribune*, Ambala Cantt., April 7, 1968.

microphones were uprooted by some members. There at least no violence was attempted on the person of the Speaker. But just a fortnight later, in the Uttar Pradesh Assembly shoes, seat-cushions and booklets were thrown at the chair. The Speaker called the Marshal and police to arrest Opposition members while the Deputy Speaker, who belonged to the Opposition, shouted at the police to get out of the Chamber.

## POWERS AND FUNCTIONS OF THE ASSEMBLY

**Legislative Functions.** The State Legislatures have the power to make laws on all subjects contained in the State List and it is their exclusive jurisdiction. Some of the important subjects in the State List are: Public Order, Police, Administration of Justice, Prisons, Reformatories, Borstal Institutions and other institutions of a like nature, Local Government, Public Health and Sanitation, Pilgrimages, Relief of the Disabled and Unemployable, Education, Libraries, Communications, Agriculture, Preservation, Protection and Improvement of Stock, Water, Land, Forests, Regulation of Mines and Mineral Development, Industries, Markets and Fairs, Weights and Measures, Public Works, Land Revenue, Excise, etc.

In addition to the subjects contained in the State List, the jurisdiction of the State Legislatures to make laws extends to matters included in the Concurrent List. Some of the important subjects in the Concurrent List are: Criminal Law, Criminal Procedure, Preventive Detention, Marriage and Divorce, Contracts, Trust and Trustees, Civil Procedure, Vagrancy, Lunacy and Mental Deficiency, Adulteration of Foodstuffs and other Goods, Drugs and Poisons, Economic and Social Planning, Trade Unions, Welfare of Labour, Vocational Training, Legal, Medical and other Professions, Relief and Rehabilitation of Displaced Persons, Trade and Commerce, Price Control, Factories, Electricity, etc. Both Parliament and the State Legislatures have the right to make laws on subjects contained in the Concurrent List, but if Parliament passes a law on a matter given in the Concurrent List, the State Legislature is not competent to pass law on the same subject. If the State Legislature, on the other hand, has passed a law on a subject given in the Concurrent List, Parliament, too, can pass a law on the subject and the State law becomes inoperative to the extent it is repugnant to the Union law. The State law, however, prevails notwithstanding such repugnancy, if the State law was reserved for the President and had received his assent.

The Constitution also imposes following restrictions on the powers of the State Legislatures even within their exclusive sphere:

(1) Some State laws will be invalid unless they are reserved for consideration of the President and are assented to by him, for example, laws passed by the State Legislatures for the acquisition of property;<sup>27</sup> laws in respect of concurrent matters which are repugnant to earlier legislations of Parliament;<sup>28</sup> laws providing for the imposition of taxes on the sale or pur-

27. Article 31 (3).

28. Article 254 (2).



charge of commodities declared by Parliament to be essential for the life of the community.<sup>29</sup>

(2) Some Bills require the previous sanction of the President before they can be introduced in the State Legislature, for instance, Bills seeking to impose restrictions in the public interest on the freedom of trade, commerce or intercourse within or without that State.<sup>30</sup>

(3) Parliament is also empowered to legislate with respect to a matter in the State List if the Council of States declares by a resolution supported by a two-thirds majority that it is expedient in the national interest for Parliament to do so.<sup>31</sup> But such a resolution remains in force for a limited period.

(4) While a Proclamation of Emergency is in operation Parliament has the power to legislate with respect to any matter in the State List.<sup>32</sup>

(5) In case of failure of constitutional machinery in a State, the President may suspend the State Legislature and vest its powers in Parliament.<sup>33</sup>

A Bill, other than a Money Bill, may originate in either House of the State Legislature, if there is a Legislative Council. A Bill is deemed to have been passed by the Houses of the Legislature when it is agreed to by both the Houses, which for all intents and purposes means the Legislative Assembly. The Council cannot force its decision on the Assembly. It can simply delay the passage of a Bill for four months. In brief, all legislative power of the State, subject to the power of issuing ordinances by the Governor, when the Legislature is not in session, is concentrated in the Assembly.

**Financial Functions.** The control of the Legislative Assembly is complete over the finances of the State. All Money Bills must originate in the Assembly and its verdict must prevail in all respects. In case there is a Legislative Council, it must return a Money Bill to the Assembly within fourteen days of its receipt with or without recommendations. If it is not returned within that period, or its recommendations are not acceptable to the Assembly, the Bill is deemed to have been passed by both Houses in the form in which it was passed by the Legislative Assembly. The Annual Financial Statement or the Budget is required to be laid before the House or the Houses of the State Legislature. All proposals for expenditure, except the expenditure charged on the revenues of the State which can be discussed but not voted upon by the State Legislature, are submitted to the Legislative Assembly in the form of demands for grants. The voting on grants is the exclusive privilege of the Assembly and it has the power to pass or reject a demand or to reduce its amount, though it has not the power to increase the amount. It is further provided that no tax will be levied in a State without the sanction of the Legislative Assembly.

29. Article 256.

30. Article 304 (b).

31. Article 249 (1).

32. Article 250 (1).

33. Article 356 (b).

**Control over Administration.** The control of the Assembly over the administration of the State is a logical conclusion of the Parliamentary system of Government. The Council of Ministers is formed out of the majority party in the Assembly and it is collectively responsible to it. No one can continue to remain a Minister for more than six consecutive months without a seat in the one or the other House of the Legislature. The salaries and allowances of the Ministers are voted by the Assembly.

The Assembly can seek information from the Government on any matter of public administration by means of questions and supplementaries. It can also move and pass resolutions recommending to the Government steps which should be taken on matters of public importance. The Assembly may censure the Government if it does not approve its policy and pass a vote of no-confidence, entailing the resignation of the Ministry.\*

**Electoral Functions.** The Legislative Assembly forms part of the Electoral College for electing the President.

## LEGISLATIVE PROCEDURE

**Legislative Procedure.** The Constitution prescribes the most important rules of procedure of the State Legislatures and they are covered by Articles 196—201. The less important and detailed rules have been left for the determination by the State Legislatures themselves. The rules prescribed by the Constitution similar to the rules prescribed for Parliament, vide Articles 107—111, and the rules framed by the State Legislatures follow the model of Parliament as incorporated in its Rules of Procedure and Conduct of Business.

**Legislative Bills.** According to the legislative procedure a Bill other than a Money or Finance Bill, may originate in either House of the State Legislature which has a Legislative Council. A Bill shall not be deemed to have been passed by the Houses of the Legislature of a State having a Legislative Council unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses. The prorogation of a House or Houses does not involve the lapse of a Bill pending in the State Legislature. Bills pending in the Council but which have not been passed by the Assembly do not lapse on a dissolution of the Assembly. The dissolution of the Assembly causes the lapse of any Bill which is pending in it, or which has been passed by it but is pending in the Legislative Council.

In case of disagreement between the Legislative Assembly and the Legislative Council over a Bill, the Constitution does not provide for a joint sitting of both Houses, as it is in the case of the Union Parliament, for the resolution of such disagreements. Disagreements between the two Houses of the State Legislature are resolved by the simple expedient of the Assembly passing the disputed Bill for the second time. The Constitution says, if a Bill has been passed by the Legislative Assembly and transmitted to the Legislative Council and (a) is rejected by the Legislative Council,

or (b) more than three months elapse from the date of its receipt by the Legislative Council without the Bill being passed by it or (c) a Bill is passed by the Council with amendments to which the Legislative Assembly does not agree, then, the Assembly may pass the Bill again either in its original form or with such amendments as suggested by the Council and agreed to by the Assembly. When the Assembly passes the Bill for the second time, it is transmitted to the Legislative Council and if (a) the Bill is, again, rejected by the Council, or (b) more than one month elapses from the date of its receipt by the Council without the Bill being passed by it or (c) the Bill is passed by the Council with amendments to which the Assembly does not agree the Bill is deemed to have been passed by both the Houses of the State Legislature in the term in which it was passed by the Legislative Assembly for the second time.

When a Bill has been passed by the State Legislature it is presented to the Governor for his assent. The Governor may either give his assent to the Bill or may withhold his assent therefrom or may reserve the Bill for the consideration of the President or he may return the Bill with a message for reconsideration in whole or in part or may suggest amendments thereto. In the last case if the Bill is again passed with or without amendments, the Governor must give the assent thereto.

**Different Stages in the Passage of a Bill.** A Bill other than a Money Bill, in order to become a law has to pass through three readings in each House, if the State has a Bicameral Legislature. The first reading covers the introduction of the Bill. The motion for leave to introduce a Bill is a formal business. The member asking for leave makes a short speech. By convention no debate takes place at this stage and the Speaker immediately puts the question. If the House grants the leave, the mover of the Bill rises to say, "Sir, I introduce the Bill." No speech is made on the contents of the Bill nor does any other members speak on the motion or the Bill. If a motion for leave is opposed, the Speaker permits the member moving the Bill to make a brief explanatory statement and so does the member opposing it. Then, the question is put to the House. But if the Opposition attacks the Bill on the ground of the incompetency of the Legislature to consider it, the Speaker permits a full discussion thereon.

After the Bill has been introduced, it is immediately published in the Gazette. The Speaker may permit the publication of the Bill in the Government Gazette before the motion for leave to introduce the Bill has been made. In that case, it is not necessary to move for leave to introduce the Bill and if the Bill is afterwards introduced it is not necessary to publish it again. The first reading of the Bill is now complete.

The second reading of the Bill is divided into two stages. The first stage consists of a general discussion of the Bill and the second stage relates to the discussion of clauses, schedules and amendments. The first stage in the second reading begins when the member in whose name the Bill stands moves one of these motions: (a) that it may be taken into consideration either at once or at some future date to be mentioned, or (b) it be referred to the Select Committee of the House, or (c) to a Joint Committee of the two Houses, if there is a Legislative Council in the State, or (d) it be circulated for the purpose of eliciting public opinion.

It is here that the member-in-charge of the Bill explains the purpose and objects of the Bill, gives the background of the Bill, explains the circumstances in which the Bill is necessary; and gives such other material information as may be necessary in respect of the Bill. The Opposition opposes the Bill, but the discussion must be confined around the principles of the Bill and its general provisions. No amendment to the Bill can be made at this stage, except for amendments to the motion that the Bill be taken into consideration or it be referred to a Select Committee or it be circulated for eliciting public opinion.

When the motion that a Bill be referred to a Select Committee is made, the member-in-charge of the Bill indicates the names of members who would constitute the Select Committee as also the date by which the Select Committee should submit its report to the House. The Select Committee usually consists of ten to fifteen members and only such members are appointed who are willing to serve on it. The mover ascertains in advance from such members their willingness to serve on the Committee. The Speaker nominates one of the members of the Committee to be its Chairman. The Committee thoroughly examines the Bill and all its provisions, discusses it clause by clause, may ask for relevant papers and records, may hear expert evidence and representatives of special interests affected by the measure and suggest its own changes and modifications. The Chairman of the Committee, then, presents the Report to the Houses. He may make any remarks, but he has to confine himself to a brief statement of facts and there can be no debate on it. The Report and the Bill as amended by the Select Committee are published in the Gazette.

After the Report has been presented, the member-in-charge of the Bill may move: (1) that the Bill is reported by the Select Committee be taken into consideration, or (2) that the Bill be re-committed either (a) without limitation or (b) with respect to particular clauses or amendments only, or (c) with instructions to the Select Committee to make some particular additional provision in the Bill. If the member-in-charge of the Bill moves that the Bill be taken into consideration, any member may move as an amendment that the Bill be re-committed. Then, follows the final stage and the third reading of the Bill when a motion is made that the Bill be passed. After such a motion has been made no amendment, except that which is formal, verbal or consequential to an amendment to the Bill, can be made. The discussion on a motion that the Bill be passed is confined to either in support or for the rejection of the Bill as a whole.

After the House has passed the Bill, it is transmitted to the other House, if there is one, where it undergoes the same process. When the Bill has been passed by the House or Houses it is submitted to the Governor for his assent and if it is assented to by him or by the President, when reserved for his consideration, it is published in the Government Gazette as an Act of the State Legislature.

**Money Bills.** A Money Bill or Financial Bill must originate in the Legislative Assembly. It cannot be introduced in the Legislative Council if the State has one. If any question arises whether a Bill is a Money Bill or not the decision of the Speaker of the Assembly thereon is final and the Speaker shall endorse a certificate on such a Bill that it is a Money

Bill when it is transmitted to the Legislative Council or to the Governor for assent. A Motion for amendment is not admissible except on the recommendation of the Governor. After a Motion has been passed by the Assembly, it is transmitted to the Legislative Council of the State. The Bill is then referred for its recommendation. The Council is required, within fourteen days of its receipt, to return the Bill to the Legislative Assembly with its recommendation. The Assembly may accept or reject the recommendation of the Council. If the Assembly rejects the recommendation of the Council, the Bill is deemed to have been passed by both Houses in the form in which it was recommended by the Legislative Assembly. If the Legislative Council does not return the Bill with its recommendation within the prescribed period of fourteen days, it is deemed to have been passed, in the form in which it was passed in the form in which it was passed by the Legislative Assembly.

## FINANCIAL PROCEDURE

**Financial Procedure.** The principles underlying the financial procedure in the State Legislatures, as they are embodied in the Union Provisions, and they are in complete accord with the nature of representative government and a sound system of public finance. The Governor, first, in the first place, the executive must to initiate financial legislation. Secondly, the Legislative Assembly has the power to make grants and to appropriate funds for different items of expenditure and to authorize borrowing by the Government. Thirdly, no financial authorization is necessary for all expenditure out of the Consolidated Fund and for all taxes imposed.

**Annual Financial Statement.** In every financial year the Governor shall cause to be laid before the State Legislature an Annual Financial Statement or Budget. The Annual Financial Statement must clearly show separately the expenditure charged on the Consolidated Fund and other expenditure proposed to be made from the Consolidated Fund, and must also distinguish expenditure on revenue account from other expenditure. The following expenditure is charged on the Consolidated Fund:

- (1) the emoluments and allowances of the Governor and other expenditure relating to his office;
- (2) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly, and of the Chairman and the Deputy Chairman of the Legislative Council in the case of States with bicameral Legislatures;
- (3) the interest, sinking fund charges and other debt charges of the States;
- (4) the salaries and allowances of the Judges of the High Court;
- (5) sums required to meet any judgment, decree or award of any Court or arbitral tribunal;
- (6) any other expenditure declared by the Constitution or by the State Legislature by law to be so charged.



It may be noted that the Constitution declares the following sums also to be expenditure charged on the Consolidated Fund of the State:

- (a) the administrative expenses of a High Court including all salaries, allowances and pensions payable to the officers and servants of the Court [Article 229(3)];
- (b) sums necessary to meet the expenses of the State Public Service Commission, including any salaries, allowances and pensions payable to the members or staff of the Commission (Article 322).

The expenditure charged on the Consolidated Fund of the State is not subject to the vote of the State Legislature. But the Legislature can discuss the estimates of the expenditure. The other expenditure is submitted in the form of demands for grants to the Legislative Assembly. The Assembly has the power to discuss, assent or refuse to assent to any demand, or reduce the amount of the demand. It cannot, however, either propose new grants or increase the amount of the demand. No demand for a grant can be made except on the recommendation of the Governor, that is, on the responsibility of the Ministry.

**Stages in Financial Legislation.** There are five stages in the passage of the Annual Financial Statement or the Budget. The first stage covers the presentation of the Annual Financial Statement by the Finance Minister to the State Legislature. The presentation of the Annual Financial Statement is accompanied by an explanatory speech. After a few days there is a general discussion on the proposals and members of the Legislature express their opinion on the policy of the Government. A fixed number of days, usually three or four, are allotted for this purpose, and it finishes the second stage. In the third stage voting of grants takes place. A separate demand is made for each department by the Minister-in-charge and it is here that the department comes under full scrutiny. A vote to reject or reduce the demand may be made by any member, but it is not within the competency of members to propose either new grants or an increase in the amount demanded. About twenty days are usually allotted for the voting of grants. On the last date and one hour before the adjournment of the sitting of the Assembly all demands which have not been disposed of till then are put to vote. No amendment or discussion is allowed on such demand. They must be accepted or rejected by the Assembly.

The next stage is the Annual Appropriation Bill which must be passed into a statute. After the grants have been made by the Assembly, a Bill is introduced to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet (a) the grants so made by the Assembly, and (b) the expenditure charged on the Consolidated Fund of the State. No amendment, which will have the effect of varying the amount or altering the destination of any grant so made, can be proposed in the Bill. The decision of the Presiding Officer whether an amendment is admissible or not is final.

The Appropriation Bill having passed through all stages is finally voted upon and if passed by the Assembly, it is certified by the Speaker as

Money Bill and transmitted to the Legislative Council, if there is one in the State.

Another step in the completion of the Annual Financial Statement is the passage of the Finance Bill. A Bill which sets out the ways and means by which revenues necessary for meeting the expenditure of the State for the ensuing year are to be raised is called the Finance Bill. The Finance Bill is presented to the State Legislature at the same time as the Budget and the procedure followed is that of a Money Bill. The Bill must be passed before the end of April, but the financial proposals become operative immediately after the presentation of the Budget under the **Provisional Collection of Taxes Act, 1931**.

## CHAPTER X

# THE STATE JUDICIARY

✓ **The High Court.** The High Courts had been functioning in India for nearly ninety years when India became independent and these High Courts had an eminent record of independence and impartiality. But all the Provinces of pre-Independent India did not have High Courts. The Calcutta High Court exercised jurisdiction over Assam and the Patna High Court over Orissa. The United Provinces had two High Courts, the Allahabad High Court and the Chief Court with its Headquarters at Lucknow. Both these Courts exercised appellate jurisdiction. By July 1948, every Province had a High Court of its own. Separate Courts were established for Assam and Orissa and the Chief Court at Lucknow was amalgamated with the High Court at Allahabad.

Originally, the Constitution provided for a High Court in each Part A and Part B States. Parliament was also empowered to create a High Court in a Part C State, or give any Court in Part C State any of the powers of a High Court, or extend the jurisdiction of the High Court of a neighbouring Part A or Part B State to a Part C State. There were, as such, 18 High Courts, one for each Part A and Part B State, 7 Judicial Commissioner's Courts, one for each Part C State other than Coorg and Delhi. The reorganisation of the States reduced the number of the States which necessarily involved the abolition of the High Courts of Hyderabad, Madhya Bharat, Patiala and East Punjab States Union, and Saurashtra and the Courts of the Judicial Commissioners for Ajmer, Bhopal, Kutch and Vindhya. Now every State, except Punjab and Haryana which have a common High Court, has a High Court operating within its territorial jurisdiction. Among the Union Territories Delhi alone with its jurisdiction extended to Himachal has a High Court the rest have Judicial Commissioner's Courts.

The position of the High Courts in India materially differs from that of the State Courts in most other federations, notably that of the United States of America. In America the State Courts are constituted under the State Constitution and consequently they have no connections with the federal judicial system. The method of appointment of Judges, their service conditions and the jurisdiction of the State Courts differ from State to State. In India all High Courts are constituted under one Constitution with uniform jurisdiction and appointment and conditions of service of the Judges. The State Governments have no control over the High Courts. Nor can they alter the Constitution or organisation of the High Courts. That can be done only either by amending the Constitution or the law of Parliament.

A High Court consists of the Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. Ori-

ginally, proviso to Article 216 empowered the President to appoint as many Judges as he might deem necessary from time to time, and also fixing from time to time the maximum strength of each High Court. The Constitution (Seventh Amendment) Act omitted the proviso, as it was considered to be of little significance from the practical point of view since the order could be changed from time to time.

**Appointment of Judges.** The Constitutional Adviser suggested in his Memorandum of May 30, 1947, on the Provincial Constitution that the High Court Judges might be appointed by the Governors with the approval of two-thirds of the members of the Council of State. The proposal to set up a Council of State was abandoned and the Provincial Constitution Committee, accordingly, recommended that Judges should be appointed by the President in consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court of the Province, except when the Chief Justice himself was to be appointed. Explaining the proposal in the Constituent Assembly, Sardar Vallabhbhai Patel said that the proposal was designed to ensure fair appointments to the High Courts so that the Judiciary should be above the suspicion of party influence.<sup>2</sup> The Constituent Assembly accepted the proposal.

The President appoints the Chief Justice of a High Court by warrant under his hand and seal after consultation with the Chief Justice of India and the Governor of a State. But in making the appointments of Puisne Judges, the President consults in addition the Chief Justice of the High Court to which they are being appointed. A Judge of a High Court must be a citizen of India and (a) must have held for, at least, ten years a judicial office in the territory of India, or (b) must have been for, at least, ten years an advocate of a High Court. The Constitution does not provide for the appointment of non-practising lawyers as Judges of a High Court. But a person is qualified for appointment as a Judge of the Supreme Court if he is, in the opinion of the President, a distinguished jurist.

The original Article 224 made provision for the attendance of retired Judges at sittings of the High Court, similar to the one in the case of the Supreme Court. But the Constitution (Seventh Amendment) Act, 1956 conferred on the President the power of making appointments of temporary additional and acting Judges. Additional Judges may be appointed for a period not exceeding two years when it appears to the President that the increase in the business of the High Courts or by reason of arrears of work such appointments are necessary. A duly qualified person may be appointed by the President as an acting Judge when a permanent Judge is absent from the duties of his office or is acting as a Chief Justice.

Originally, Judges held office until they attained the age of sixty years. The Constitution (Fifteenth Amendment) Act, 1963, raises the age of retirement from 60 to 62 years. But a Judge may resign office or may be removed from his office by the President in the same manner as a Judge of the Supreme Court may be removed. Judges of the High Courts, accord-

1. See *ante*. The Council of State as proposed by the Constitutional Adviser was to be a body in the nature of the Privy Council to be set up at the Centre to advise on several matters.

2. *Constituent Assembly Debates*, Vol. IV, p. 710.

ingly, enjoy a security of tenure similar to that of the Judges of the Supreme Court. They can be removed only on the ground of proved misbehaviour or incapacity by the President on an address of Parliament adopted separately by each House by a majority of its total membership as well as by a two-thirds majority of those present and voting.

The Constitution originally provided that a person who had retired as a Judge of a High Court could not plead or act in any Court or any authority within the territory of India. The Constitution (Seventh Amendment) Act, 1956, partially modified the bar on retired High Court Judges. The amended Article 220 now permits a retired High Court Judge to practise before the Supreme Court and any High Court other than the one in which he was a permanent Judge. But the Law Commission has criticised this provision and recommends for its abolition.

**Salaries, etc., of the Judges.** The Chief Justice and Judges of High Courts get a salary of Rs. 4,000 and Rs. 3,500 per mensem respectively. The salaries of the High Court Judges cannot be varied and neither Parliament nor State Legislatures have any power in this matter. The President, however, is empowered to reduce the salaries of the Judges during the operation of the Proclamation of Emergency. Allowances and rights in respect of leave of absence and pension of the Judges are determined by an act of Parliament. Neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.<sup>3</sup> Salaries and allowances of the Judges have been charged on the Consolidated Fund of the State and hence are not votable. Their pensions are charged on the Consolidated Fund of India.<sup>4</sup>

The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another High Court. According to the original provisions of Article 222 Judges transferred by the President from one High Court to another were entitled to a compensatory allowance. This was considered to have no justification and the Constitution (Seventh Amendment) Act, 1956, amends Article 222 to that extent.

**Independence of High Court Judges.** The Constitution has made adequate provisions to ensure autonomy of the High Courts and the independence of the Judges in the performance of their duties. These may be summarised as below:

(1) The appointment of Judges of the High Court are made by the President and, accordingly, these are Union appointments and not State appointments made by the Governor. They are made in the case of the Chief Justice in consultation with the Chief Justice of India and in case of Puisne Judges also in consultation with the Chief Justice of the High Court concerned.

(2) Judges have security of tenure and their age of retirement is fixed by the Constitution. Removal before the age of retirement can take

3. Articles 221(2), 238(3).

4. Article 112 (3) (d) (iii).



place on the grounds and in accordance with the procedure prescribed in the Constitution and it is similar to that of the Supreme Court Judges.

(3) A retired Judge of the High Court is prohibited from practising in Courts or before any authority in India except the Supreme Court and other High Court of which he had not been a Judge.

(4) Salaries of the Judges are fixed by the Constitution. Their allowances and rights of leave and pension are determined by Parliament and these cannot be varied to their disadvantage after their appointment.

(5) The salaries of the Judges are charged upon the Consolidated Fund of the State whereas their pensions are charged upon the Consolidated Fund of India.

(6) The administrative expenses of the High Court are charged upon the Consolidated Fund of the State.

(7) Appointments of officers and servants of the High Court are made by the Chief Justice provided that the rules made by the Governor may require that in any specified cases no person who is not already attached to the Court shall be appointed save after consultation with the State Public Service Commission.

**Jurisdiction of the High Court.** The Constitution does not attempt detailed definitions or classification of the different types of jurisdiction of the High Courts. It was presumed that the High Courts which were functioning with well-defined jurisdictions at the time of the framing of the Constitution would continue with it and maintain their position as the highest Courts in the States. The Constitution, accordingly, provided that the High Courts would retain their existing jurisdiction subject to the provisions of the Constitution and any future law that was to be made by the Legislature. This was affirmed by the Supreme Court in **National Sewing Thread Co., Ltd. vs. James Chadwick and Bros. Ltd.** (1953).

Apart from the normal original and appellate jurisdiction, the Constitution also vests in the High Courts four additional powers: (1) the power to issue writs or orders for the enforcement of Fundamental Rights or for any other purpose; (2) the power of superintendence over subordinate Courts; (3) the power to transfer cases to itself pending in the subordinate Courts involving interpretation of the Constitution; and (4) the power to appoint officers and other servants of the High Court.

The High Courts are primarily Courts of appeals. Only in matters of admiralty, probate, matrimonial, contempt of court, enforcement of Fundamental Rights and cases ordered to be transferred from a lower Court involving the interpretation of the Constitution to its own file, they have original jurisdiction. The High Courts of Calcutta, Bombay and Madras exercise original civil jurisdictions when the amount involved is more than two thousand rupees. In criminal cases it extends to cases committed to them by Presidency Magistrates. On the appellate side they entertain appeals in civil and criminal cases from their subordinate Courts as well as from their original side. According to historical reasons and as a result of the specific provision in the Government of India Act, 1935, no High Court had any original jurisdiction in any matter concerning

revenue. But the proviso to Article 225 of the Constitution of India now removes this restriction.

The jurisdiction as well as the laws administered by a High Court can be affected both by Parliament and the State Legislature. Parliament exercises exclusive power to make laws touching the jurisdiction, powers, and authority of all Courts with respect to subjects on which it is competent to legislate. It can also legislate on subjects enumerated in the Concurrent List. Similarly, a State Legislature has power to make laws touching the jurisdiction, powers and authority of all Courts within the State with respect to all subjects enumerated in the State List and in the Concurrent List. But with regard to matters in the Concurrent List the Union Law normally prevails in case of conflict.

**Power of the High Courts to issue certain writs.** Before the commencement of the Constitution in 1950 only the High Courts of Calcutta, Madras and Bombay had the power to issue certain prerogative writs within their original civil jurisdiction. Article 226 now empowers all the High Courts to issue prerogative writs and orders, directions and writs both for the enforcement of Fundamental Rights and for other purposes throughout the territories in relation to which they exercise jurisdiction. It will, thus, appear that in addition to the right of the Supreme Court to issue writs for the enforcement of Fundamental Rights, every High Court in India has been vested with the power to issue to any person or authority, including in appropriate cases any Government, within the territories of their respective jurisdictions, directions, orders or writs including writs in the nature of **habeas corpus, mandamus, prohibition, quo warranto and certiorari** or any of them for the enforcement of the Fundamental Rights and for any other purpose.

Although the Supreme Court and the High Courts have concurrent jurisdiction in the matter of enforcement of Fundamental Rights, yet the Constitution does not give to High Courts the special responsibility of protecting Fundamental Rights as the Supreme Court has been given. Under Article 32, the Supreme Court is made the guarantor and protector of the Fundamental Rights whereas in the case of the High Courts, the power to enforce Fundamental Rights is part of their general jurisdiction. This special and unique position of the Supreme Court was emphasised by Mr. Justice Patanjali Sastri in **Romesh Thapar v. The State of Madras**. His Lordship observed, "That Article<sup>7</sup> does not merely confer power on this Court, as Article 226 does on the High Courts to issue certain writs for the enforcement of the rights conferred by Part III, or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a 'guaranteed' remedy for the enforcement of those rights, and this remedial right is itself made a Fundamental Right by being included in Part III. This Court is thus constituted the protector and guarantor of Fundamental Rights and it cannot, consis-

5. Section 226.

6. Article 32.

7. Article 32.

tently with the responsibility so far as the protection of persons seeking protection against the Courts is concerned.

**Power of Superintendence.** The High Court has power of superintendence over all Courts or tribunals except those which are within their respective jurisdictions and in the exercise of this power may call for returns, make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts. The Constitution accordingly vests in each High Court as the highest court within its territorial jurisdiction, a special power and responsibility over all Courts and tribunals, except military courts, so that the judicial functions in the State may be properly and discharge their duty according to law. The power of superintendence over inferior courts and tribunals conferred on the High Court is both judicial as well as administrative. The Constitution does not place any restrictions on the power of superintendence by High Courts. This point was made clear in *Jodhey v. State*. Mr. Justice S. R. Das on behalf of the Allahabad High Court observed: "On a proper interpretation of this clause it is difficult to my mind to hold that the powers of superintendence are conferred only to administrative matters. There are no restrictions or restrictions placed on this power of superintendence in this clause and the purpose of this clause seems to be to make the High Court the guardian of all justice within the territorial limit of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the various subordinate tribunals."

**Transfer of certain cases to High Court.** If the High Court is satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of the Constitution, it may transfer that case to itself. After that case has come to the file of the High Court, it may dispose of the whole case itself or may determine the constitutional question involved and return the case to the subordinate Court with a copy of its judgment. The subordinate Court will then proceed to dispose of the case in conformity with the judgment of the High Court on the constitutional issue. The Constitution thus denies to a subordinate Court the right to interpret the Constitution so that there may be the maximum possible uniformity as regards constitutional decisions. It is accordingly, the duty of the subordinate Courts to refer to the High Court a case which involves a substantial question of law as to the interpretation of the Constitution and the case cannot be disposed of without the determination of such question. The High Court may also transfer the case to itself upon the application of the party in the case.

**Court of Record.** The High Court is a Court of record and has all the powers of such a Court including the power to punish for contempt of itself. The two characteristics of a Court of record are that the records of such a Court are admitted to be of evidentiary value and that they cannot be questioned when produced before any Court, and that it has the power to punish for contempt of itself. Neither the Supreme Court nor the Legislature can deprive a High Court of its power of punishing a contempt for itself.

8. Article 227.

9. *Ranga Ganga Pratap Singh v. Mahabul Das Ltd.*, 1958, S.C.J. 461.

**Appointment of Officers and Servants of the High Court.** Article 226 empowers the Chief Justice of a High Court to appoint officers and servants of the Court for the efficient performance of its functions. The Governor may in this respect require the Court to consult the State Public Service Commission. The Chief Justice is also authorised to control the conditions of service of the High Court staff subject to any law made by the State Legislature in this respect. The administrative expenses of the High Court are charged on the Consolidated Fund of the State. In **Pradyat Kumar vs. The Chief Justice of the Calcutta High Court** (1956), it was held that "a power of appointment includes the power to suspend or dismiss." The Chief Justice has, thus, the power to suspend or dismiss any officer or servant from the service of the High Court.

### SUBORDINATE COURTS

**Subordinate Judiciary.** Before the transfer of power the subordinate judiciary, particularly on the criminal side, did not command the unflinching confidence of the people for its independence and impartiality. Both the Indian Statutory Commission and the Joint Select Committee on Indian Constitutional Reform dwelt on this aspect and had emphasised the paramount importance of an independent and fair-minded judiciary enjoying the confidence of the people. The Joint Select Committee laid special stress on the need for a competent subordinate judiciary and observed that it was the subordinate judiciary in India "who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior judges."

The Government of India Act, 1935 partially removed the existing defects on the civil side, but nothing tangible was done in the case of the magistracy on the criminal side. The District and Sessions Judges were appointed by the Governor, after consultation with the High Court, in his individual judgment. Subordinate Civil Judges were recruited as a result of competitive examination and the Governor made rules, in consultation with the Public Service Commission and the High Court, defining the qualifications required. Their postings and promotions rested with the High Court. But in the case of District and subordinate Magistrates appointments were made by the Provincial Government under the provisions of the Code of Criminal Procedure and there was no obligation to consult the High Court. Nor was there any obligation to consult the High Court for their postings, transfers, promotions or in investing any of them with special criminal powers. The District Magistrate was as well the principal District Officer, and the Collector. Dr. Ambedkar correctly pointed out in the Constituent Assembly that the magistracy was intimately connected with the general system of administration.<sup>12</sup>

Originally neither the Draft Constitution prepared by the Constitutional Adviser in 1947, nor the one prepared by the Drafting Committee

10. Joint Select Committee on Indian Constitutional Reform, Report (1934), para 337.

11. Government of India Act, 1935, Section 254.

12. *Constituent Assembly Debates*, Vol. IX, p. 1571.

in 1948, contained any specific provision on the subordinate judiciary. The intention at that time was that services of all types should not be included in the Constitution but were to be regulated by Acts of the appropriate Legislatures. The Conference of the Federal Court and the Chief Justices of High Courts held in March 1948, prominently discussed the omission to provide specifically for the subordinate judiciary in the Constitution. The conference regarded it most essential that the members of the subordinate judiciary should not be exposed to the extraneous influence of the party in power. In a Memorandum incorporating comments and suggestions on the Draft Constitution the Judges observed: "So long as the subordinate judiciary, including the District Judges, have to depend upon the provincial executive for their appointment, posting, promotion and leave, they cannot remain entirely free from the influence of members of the party in power and cannot be expected to act impartially and independently in the discharge of their duties. It is therefore, recommended that provisions be made placing exclusively in the hands of the High Courts the power of appointment and dismissal, posting, promotion and grant of leave in respect of the entire subordinate judiciary including District Judges."

The Drafting Committee accepted these suggestions. The Committee came to the conclusion that the time was appropriate for assimilating the civil and criminal justice and placing them equally under the control of the High Courts. The Drafting Committee, accordingly drafted new provisions and inserted a new Chapter VIII in Part VI of the Draft Constitution containing Article 209-A, 209-B and 209-C. These provisions regarding the subordinate judiciary came for discussion in the Constituent Assembly on September 16, 1949. In moving the new Articles Dr. Ambedkar made some changes. The promotion and posting of the District and Sessions Judges, which under the Draft Constitution were the functions of the High Courts, were now made the responsibility of the Governors in consultation with the High Courts. Whereas in the draft Articles, as first proposed, the High Courts were vested with full powers in regard to the posting and promotion of all members of the subordinate judiciary, the amended Articles confined this power of the High Courts to the subordinate civil judiciary alone. A new Article was added to provide that the procedure laid down for the civil judiciary would apply to the magistracy exercising criminal jurisdiction if the Governor by public notification so directed and that too subject to such exceptions and modifications as he might specify. In defending these changes Dr. Ambedkar observed, "The Drafting Committee would have been very happy if it was in a position to recommend to the House that immediately on the commencement of the Constitution, provisions with regard to the appointment and control of the civil judiciary by the High Court were also made applicable to the magistracy. But it has been realized that the magistracy is intimately connected with the general system of administration. We hope that the proposals which are now being entertained by some of the Provinces to separate the judiciary from the executive will be accepted by the other Provinces so that the provisions of Article 209-E would be made applicable to the Magis-

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13. *The Framing of India's Constitution, Select Documents*, Vol. IV, p. 186.



trates in the same way as we propose to make them applicable to the civil judiciary. But some time must be permitted to elapse for the effectuation of the proposals for the separation of the judiciary and the executive. It has been felt that the best thing is to leave this matter to the Governor to do by public notification as soon as the appropriate changes for the separation of the judiciary and the executive are carried through in any of the Provinces."<sup>14</sup>

The Constituent Assembly finally adopted the Articles proposed by Dr. Ambedkar and they became Articles 233 to 237 of the Constitution.

**Criminal Courts.** Every district in a State has both Civil and Criminal Courts. On the criminal side there is a great measure of uniformity throughout India as the Code of Criminal Procedure applies to all Courts. At the head of a district is the Sessions Court presided over by a Sessions Judge. A Judge of a Sessions Court, who sits either with a jury or with assessors, the opinion of the assessors being not binding on the Court, may pass any legal sentence, but a death sentence is subject to confirmation by the High Court. Below the Sessions Court there are Courts of Magistrates of the First, Second and Third Class. The jurisdiction of each class of Magistrate is limited to specified offences and a Magistrate of the first class may pass a sentence of imprisonment not exceeding two years or of a fine not exceeding a thousand rupees, a Magistrate of Second Class can give punishment up to six months and a fine of two hundred rupees and a Magistrate of the Third Class to one month and fifty rupees. In some States Village Panchayats have been vested with jurisdiction to try petty criminal cases, e.g., cases involving minor injury, trespass or removal of cattle, etc. The Panchayats can impose fine not exceeding a hundred rupees but they cannot pass any sentence of imprisonment. The decisions of the Panchayats are non-appealable.

The Sessions Judge and the District Magistrate both superintend the Courts of Magistrates subordinate to them and the superintendence here is also both judicial and administrative. Appeals from the Magistrates of the Second and Third Class lie to the District Magistrate whereas appeals from other Courts or Magistrates lie to the Court of Sessions. Appeals from the Court of Sessions lie with the High Court. All sentences are appealable except sentences of imprisonment not exceeding one month passed by a Sessions Court, or a sentence of fifty rupees (or two hundred rupees if the case is tried summarily by a Magistrate) passed by a Sessions Court, District Magistrate or a Magistrate of the First Class. Appeals against acquittal are also permitted, but are not common.

An aggrieved party in a criminal case has also the right to move the District Magistrate, the Sessions Court or the High Court in revision. The powers of the District Magistrate and the Sessions Court are limited in revision cases. They may, however, recommend interference by the High Court, if there is miscarriage of justice.

Criminal Courts are required to send, through the superintending Courts, periodical statements of cases disposed of to the High Court. From these statements the superintending Courts make notes and com-

14. *Constituent Assembly Debates*, Vol. IX, p. 1571.

ments and return them to the subordinate Courts for the explanations or guidance. Records of the lower Courts may also be called by the superintending Court for examination and in case of any procedural flaw and non-compliance with the regulations or instructions, they are forwarded to the High Court with recommendations for interference in revision.

**Civil Courts.** Throughout India, excepting the Presidency Towns, the District Civil Court is presided over by a District Judge who is also the Sessions Judge. The Court of the District Judge is the principal Civil Court in the district and exercises both administrative and judicial powers. It exercises both original and appellate jurisdiction in civil cases and has wide powers under special Acts such as the Succession Act, the Guardian and Wards Act, the Provincial Insolvency Act and the Divorce Act. The District Court has powers of superintendence over subordinate Courts exercising civil jurisdiction in a district.

Next to the District Court is the Court of a Civil Judge or a Senior Subordinate Judge. The Court of a Civil Judge or a Senior Subordinate Judge has jurisdiction over cases of any amount. In the States where there are Courts of Civil Judges they have no appellate jurisdiction whereas the Courts of Senior Subordinate Judges exercise appellate powers in minor cases. Below them are the Courts of Subordinate Judges or **Munsiffs** as they are named in Bihar, Orissa, Uttar Pradesh and Assam. Subordinate Judges or the Munsiffs may be of the First or Second Class with varying jurisdiction. Appeals from the Subordinate Civil Courts lie in the first instance, to the District Court if the amount involved does not exceed five thousand rupees. If it exceeds five thousand rupees, appeals lie to the High Court. Rights of second appeal differ in different States, but there is a right of second appeal on a point of law or on account of substantial defect in procedure or when the Court of first appeal differs on a question of fact from the Court of first instance.

Small Causes Courts have been established in big towns for the expeditious disposal of cases not involving difficult questions of law and where the amount involved does not exceed two thousand rupees, or one thousand rupees, or five hundred rupees as the State Government may determine. Small Causes Courts follow summary procedure, and the judgments are not ordinarily appealable though errors in law may be rectified in revision.

In some States Village Panchayats have been invested with power to try minor civil cases involving movable property. The decisions of the Panchayats are not appealable.

**Appointment of District Judges and other Judges.** The Constitution divides judicial posts into two categories. The higher category includes District and Sessions Judges, Judges of the City Civil Courts, Assistant District and Sessions Judge, Chief Judges of Small Causes Courts, and Chief Presidency Magistrates. The second or the lower category includes other civil judicial posts inferior to the post of a District Judge. Appointments to posts in the higher category are made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation

to such State.<sup>16</sup> No person, other than already in the service of the Union or of the State, is eligible for appointment in this category unless he is an advocate or a pleader of seven years' standing and is duly recommended by the High Court for appointment.<sup>17</sup>

All appointments in the lower category, i.e., other judicial posts inferior to the posts of a District and Sessions Judge, Judge of the City Civil Court, Assistant District and Sessions Judge, Chief Judge of the Small Causes Court and Chief Presidency Magistrate, are made by the Governor of a State in consultation with the Public Service Commission and the High Court exercising jurisdiction in relation to such State.<sup>18</sup> The practice that exists in most States is that the Public Service Commission conducts competitive examination for recruitment to the judicial service of the State. The Commission prescribes certain minimum educational and professional qualifications for candidates competing for this examination. The required vacancies are filled up from amongst the list of successful candidates in order of merit. The selected candidates are given special training for a certain period before regular appointment to the service. Thereafter they come under the superintendence of the High Court in the discharge of their responsibilities.

**Control over Subordinate Courts.** The control over District Courts and Courts subordinate thereto has been vested in the High Court. Article 235 provides that "the control over District Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of the District Judge shall be vested in the High Court...." The control by the High Court, accordingly, includes the control over the posting, promotion, and the grant of leave to persons belonging to the judicial service and holding posts inferior to that of a District Judge. All subordinate Courts, in brief, are placed under the administrative control of the High Court. Postings and promotions of District Judges are made by the Governor in consultation with the High Court.

**Separation of the Executive from the Judiciary.** The Constitution also contemplates the separation of the executive from the judiciary. At present, the administrative control over the District Magistrates and the subordinate Magistrates vests in the State Government and in the matter of their postings, promotions, and other matters the High Court has no jurisdiction. Article 237 provides for the transfer of the administrative control over subordinate criminal Courts to the High Court. The Constitution says, "The Governor may by public notification direct that the foregoing provisions of this chapter (regarding the subordinate Civil Courts) and any rules made thereunder shall with effect from date as may be fixed by him in that behalf apply in relation to any class or classes of Magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notifications."

16. Article 233 (1).

17. Article 233 (2).

18. Article 234.

Article 50 on the Directive Principles of State Policy requires the State to "take steps to separate the judiciary from the executive in the public services of the State." The separation of the Judiciary from the Executive is an essential requirement for the maintenance of the liberties of the people and as Montesquieu put it, "There is no liberty if the power of judging be not separated from the legislative and executive powers." Under the old order in India the evils of the executive and judicial functions being combined in one person at the district level were in full glare. There was neither independence nor impartiality consistent with the high traditions of the judiciary. The public opinion was accordingly, very critical of the anomaly prevailing in India and agitated for the separation of the judiciary from the executive.

The case for the separation of the Judiciary from the Executive was cogently put by Mr. Justice Meredith of the Patna High Court. His Lordship observed, "First of all, what is meant by the separation of these functions, and what does it involve? It means the establishment of the principle that the Judge who tries a case must be completely impartial, uninterested in the success of either side, and independent of outside influence... The general principle involves two consequences, first that a Judge or Magistrate who tries a case must not be in any manner connected with the prosecution or interested in the prosecution. Second, that he must not be in direct administrative subordination to any one connected with the prosecution (or indeed the defence). Both these aspects of the matter are equally important and both these reveal defects in our present system, whereunder the Magistrate who tries a case, or hears a criminal appeal, is frequently himself a Sub-divisional Officer or District Magistrate connected with the police and the prosecution, and interested in its success, as by reason of the executive side of his duties he is responsible for the maintenance of law and order, and whereunder the Magistrate trying a case is also under the direct administrative control of the executive authorities, the Sub-divisional Officer, the District Magistrate, the Commissioner, and the executive officers of the Government, who are highly interested in the success of Crown cases.

"Quite clearly it is impossible for a Judge to take wholly impartial view of the case he is trying if he feels himself to any extent interested in or responsible for the success of one side or the other. That is the first aspect. Quite clearly, it is equally impossible for him to take an impartial view of the case before him if he knows that his posting, promotion and prospects generally depend on his pleasing the executive head of the district, the District Magistrate, who is also the head of the local police, who has frequent confidential conferences with them and generally controls the work of the Police Superintendent. Thus, the separation of functions means and involves the elimination of these two evils. That these are evils few will question."

This is a lengthy quotation from the opinion of Mr. Justice Meredith, but it is highly important for the proper appreciation of the fundamental principle of universal application, the separation of the Judiciary from the Executive. In spite of the embodiment of this principle in the Constitution itself as a Directive Principle of State Policy, there is a tendency in some quarters to think and argue that the separation of the Judiciary

from the Executive has lost its importance now when India has become independent and responsible governments function in all the States. It is true that the Constitution guarantees the independence of the Higher Bench, but much is left to be desired in the case of the subordinate magisterial Courts. Concentration of powers has always corrupted those who exercise it no matter whether the country is independent and democratic or under the foreign rule, though under the latter the evils following from the combination of judicial and executive functions are bound to be greater. Lord Hewart, in his **The New Despotism**, says, "The public official is not independent. . . . One would have thought it perfectly obvious that no one employed in an administrative capacity ought to be entrusted with judicial duties in matters connected with his administrative duties. The respective duties are incompatible. It is difficult to expect 'in such circumstances that he should perform the judicial duties impartially. Although he acts in good faith and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind, as everybody who has had any dealings with public officials knows, to bear on the matter he has to decide. More than that, it is his duty, as an official, to obey any instructions given him by his superiors, and in the absence of special instructions to further what he knows to be the policy of his department. His position makes it probable that he should be subject to political influences."

Some of the States in India have actually separated the judiciary from the executive. A few others are experimenting with it and have appointed judicial Magistrates in a few selected districts. But it is submitted that merely changing the nomenclature to judicial Magistrates does not bring about the desired change contemplated in the Constitution. Separation of the Judiciary from the Executive can only become an accomplished fact and a matter of reality when High Courts are given full administrative control over the appointments, postings, promotions, and other matters relating to the Magistrates. It is only then, that the influence of the executive can be eliminated. Hamilton has rightly maintained that "it is peculiarly dangerous to place the judges in a situation to be either corrupted or influenced by the Executive."



## CHAPTER XI

# SERVICES UNDER THE UNION AND THE STATES

**How the Government operates?** Government, whether Union or State, operates through its Secretariat. The Secretariat, both at the Centre and in a State, is divided into Ministries or Departments among whom various subjects of governmental activity are distributed according to administrative convenience. Each Department is presided over by a Minister. In most of the Departments there is at least one Deputy Minister, who is also a member of the Council of Ministers. But a Deputy Minister does not hold a separate charge of the Department. His task is to assist the Minister with whom he is associated in his administrative and parliamentary duties and may be compared to a Parliamentary Secretary in Britain: a "Junior Minister."

Besides the political heads of various Departments of Government there are a number of permanent officials and a clerical staff. At the head of each Department is the permanent official Secretary, a member of the Indian Civil Service or Indian Administrative Service, who occupies a position of the very highest responsibility and importance. In fact, the Secretary is the key man in the Department who helps his political chief to see that the Department works efficiently and in a particular direction. The Secretaries have in most cases been so long attached to their respective Departments that they acquire complete grasp of affairs within their own spheres and provide "a permanent brain trust" to the Ministers who are amateurs in the art of administration. Then, there are in the Department, possibly a Joint Secretary, a Deputy Secretary, an Under Secretary, Assistant Secretaries, Superintendents and many others who do merely secretariat work of a purely routine character. Highest and lowest, these non-political agents of administration make up, in general, the Civil Service. Their tenure of office is permanent and they continue to function regardless of political changes. They are outside the domain of politics and this is the most important feature of the Civil Service. Lord Balfour has given a true picture of the position which Civil Servants occupy in Britain and it is similarly applicable to the Civil Service in India. The Civil Servants, wrote Lord Balfour, "do not control policy, they are not responsible for it. Belonging to no party, they are for that very reason an invaluable element in Party Government. It is through them, especially through their higher branches, that the transference of responsibility from one party or one minister to another involves no destructive shock to the administrative machine. There may be change of directions, but the curve is smooth." The Civil Servants, in brief, keep the wheels of governmental

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1. Introduction to Bagehot's *English Constitution*, p. xxiv.

machine going and act as agents for the fulfilment of the policy of the Party in office, the policy formulated during the elections and formally endorsed by Parliament. They are a link between successive ministries, and repository of principles and practices which endure while governments come and go. Their rigid neutrality and rigorous impartiality in the party political issues is the first code of their official conduct and they serve with equal fidelity whatever be the complexion of Government. All Civil Servants owe a temporary allegiance to the party in power and its programme, no matter what their bias or personal conviction. "The first thing," observes Viscount Attlee, "a Minister finds on entering office is that he can depend absolutely on the loyalty of his staff and, on leaving office, he will seldom be able to say what the private political views are even of those with whom he has worked most closely."<sup>2</sup>

**Functions of the Departments.** The functions of the Departments may broadly be said to be four. First, a Department must answer for its administration to the public. Administration does not operate in a vacuum. Since it translates policy into practice, the policy, which has received the approval of the people and endorsement of the Legislature, must be capable of explaining itself. It means the accountability of administration to both the Legislature and the public. As this accountability is to be effected through those who are responsible for administration, the Department must provide to their political chief all relevant information so that he may be able to defend the actions of his Department in the Legislature and on the public platform. The work of the Department must, therefore, be conducted in such a way and its policy so framed that it should be capable of "articulate rational defence."

The second function of the Department is the drawing up of its policy. Policy, really, is formulated by the Cabinet. But all details with the working out of policy so formulated and all routine business connected therewith are left to various Departments of the Government. Very often the Department may itself suggest proposals within the framework of the policy of the Government. Such proposals may either be the outcome of the Department's own administrative experience or may be the result of the directions given to it by its political chief. Whatever be its origin, the Department prepares the draft of the scheme, works out its details in accord with the general policy of the Cabinet and consults the interests likely to be affected by it. If the scheme of the policy cannot be carried out within the framework of the existing law, then, it passes into the stage of proposals for a Bill. After its approval by the Cabinet, it is drafted as a Bill to be laid before the Legislature at the Centre or in the States as the case may be. The Bill is sponsored and piloted by the Minister in-charge of the Department to which it relates and it is his responsibility to see it through. But the members of the Civil Service have to remain in attendance in the Legislature to assist the Minister with information and advice whenever he is under fire in the House. It will, thus, be clear that even if the inspiration of the Bill may have come from the Minister, the preparatory work is the task of the Department and in

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2. "Civil Servants, Ministers, Parliament and the Public." *The Indian Journal of Public Administration*, April-June 1955, p. 96.

great part the result of the influence exerted by the permanent Secretary. The second point Mr. Fisher is concerned in stating clearly, which Aker is that the Civil Servant is concerned to put his own views in relation to his policy, not that he tends to thwart them, but because it is his duty to see that the Minister understands all the difficulties and dangers of the course which he wishes to adopt.<sup>3</sup>

Most modern statutes are so drawn up that the Executive has to late in general terms, and leaves to the Department to work out the detailed regulations. The Minister is free to make alterations in the rules and regulations so long as they are in law. The Department is usually, concurrently with its preparation of the Bill, engaged in issuing orders and subordinate acts of law. In England, after the Bill becomes law will issue them in the form drafted by the Law Department. In the application of the rules and regulations of public law, the Executive often assumes a quasi-judicial role. In many of the kinds of judicial or quasi-judicial functions arise in the exercise of administration of public services, particularly which affect the individual welfare of large sections of the community. In fact, the switch of power over the business of the State from negative to positive has necessitated Executive to act along two lines especially. In the first place, Executive is given to certain broad rule-making authority to the administration and, secondly, authority is conferred upon administration in certain cases to adjudicate controversies. Decisions of these kinds are not truly judicial as they do not determine legal rights. They are, however, an extremely important means by which administrators make policy and shape the nation's future within the framework of powers agreed to by Parliament.

Finally, the function of the Department is to implement policy. When the policy has been determined, presented and sanctioned, it becomes the duty of the permanent officials of the Department to see that it is faithfully carried out, even if the policy is not what they might have urged. Sir Warren Fisher has cogently explained the principles on which Civil Servants in Britain act. It will be instructive to quote them here. Fisher says, "Determination of policy is the function of Ministers, and once a policy is determined it is the unquestioned and unquestionable business of the civil servant to strive to carry out that policy with precisely the same goodwill whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time, it is the traditional duty of civil servants, while decisions are being formulated, to make available to their political chiefs all the information and experience at their disposal, and to do this without fear or favour, irrespective of whether the advice thus tendered may accord or not with the Minister's initial view. The presentation to the Minister of the relevant facts, the ascertainment and marshalling of which may often call into play the whole organisation of the Department, demands of the civil servant greatest care. The presentation of inferences from the facts equally demands from him all wisdom and detachment he can command."<sup>4</sup> There is little evidence in England of

3. *Ibid.*, p. 96.

4. As quoted in Jennings' *Cabinet Government*, pp. 114-15.

Civil Servants sabotaging the policy of the responsible political head of their Department.

R.K. Ramadhyani, writing on the **Role of Civil Servants**, says, "The Civil Servant has thus the dual role of being the executive for the policy of a party and of being its interpreter: he is also in a good measure a maker of policy on its behalf. It is mainly in executing the policy of the party that conflict may arise: it can only be secondary in making new or subsidiary policy. A Civil Servant, exercising his democratic right of vote, may have even cast his vote against the party which has come into power. He is now called upon to implement the policy of the party and very clearly he is in duty bound to do so, as he is not a ruler by himself but a public servant. It is his duty, therefore, to try to understand the policy of the party which has the mandate of the people and to implement it in the most faithful way. If he did not do so he would not be true to the democratic form of government which requires that for the time being the rule of the majority has to be accepted by the minority."

**Organisation of the Civil Service.** The guiding principles of Civil Service organisation are very simple and obvious. They are three: a unified service, recruitment by open competition, and classification of posts into intellectual for policy, and clerical for mechanical work to be filled separately by separate examinations. The division of Civil Servants into these two categories is essential for the proper performance and co-ordination of functions and for making policy responsive and responsible. In the clerical category may be placed all such work as either is of a simple mechanical kind or consists in the application of well-defined regulations, decisions and practices to particular cases. In the other category—intellectual for policy—may be placed all such work which is concerned with the formulation of policy, the revision of existing practices of current regulations and directions, and the organisation and direction of the business of government.

The administrative class is the pivotal and directing class of the whole Civil Service. "They are responsible," as Dr. Finer says with reference to the British administrative class, "for transmitting the impulse from their political chief, from the statutes and declarations of policy, through the rest of the service and out to the public."<sup>5</sup> On this class rests, in India as in Britain, the responsibilities for formulating Departmental policy and for controlling and directing the various Departments. They are a body of advisers who find solutions that arise outside the normal routine of Departmental work, supply suggestions which may form the ingredients of supreme policy, and interpret regulations applying to difficult cases. The Directive Principles of State Policy enshrined in the Constitution, the realization of the objective of a Welfare State on a socialistic pattern, and the prodigious effort involved in the proper execution of Five-Year Plans have created new responsibilities and onerous tasks for the whole administration and particularly for the administrative class. Their duties have become all-comprehensive and embrace planning, control and guidance of the entire economic as well as social life of the nation. "When it becomes

5. *Hindustan Times*, New Delhi, May 10, 1957.

6. *The Theory and Practice of Modern Government*, p. 767.

the central purpose and justification of government' wrote Sukhrankar, the then Cabinet Secretary, while adhering to democratic values and methods to find a rich social and economic content for freedom, to bring about equality of opportunity to all and to secure the maximum development of the human and material resources of a vast country, the administration faces new and immensely vital tasks." These new and immensely vital tasks require the proper development of new arts of what may be called social and economic engineering."

For the efficient performance of these heavy and arduous duties the administrative officers must necessarily possess a trained mental equipment of a high order capable of ready mastery of complex and intricate problems. They must also possess the virtue of human sympathy. Prime Minister Jawaharlal Nehru reminded his audience consisting of civil servants at Kurnool, on December 9, 1955 the exact purpose of the Services. "The Services", he explained, 'as their name implies are supposed to serve, obviously, Serve who? society, the people, the country. Why I say this, because, the test, always, has to be how far the Services, whether as a whole or any individual member of them are serving the larger causes that society has, that the nation has.' The qualities exactly wanted in public servants must, therefore, be: initiative and enterprise, planning and organising capacity, efficiency, honesty, loyalty, political neutrality, width of social outlook, and spirit of social service.

The British Civil Service is world famous for its political neutrality, impartiality and integrity. "The characteristic which has long been recognised in the British administrator," says the **Report of the Committee on the Political Activities of the Civil Servants**, "and extolled as a special virtue is his impartiality and, in his public capacity, a mind untinged by political prepossession." But this traditional concept of political neutrality is undergoing, as S. Lall rightly observed, "radical change under the impact of many factors some of which are common to all nations and others special to under-developed countries like India. The concept is being rapidly transformed, without a conscious realization, from a negative doctrine of political sterilization and neutrality to a positive, non-partisan participation in the management of country's affairs." The process of decision is no longer exclusively confined to the Ministers. The process of decision-making is diffused over the entire system of government. The Ministers may ultimately mould and shape the policies, but all such policies are being constantly readjusted "in a seamless web of a multiplicity of agencies. The decision making process has recently become very complex and dispersed as a result of the enormous increase in the scale and scope of governmental activities (particularly in matters of welfare and State enterprise), the pressure thrown up by the democratic processes in-

7. Introduction to Public Administration in India, Report of a Survey by Paul H. Appleby.

8. Govind Ballabh Pant, "Public Servant in a Democracy," published in the *Indian Journal of Public Administration*, July-September 1955, p. 181.

9. Published in the *Indian Journal of Public Administration*, October-December 1955, p. 289.

10. "Civil Service Neutrality," *Indian Journal of Public Administration*, January-March, 1958, p. 1.



volved in the establishment of an egalitarian society and the increasing complexity of modern society. The higher echelons of the Civil Services today not only advise and assist the Ministers in the formulation of policy; they indirectly influence decision." The dichotomy of the governmental process into **politics** and **administration**, i.e., 'decision' and 'execution' no longer exists.

**Classification of Service.** In countries with a federal polity, it is usual for the Central Government and the Governments of the constituent units to have separate organised services for the administration of subjects falling within their respective spheres of jurisdiction. In India, too, there are two sets of services, Central Services and State Services. The Central Services are concerned with the administration of Union subjects, such as, Foreign Affairs, Defence, Income Tax, Customs, Posts and Telegraphs, etc., and the officers of these services are exclusively in the employ of the Union Government. The subjects within the jurisdiction of the States such as Land Revenue, Agriculture, Forests, Education, Health, Veterinary, etc., are administrated by the State Services and the officers of these services are exclusively in the employ of their State Governments. In addition to these two classes of Services, the Constitution also provides for the All-India Services, a form of personnel organisation which has no parallel in any other federal country, except in Pakistan. The All-India Services are common to the Union and the States and are composed of officers "who are in the exclusive employ of neither and may at any time be at the disposal of either." The Constitution names two such Services, the Indian Administrative Service and the Indian Police Service.<sup>11</sup> It is further provided that other All-India Services may also be created by Parliament, if the Rajya Sabha declares by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so.<sup>12</sup> A resolution was adopted by the Rajya Sabha on December 6, 1961, to the effect that it was necessary and expedient in the national interest that Parliament should by law provide for the creation of Indian Service of Engineers, the Indian Forests Service and the Indian Medical and Health Services. Indian Economic Service was subsequently added.

Dr. Ambedkar explained in the Constituent Assembly the reasons for making this extraordinary provision for the creation of All-India Services, particularly the Indian Administrative Service. He said, "The dual polity which is inherent in a federal system is followed in all Federations by a dual service. In all Federations there is a Federal Civil Service and a State Civil Service. The Indian Federation, though a dual polity, will have a dual service, but with one exception. It is recognised that in every country there are certain posts in its administrative set-up which might be called strategic from the point of view of maintaining the standard of administration. . . . There can be no doubt that the standard of administration depends upon the calibre of the Civil Servants who are appointed to these strategic posts. . . . The Constitution provides that without depriving the States of their right to form their own civil services there shall be an

11. Article 312 (2).

12. Article 312 (1).

All-India Service recruited on all-India basis with common qualifications with uniform scale of pay and members of which alone could be appointed to these strategic posts throughout the Union." The members of the Indian Administrative Service, therefore, man administration both at the Centre as well as in the States. Referring to three All India Services—Engineering, Medical and Forest, the Home Minister, Lal Bahadur Shastri, said at Tirupathi on September 25, 1962, that these Services were being constituted to bring about homogeneity and unity in administration. This was one of the recommendations, Shastri added, of the States Reorganisation Commission.<sup>13</sup>

**The Indian Administrative Service.** The control and management of the Indian Administrative Service, as S.B. Bapat says, "is necessarily a joint co-operative affair."<sup>14</sup> The Service is organised in the form of a number of I.A.S. cadres for each State. Recruitment to the Service is made by the Union Government on the results of a competitive examination conducted by the Union Public Service Commission. The officers thus recruited are allotted to the different State cadres. The strength of each cadre is so fixed as to include a reserve of officers who can be deputed for service under the Union Government for one or more "tenures" of three, four or five years before they return to their State cadre. This arrangement is claimed to have the advantage of having at the disposal of the Union Government the services of officers with first-hand knowledge and experience of conditions in the States. And the States have officers, after their return to the State cadre, who are fully familiar with the policies and programmes of the Union Government.

There is yet another distinctive feature of the Indian Administrative Service. It is a multi-purpose Service composed of "generalist administrators" who are expected, from time to time, to hold posts involving a wide variety of duties and functions. At one time they may be responsible for the maintenance of law and order, at another time for the collection of revenue, regulation of trade, commerce or industry, and still at another they may be engaged in the welfare activities like education, health, labour and development and extension work in agriculture and reconstruction. Thus, the administrators get a general training, in more or less every branch of administration. There are two definite advantages of such a system of service. According to the arguments of Macaulay and Jowett, it is a better qualification for intellectual work than a special training, and that success in such a kind of training is likely to indicate desirable qualities of character. Secondly, it accounts for the liberal outlook of the administrators.

The method of recruitment to the Indian Administrative Service combines a written examination of a high standard. The written examination includes compulsory papers and a number of optional papers selected from a group so made as to compel the candidate to go outside the range of subjects which he may have studied at the University. The written examination is followed by a searching personality test. Candidates have to

13. *The Tribune, Ambala Cantt.*, September 27, 1962.

14. "The Training of the Indian Administrative Service," *The Indian Journal of Public Administration*, April-June 1955, p. 119.

obtain a certain minimum percentage of marks in the aggregate of compulsory and lower optional papers before they can be called for interview. For a period it was the rule that a candidate could be failed on personality test alone but the interview mark is now simply added to those of written papers. This method of recruitment, says S.B. Bapat, ensures, "that the youngmen recruited to service possess not only a high level of intelligence and academic learning but also an adequate measure of the qualities of personality and character, such as, discernment, clarity of thought and expression, intellectual integrity, self-confidence, self-possession, breadth of outlook and sense of moral and social values—qualities which must be looked for in persons holding responsible administrative positions in any democratic welfare State."<sup>15</sup>

What administration really needs today is leadership. "Leadership in administration," writes K.N. Butani, "translated into practical realities, implies that leaders must have 'spring' and vitality in them to be able to top the immense potentialities of human endeavour for creative activity. By dash, enthusiasm, and zest for work, they should be able to infect the entire team they command with a pioneering spirit of endeavour and towards feats of administrative achievement."<sup>16</sup> It, therefore, makes it imperative that men of special merit who exhibit attributes of leadership by their decisiveness and dash at interviews should be recruited in the administrative service. Mere possession of academic qualifications and to pass the written examination is not enough and hence the tutility of interviews, which has now become topical for discussion, is untenable.

**Recruitment and Conditions of Service.** "The method of responsible Government to be successful in political working," observed the Joint Select Committee on Indian Constitutional Reform, 1933-34, "requires the existence of a competent and independent Civil Service staffed by persons capable of giving to successive Ministers advice based on long administrative experience, secure in the positions, during good behaviour, but required to carry out the policy upon which the Government and Legislature eventually decide." So long as politicians can influence in any vulgar sense appointments and promotions, there is, as Dr Jennings aptly says, "a risk of toadying, flattery and self-seeking" and the mind of the Minister will always be devoted to the need of rewarding his followers. The whole administration must, under the circumstances, deteriorate both in tone and efficiency and the services may be depleted of able, efficient, honest and experienced persons. The method of selection to the various posts in the public services and their conditions of service are, therefore, matters of supreme importance in order to secure a continuous inflow of competent men of the right type.

The Drafting Committee thought it advisable that detailed provisions relating to the services should be regulated by Acts of the appropriate Legislatures rather than by Constitutional provisions.<sup>17</sup> The Constituent

15. "The Training of the Indian Administrative Service," *The Indian Journal of Public Administration*, April-June, 1955.

16. "Leadership in Administration," *The Indian Journal of Public Administration*, October-December, 1956.

17. Vol. I, para 274.

18. *The Draft Constitution of India*, p. xi.

Assembly accepted this recommendation of the District Commission and the Commission has directed the concerned departments to follow the established rules of recruitment and promotion of members of security forces of the Union and the States to be recommended by the government concerned.

The Commission proposes that except in cases of persons appointed to work as in the case of the Employees of the Government and of the Public Works, the terms of entry of persons appointed to service under the Union, including such persons as are appointed to service in pursuance of the pleasure of the President or the Governor, shall be subject to the pleasure of a State or Union government or a State or Union Government, as the case may be. Dismissal or removal of such persons shall not be effected by an authority empowered to do so, except by order of such authority. And no disciplinary proceedings or inquiries of such persons shall take place until the government or government concerned has shown cause against the action proposed to be taken against them. **This requirement is not necessary:**

- (i) where dismissal or removal of such persons is a result of the conviction of a person of an offence;
- (ii) where an authority empowered to dismiss or remove a person or reduce him in rank is satisfied that it is not possible for him to be recorded by the authority in question that such person is not suitable to give that person an opportunity of stating his case;
- (iii) where the President or the Governor is of opinion that he is satisfied that in the interest of the security of the State it is not expedient to give such an opportunity to that person.

If any question arises whether it is reasonably practicable to give to any person an opportunity of showing such cause, the authority charged with the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final. No Court shall be entitled to call in question such decision.

The Constitution guarantees to persons who have been appointed in the Secretary of State to a Civil Service in India the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters as that person was entitled to before the commencement of the Constitution.

## PUBLIC SERVICE COMMISSIONS

**Public Service Commissions.** "Wherever democratic institutions exist experience has shown that to secure an efficient civil service it is essential to protect it so far as possible from political or personal influences and to

19. Article 309. Also refer to Entry 70 of the Union List and Entry 41 of the State List.

20. Article 310.

21. Article 311.

22. Article 311 (3).

give it that position of stability and security which is vital to its successful working as the impartial and efficient instrument by which governments, of whatever political complexion, may give effect to their policies."<sup>23</sup> Public Service Commissions are fundamental to the very conception of a democratic government, for they perform a very important and vital function in a democracy. Their primary objective is to establish a Civil Service free from personal and political influences and to secure to civil servants protection from victimization and injustice. They provide effective instruments by which governments professing different political faiths and pursuing different ideologies can give effect, through an efficient and impartial Civil Service, to their programmes and policies. Independence, impartiality and integrity, therefore, constitute the essential characteristic features of a true and efficient Public Service Commission.

**Origin and development in India.** The Government of India Act, 1919, provided for the establishment of a Public Service Commission in India. But no action was taken thereupon. The Royal Commission on Superior Civil Services (Lee Commission), 1924, gave particular attention to this matter and recommended that the statutory Public Service Commission envisaged in the Government of India Act, 1919, "should be established without delay."<sup>24</sup> It was only in October 1926 that a Public Service Commission was established at the Centre. In 1929, Madras established its own Public Service Commission. The Punjab Legislative Council enacted legislation for the establishment of a Commission, but it could not come into existence due to scarcity of finances.

The Indian Statutory (Simon) Commission recommended the establishment of Public Service Commissions in all the Provinces. "We have no doubt", the Commission observed, "of the necessity for the establishment of provincial Public Service Commissions if an efficient and loyal public service is to be maintained."<sup>25</sup> They thought that the protection of the services from political influences was an essential condition of the constitutional advances they recommended. It was, accordingly, suggested that provision should be made in the Government of India Act that, if any Provincial Legislative Council did not pass within a prescribed time an act for the establishment of a Public Service Commission, with a Constitution and functions approved by the Secretary of State in Council, the Provincial Government "shall be required (1) to conduct its recruitment through the agency of the Central Public Service Commission; (2) to submit appeals from members of the provincial and subordinate services to the same body; and (3) to accept and apply the same conventions in regard to the Commission's recommendations as are accepted by the Government of India."<sup>26</sup> The Government of India Act, 1935, accordingly, provided that "there shall be a Public Service Commission for the Federation and a Public Service Commission for each Province." Provision was also made whereby the same Public Service Commission could serve the needs of two or more Provinces jointly.

23. *Report of the Royal Commission on the Superior Services in India (Lee Commission)*, para 24.

24. *Ibid.*

25. *Report of the Indian Statutory Commission*, Vol. II, para 339.

26. *Ibid.*



The Constituent Assembly had then before it the Government of India Act, 1935, outlining the structure and functions of the Public Service Commissions together with the way in which they were to be dealing with their work. The Union Constitution Committee and the Provincial Constitution Committee did not find it necessary to propose any changes and recommended that the provisions relating to the Public Service Commissions should be on the lines of those in the Government of India Act, 1935. But there was one point of difference in the recommendations of these Committees. Whereas the Union Constitution Committee had recommended that the appointment of the Chairman and members of the Federal Commission should be made by the President on the advice of his Ministers, the Provincial Constitution Committee had suggested that Provincial Commissions should be appointed by the Governor acting in their discretion. But in presenting the Report of the Committee to the Constituent Assembly on July 18, 1947, Sardar Vallabhbhai Patel said that the appointment of the Chairman and members of the Provincial Public Service Commissions would generally be made by the Government on the advice of his Cabinet or Ministry.<sup>27</sup>

In pursuance of the Reports of the Union Constitution Committee and the Provincial Constitution Committee the Constitutional Adviser in his Draft of October 1947 included provisions for Public Service Commissions which closely followed the Government of India Act, 1935. The Drafting Committee in its Draft of February 1948, adopted the Constitutional Adviser's Draft. In May 1948 a conference of the Chairmen of all the Provincial Public Service Commissions and the Chairman and members of the Federal Public Service Commission was held and some suggestions were made for incorporation in the Constitution. The more important of these suggestions were:

(1) Provision should be made in the Constitution that the procedure prescribed for the removal from office of Judges of the Supreme Court and High Courts and the Comptroller and Auditor General should be followed also in the case of the members of the Public Service Commissions.

(2) Following the Government of India Act, 1935, the Draft had provided that not less than one-half of the number of members of a Public Service Commission should be persons who had held public office for at least ten years. The conference suggested that in order to provide for the representation of all the interests involved, this percentage should be reduced to one-third.

(3) Provision should be made that the conditions of service of a member of a Public Service Commission should not be varied to his disadvantage during his tenure of office.

(4) The Chairmen of Public Service Commissions, like the members, be eligible to hold office after retirement with the permission of the President or Governor as the case might be. The conference thought that

27. *Constituent Assembly Debates*, Vol. IV, p. 581.

28. *The Framing of India's Constitution. Select Documents*, Vol. IV, p. 411.

while all restrictions on the future employment of Chairmen and members of the Commission should not be abrogated, the services of such experienced men should, if necessary, be available to the Government.

(5) Before the President or the Governors made regulations excluding any matter from the purview of the Public Service Commissions, the appropriate Commission itself should be consulted.

(6) While it could not be made obligatory on the government to accept the advice of a Commission in all cases, provision should be made for reports of the Public Service Commissions to be compiled annually and laid before the appropriate Legislature, and in particular for a list of cases to be placed before the Legislature where the advice of the Commission was not accepted.

These suggestions were cast in the form of draft amendments and the Drafting Committee considered them together with the views of the Ministry of Home Affairs and the Law Ministry. The amendments proposed by the Drafting Committee were considered by the Constituent Assembly on August 22 and 23, 1949. In the course of revision Articles relating to the Public Service Commissions were renumbered 315 to 323.

**Public Service Commissions under the Constitution.** The Constitution of India provides for a Public Service Commission for the Union and a Public Service Commission for each State. But if the Legislatures of two or more States authorize it by resolution, Parliament may establish a Joint Commission for those States. The Union Public Service Commission may perform the functions of a State Public Service Commission at the request of the Head of the State, and with the consent of the President. All States, except Nagaland, have Public Service Commissions of their own. The Union Territories are served either by the Union Public Service Commission or by the Public Service Commission of the adjoining State.

**Appointment and Terms of Office of Members.** The members of the Union Public Service Commission, and of any Joint Commission are appointed by the President and the members of a State Public Service Commission by the Head of the State. One-half of the members of a Commission, Union or State, must have held office for at least ten years either under the Government of India or under the Government of a State. A member holds office for six years or until he attains, in the case of the Union Commission the age of sixty-five years and in the case of a State Commission the age of sixty years, whichever is earlier. A member of a Public Service Commission is, on the expiration of his term of office, not eligible for re-appointment to that office. The Chairman of the Union Commission is ineligible for further appointment either under the Government of India or under the Government of a State. But a member of the Union Commission is eligible for appointment as the Chairman of the Union Commission or as the Chairman of a State Commission. The Chairman of a State Commission is eligible for appointment as the Chairman or as a member of the Union Commission or as the Chairman of any other State Commission. A member of the State Commission is eli-

gible for appointment as the Chairman or as a member of the Union Commission or as the Chairman of that or any other State Commission. None of them, however, is eligible to any other employment other than the Union Government or under the Government of a State.

The number of the members constituting the Union Public Service Commission and the conditions of their service or of a Joint Commission are determined by the President and in the case of State Commissions by the Governor by regulations. It has since been decided that there shall be six to eight members of the Union Commission and usually three for the State Commissions. The conditions of service of a member of a Public Service Commission cannot be varied to his disadvantage after his appointment. The Chairman of the Union Public Service Commission receives a salary of Rs. 4,000 a month and its members Rs. 3,500. In the case of the State Public Service Commissions the salaries vary from State to State. The entire expenses of the Commission, including the salaries and allowances of its members, are charged on the Consolidated Fund of India and in the case of a State Public Service Commission on the Consolidated Fund of the State.

**Removal and Suspension of a Member.** A member of the Union Public Service Commission can be removed from office by an order of the President on the ground of misbehaviour. The Constitution prescribes a procedure to prove misbehaviour. The ground of misbehaviour is referred to the Supreme Court by the President. The Supreme Court then conducts the enquiry, as prescribed under Article 145 of the Constitution and submits a report to the President. Pending enquiry by the Supreme Court, the President in the case of a member of the Union Public Service Commission and the Governor in the case of a member of the State or Joint Public Service Commission may suspend the person concerned. The President may remove by order a member also on the following grounds:

- (a) if he is adjudged an insolvent; or
- (b) if he engages during his term of office in any paid employment outside the duties of his office; or
- (c) if he is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body; or
- (d) if he becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government.

31. Article 319. Employment under Government. This University is not meant employment which is paid for by the Government. The Universities and Public Corporations are independent legal entities with their own independent financial resources. Accordingly, or phrased in other words, there is no employment under Government. Some States have appointed retired persons as members of the Public Service Commissions or who had resigned their office or have retired or resigned from the statutory bodies. In the case of universities an interchange between Vice-Chancellorship and membership of a Commission has now become almost a regular feature.

32. Article 318.

33. Proviso to Article 318.

34. Article 317 (1).

35. Article 317 (2).

36. Article 317 (3).

of India or a State Government or in any way participates in its profits or in any benefit or emolument arising therefrom except as an ordinary member of an incorporated company.<sup>37</sup>

There was no provision in the Government of India Act, 1935 for the removal and suspension of the members of the Public Service Commissions. All such matters were governed by rules framed by the Governor-General and the Governors acting in their discretion.<sup>38</sup> Article 317 of the Constitution empowers the President alone to remove the members of the Public Service Commission. He does so by his order, without any formality, when a member is adjudged an insolvent, or he engages himself in any other employment or he is deemed unfit to continue in office owing to infirmity of mind. But removal on grounds of misbehaviour involves observance of certain procedure as provided in the Constitution. Constitution also provides an instance of misbehaviour.<sup>39</sup>

**Functions of the Public Service Commissions.** The Constitution prescribes following functions of the Public Service Commission.<sup>40</sup>

- (1) The Union and the State Public Service Commissions shall conduct examinations for appointment to the Union and State services respectively.
- (2) To assist the States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required if two or more States make such a request to the Union Public Service Commission.
- (3) To give advice:
  - (a) on any matter referred to them relating to methods and recruitment to civil service and for civil posts;
  - (b) on the principles to be followed in making appointments, and in making promotions and transfers from one service to another;
  - (c) on disciplinary matters including petitions on such matters;
  - (d) on the claim made by any person that the costs of defending legal proceedings against him in respect of acts done or purporting to be done in the execution of his duty should be borne by the Government;
  - (e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government in a civil capacity and any question as to the amount of any such award.<sup>41</sup>
- (4) Any other functions as respects services conferred by Parliament in the case of the Union Commission and by the State Legislature in the case of State Commission.

37. Article 317 (4). .

38. Section 265 (2) (a).

39. Article 317 (4).

40. Article 320.

41. Article 320.

Thus, normally, a Public Service Commission must be consulted in all matters relating to methods of recruitment, on the methods to be followed in making appointments, promotions and transfers, on the suitability of applicants, on disciplinary matters affecting any person in a civil capacity, on claims submitted by civil servants for payment of costs incurred in defending legal proceedings and for compensation of injuries sustained while in the execution of their duties and for the award of pensions. But the Constitution also empowers the President and the Governors to make regulations specifying the matters in which, either generally or in particular circumstances, the Commission may not be consulted." No reference need be made to the Public Service Commission on matters relating to the reservation of appointments or posts in favour of backward classes, Scheduled Castes and Scheduled Tribes."

In 1961 an amendment was made which provided, "It shall not be necessary for the President to consult the Commission in any case where he proposes to make an order of dismissal, removal or reduction in rank after being satisfied that such action is necessary in the interest of the security of the State." In 1962 following the Proclamation of Emergency similar amendments were made curtailing the advisory functions of the Commission. All regulations made by the President or the Governor specifying the matters in which it is not necessary to consult the Commission are to be laid before the appropriate Legislature and are subject to legislative control and modification."

Under Article 321 of the Constitution, the functions of the Union or State Public Service Commission may be extended by an Act of Parliament or by the appropriate State Legislature as the case may be. Such an Act may bring within the scope of the functions of the Commission matters connected with the services of public institutions, such as, public corporations and local bodies, under the Union or State Government. The need for bringing such institutions within the purview of the Public Service Commission is undeniable in view of the greater emphasis on the utility of public corporations and such other institutions in the context of the increasing activities of a welfare State. These institutions employ an ever-increasing number of officials.

**Guarantees to Secure Independence of the Commissions.** The Constitution contains following guarantees to secure independence of the Commissions in the discharge of their duties:

(1) The Public Service Commissions in India are constitutionally created and are in no way subordinate either to the Executive or the Legislature. Parliament can neither abolish them nor alter their powers and functions, except by following the process of constitutional amendments, which is a difficult and cumbersome procedure.

(2) The term of office of a member is fixed by the Constitution and one is not eligible for re-appointment to that office on the expiration of his term. •

42. *Proviso to Article 320.*

43. *Article 320 (4). Also refer to Articles 16 (4) and 335.*

44. *Article 320 (5).*



(3) Removal or suspension of a member can only take place in accordance with the procedure and for reasons prescribed in the Constitution.

(4) The conditions of the service of a member cannot be varied to his disadvantage after his appointment. The salaries, and allowances of the members and staffs of the Commissions as well as expenditure incurred on their upkeep are charged on the Consolidated Fund. The Commissions are, accordingly, not subject to the vote of Parliament or State Legislature, and, consequently, not subject to the vagaries of fluctuating public opinion.

(5) In order to avoid the suspicion that promise or prospects of further employment under the Government might operate or be used to influence the judgment of the members of the Commission, the Chairman and members on ceasing to hold office become ineligible for further employment under Government except:

- (i) that the Chairman of a State Commission is eligible for appointment as Chairman or member of the Union Commission or as Chairman of any other State Commission;
- (ii) that a member of the State Commission is eligible for appointment as Chairman or member of the Union Commission, or as Chairman of that or any other State Commission;
- (iii) that a member of the Union Commission is eligible for appointment as Chairman of the Union Commission or Chairman of a State Commission.

(6) In order to ensure the reasoned judgment, their independence and impartiality, the makers of the Constitution had intended that only men of mature age and long experience should be elevated to the Public Service Commissions. The age of retirement has been, accordingly, fixed at sixty years for the members of the State Commissions and sixty-five for members of the Union Public Service Commission.

All these constitutional provisions have not fulfilled the expectations of the makers of the Constitution. In actual practice appointments to the Commissions, particularly in the States, have often been made on political considerations thereby lowering their prestige in the eyes of the public. In fact, due advantage has been taken of the absence of qualifications and mode of selection of the members of the Commissions by certain State Governments, with the result that appointment to the Public Service Commissions is deemed by many political aspirants as reward of their party services. At the Union level, except for Shivashunmugam Pillai, who was a former Speaker of the Madras Legislative Assembly,<sup>45</sup> no politician has been appointed on the Commission. In the States, it is just the reverse. The Law Commission had made pointed reference to the shocking state of affairs prevailing in the States. The Commission said, "Having regard to the important part played by the Public Service Commission in the selection of the subordinate judiciary, we took care to examine as far as possible the Chairmen and some of the members of the Public Service Com-

<sup>45</sup> He was a member of the Union Public Service Commission from 1955 to 1961.

missions in the various states. We are constrained to state that the personnel of these Public Service Commissions in some of the States was not such as could inspire confidence, from the points of view of either efficiency or impartiality. There appears to be little doubt that in some of the States appointments to these Commissions are made not on considerations of merit but on grounds of party and political affiliations. The evidence given by members of the Public Service Commissions in some of the States does create the feeling that they do not deserve to be in responsible posts they occupy. In some of the southern States the impartiality of the Commissions in making selections to the judicial service was seriously questioned.<sup>46</sup> An ex-Chairman of the Madhya Pradesh Public Service Commission had said, "The constitutional independence given to the Commission is largely vitiated by vesting the appointment of members in the hands of the Governor, i.e., the Chief Minister in actual practice. The Chief Minister often appoints persons on political, communal, regional and other grounds, and not solely on merit, and human being what it is, such persons usually find it difficult to resist ministerial pressure and influence in carrying out their duties in an independent and impartial manner. . . ."

But what happened in Bombay (now Maharashtra) shall perhaps remain unprecedented in the history of Public Service Commissions in India. A Deputy Minister in the Bombay Government was appointed a member of the Commission from the quota reserved for civil servants. "Although the appointment," says B.A.V. Sharma, "seems to fulfil the legal niceties it was clearly against the spirit of the Constitution. There cannot be a worse example of a party government ruthlessly seeking to promote its interests and that of a party member in total disregard of constitutional propriety."<sup>47</sup>

**Public Service Commission an Advisory Body.** Although the Constitution provides that the Union and State Public Service Commissions shall conduct examinations for appointment to the services of the Union and the services of the States respectively and normally they shall be consulted in all matters relating to methods of recruitment, yet the status of the Public Service Commissions is advisory. The use of the words "shall be consulted" in Article 320(3) are significant of the meaning. The Public Service Commission merely gives its opinion to the President or the Governor, as the case may be, with regard to the suitability of the candidate for the post under consideration and it is not obligatory upon the latter to accept that opinion or recommendation. Sometimes the Government directs the Public Service Commission to recommend more names than the available posts and makes selection of its own out of the panel of names so recommended without adhering to the priority recommended by the Commission. The Constitution, however, provides that it is the duty of the Union Commission and the State Commissions to present annually to

46. Law Commission of India, Fourth Report, *Report of Judicial Administration*, Vol. I, Ministry of Law, Government of India, New Delhi, 1958, p. 171.

47. Rego, D.V., "The Public Service Commission. Its Powers and Functions - A Critical Assessment" in *Studies in State Administration*, Edited by G.S. Halappa, p. 134.

48. Sharma, B.A.V., "Public Service Commissions in India" in *Studies in Indian Democracy*, Edited by Aiyar, S.P., and Srinivasan, R., p. 227.

the President or the Governor, as the case may be, a report as to the work done by the Commission. Immediately after the receipt of such a report the President or the Governor is required to lay before each House of Parliament or the State Legislature, as the case may be, together with a memorandum of the cases where the advice of the Commission was not accepted and the reasons for such non-acceptance.<sup>49</sup>

It would, thus, appear that the framers of the Constitution have made specific provision that the Legislatures of the Union and the States are the ultimate judges of Governments' actions. This provision simultaneously ensures that consultation with the Commission is not overlooked, that the advice of the Commission is as a rule accepted, and that the Governments are free in cases where they consider the matter of sufficient importance to follow their own judgment provided they are prepared to justify their action before the Legislature.<sup>50</sup> The Union Government have had to consult the Union Commission every year on about sixty thousand cases and the number of cases in which the Commission's advice is not accepted is really negligible. But in the States it is otherwise. The reports of the State Public Service Commissions provide sufficient material to authenticate that inadequate respect is paid by the Governments to the recommendations of the Commissions. Even more grave are certain unpublished allegations of interference, direct and indirect, by authority and pressures to influence decisions.

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49. Article 323.

50. Bapat, S.B., 'Public Service Commissions--An Indian Approach,' *The Indian Journal of Public Administration*, January-March 1956, p. 58.

## CHAPTER XII

# POLITICAL PARTIES

**Political Parties and Democracy.** Political parties are the very life-blood of democracy. Without them democracy degenerates into totalitarianism. For, MacIver says, "There can be no united interest of principle, no orderly evolution of policy, no regular resort to the constitutional device of parliamentary elections, nor of course any of the recognised institutions by means of which a party seeks to gain or to maintain power." Those who deplore the existence and influence of political parties do not really understand the working of the machinery of democracy. Lowell has aptly said that "the conception of Government by the whole people in any large nation is, of course, a chimera. For wherever the suffrage is wide, parties are certain to exist and the control must really be in the hands of the party that comprises a majority or a rough approximation to a majority of the people." Without party organisation there may be factions and cabals, people appealing and petitioning to government for the redress of personal and sectional grievances. A political party seeks to do more than influence or support the government: it seeks to make it and to maintain it. Its primary business is to influence the electorate to win election, and form the government in order to pursue its programme. A political party is an organised unit which enables men and women who think alike to pursue a definite programme and pursue it vigorously. It, therefore, brings order out of chaos by putting before a multitude of voters its programme and securing their approval on vital issues of policy. It plans and contests elections and endeavours to win. For winning elections it is necessary that a political party should have the sanction of a majority of voters. It needs educating the electorate and moulding public opinion. Every political party does it through its press, platform and other vehicles of propaganda at its disposal.

Democracy, thus, needs political parties for two reasons. First, they are the means by which citizens get an opportunity to choose their rulers. Secondly, political parties explain and educate the citizens in the merits and dangers of alternate policies. They present their programmes and submit the representatives of those programmes to the choice of the electorate. This provides an opportunity to the electorate to determine for themselves the kind of government they wish to have. Political parties, in brief, "make articulate the inarticulate desires of the masses." They act, in the words of Lowell, as the broker of ideas. They gather up the whole nation into fellowships and bring to the individual citizen, as Dr. Finner says, "a vision of the whole nation, otherwise distant in history, territory and futurity."

**Party System an Extra-legal Growth.** The party system is an extra-legal growth in every democratic country. It exists outside the legal framework of the State and yet it has become everywhere as indispensable as law itself. The Constitution of the United States does not presume the existence of political parties. The makers of the Constitution shared the common opinion that the influence of political parties was highly detrimental to national solidarity. Planning as the "Fathers" were for the United States as a whole, they sought to provide a mechanism of government which would be free from all "violence of the faction," and parties, they were convinced, encouraged strife, division, chicanery and personal manipulation. But within a few years of the career of the Union party divisions and party spirit were sufficiently evident. In the Presidential election of 1796, there were two national parties, one supporting John Adams and the other supporting Thomas Jefferson. By 1800 the party system had settled itself quite firmly in the government, even to the extent of necessitating the addition of the Twelfth Amendment so as to make the Electoral College method workable. Since then, it has become the central feature of the American system. "But for the appearance of a national party system," as Professor Brogan realistically points out, "the election of a President really enough of a national figure to carry out his duties, might have been impossible. And it is certain that the greatest breakdown of the American constitutional system, the Civil War, came only when the party system collapsed."<sup>2</sup>

Her Majesty's Government in Britain is a party government and the Prime Minister is the leader of the majority party in the House of Commons. The party in Opposition is Her Majesty's Opposition and it is recognised as a vital and necessary element in the working of the British Constitution. The functions of the Opposition are to criticise and vote against the policy of the Government, the party in office, with a view to overthrowing it and taking its place. In fact, the party in power, in a Parliamentary system of Government, tolerates and encourages the existence of Opposition "because opposition is necessary to the health of its own existence." Both the majority party and the Opposition accept the principle of "live and let live" in the knowledge that the system of Parliamentary Government allows to each in turn and in time its fair share of power. Jennings has, therefore, aptly said that a "realistic survey of the British Constitution today must begin and end with parties and discuss them at length in the middle."<sup>3</sup> Yet, political parties in Britain are not organs of the State specifically regulated by its laws. The law does not even mention them. Their only nearest approach to official recognition is in the rules for the formation of Committees in the House of Commons, and the Ministers of the Crown Act, which provides for an annual salary to the Leader of the Opposition for his services in that capacity.

**Two Party vs. Multiple Party System.** The British Constitution has grown and evolved under the two-party system and in all those countries that have borrowed Parliamentary Government from Britain, it implies, strictly speaking, the existence of two parties only. The essence of party government, as practised in Britain and the Dominions, is that the party

2. Brogan, D.W., *An Introduction to American Politics*, p. 45.

3. *The British Constitution*, p. 31.



enjoying majority in the Lower Chamber forms the Government and its leader becomes the Prime Minister. All Ministers are taken from one single party and this political homogeneity makes them a well-organised and a responsible team of administrators who play the game of politics with singleness of purpose under the captaincy of their accredited leader. They rise and fall in unison and are individually and collectively responsible for the policy which the Cabinet initiates and they carry out. If the Lower House does not endorse the policy of the Government and vote for lack of confidence in it, one of the two things may happen then. Either the Opposition party assumes office, if it can command a majority in the Lower House, or, more commonly, the Prime Minister may ask for dissolution of the Legislature when a general election takes place and verdict of the electorate is obtained. The party returned in majority in the Lower House forms the Government.

But in most countries of the Continental Europe there are multiple parties sometimes numbering from 17 to 20, as in France. The multiple party system is really intriguing. Where there are numerous parties it is a misnomer to call them "parties." They are, as a matter of fact, political groups. When there are a number of groups, there can be no well-defined single majority able to form a stable government. Majority can be obtained only by combination of groups and they are a collection of strange bed-fellows with nothing in common either by way of loyalty or allegiance. They are the product of bargaining and compromise. And a Ministry, which is the result of compromise between heterogeneous groups, is sure to break down at the slightest pretext. There is no common party leader who can bind them together. Every Minister is a prospective Prime Minister. Cabinets formed by this method are, therefore, notoriously weak and unstable. Mr. Briand remarked on one occasion that the day on which a French Prime Minister takes office is the day upon which one at least of his colleagues begins to prepare his downfall.

Whatever be the merits of the multiple-party system and however it may reflect more accurately the way in which the popular mind is actually divided, it is impracticable as an operative ideal. The essential need in administration is the absence of uncertainty. The government must be able to plan its way continuously to an ordered scheme of policy. This involves a stable majority. "A legislature, otherwise, is so much master of the executive that the latter is unable to attempt great measures, and the time which should be spent upon them is devoted to manoeuvring for positions which are lost almost as soon as they are occupied." Two parties, thus, as Dr. Finer concludes, "are better for the happiness and duty of nations than many parties, and two parties contesting seats everywhere. For then lies and error may be in all places challenged, while destruction of will and disintegration of outlook are reduced."<sup>4</sup>

**Growth of Political Parties in India.** Political parties, according to Professor Laski, "are predominantly organisations which seek to determine the economic Constitution of the State." Viewed as such there was no political party in India in the pre-Independence stage which sought to

4. Laski, H.J., *Democracy in Crisis*, p. 96.

5. Laski, H.J., *Grammar of Politics*, pp. 314-15.

6. *Theory and Practice of Modern Government*, p. 360.

determine the economic constitution of the State, although there existed three important parties—the Indian National Congress founded in 1885, the All-India Muslim League, established in 1906, and the All-India Hindu Mahasabha founded in 1916. The Indian National Congress was composed of diverse elements and its main aim was to secure India's freedom from the alien rule. The Congress was, in fact, as Professor Avasthi observes, "not a party but a nation on the march to win independence."<sup>7</sup> Being the spearhead of the national movement, it was natural and inevitable for this national organisation to bring together and consolidate all possible forces under the banner of nationalism for the achievement of India's freedom. It had among its members and supporters landlords and tenants, capitalists and labourers, doctors and bankers and men belonging to professional classes irrespective of race, religion or creed and large sections of the depressed classes also. Such a heterogeneous organisation could not lay down and pursue a definite and distinctive social and economic programme as it would have involved "a war on two fronts, a war against imperialism and an internal war against vested interests within the country itself and no sane general would adopt such a strategy."<sup>8</sup> To be with the Congress, was patriotic and to oppose it was 'toadyism'. There were in the words of Jawaharlal Nehru only two parties in India, one which struggled for freedom and the other which supported British imperialism. Even when the Congress functioned as a political party, "it never diverted its attention or energies from the goal of national freedom" and it claimed to represent all the various classes and Committees in the country.<sup>9</sup>

The Muslim League, on the other hand, was a communal party and it did not deserve the nomenclature of a political party. Its membership was open to Muslims only and it was founded in 1906 with the object of: (1) infusing the sense of loyalty in the heart of Indian Mussalmans for British Government and removing any misunderstanding that might creep in the community regarding any measure of the Government, and (2) safeguarding the political rights and interests of the Mussalmans through respectful representation.<sup>10</sup> Some factors,<sup>11</sup> however, brought about a significant change in the outlook of the Muslim League and in 1913, its Constitution was amended and the attainment of a system of self-government suitable to India was adopted as its ideal and the promotion of national unity as the chief method of its attainment. The Lucknow Pact of 1916 was really the triumph of the nationalist Muslims. In its 1916 session the League demanded self-determination for India and in 1920, it supported the Congress programme of Civil Disobedience. Then, came the split in the League in 1927, when two different sessions were held, one in Lahore under the Presidentship of Mian Mohammad Shafi, and the other in Calcutta under the Presidentship of Mohammad Yakub. The

7. *The Indian Journal of Political Science*, January-March 1951, p. 7.

8. *The Indian Journal of Political Science*, October-December 1939, p. 139.

9. Chandrashekharan, C.V., *Political Parties*, p. 60.

10. Lal Bahadur, *The Muslim League*, p. 43.

11. The main factors responsible for change in the outlook of the Muslim League were: the attitude of the European powers towards Turkey, the Nationalist movements in Turkey and Persia, the rendition of the Partition of Bengal in 1911, etc.

Mian group had supported co-operation with the Indian Statutory Commission whereas the second led by M.A. Jinnah had declared for its boycott. The Nehru Report in 1928, however, helped to narrow down the differences though dissensions continued till 1934 when the Muslim League was reorganised.

The All-Parties Muslim Conference held at Delhi, under the Presidentship of H.H. the Aga Khan, while rejecting the Nehru Report, passed a resolution aiming to secure for the Muslims all the advantages which the community could procure "under the existing law." This was a clear departure from the previous policy of the Muslim League, though apparently it still supported the ideals of nationalism and democracy. In the following years there was a visible reversal in the League's policy and programme and in his presidential address at the Lucknow session in October 1937, Jinnah said, "the Muslim League stands for full democratic self-government of India" and added that "the present leadership of the Congress, specially during the last ten years, has been responsible for alienating the Mussalmans of India more and more by pursuing a policy which is exclusively Hindu, and since they have formed governments in six provinces where they are in majority, they have by their words, deeds and programmes shown that the Mussalmans cannot expect any justice or fairplay at their hands. On the very threshold of what little power and responsibility is given, the majority community have clearly shown their hand that Hindustan is for the Hindus." The immediate cause of change in the Muslim League policy and programme was the failure of the Congress-League negotiations for the formation of coalition Ministries in the Congress majority Provinces and the subsequent formation of Congress Ministries therein. It, thus, "suddenly dawned upon the League," as Gurmukh Nihal Singh observed, "with the force of revelation that the Muslims were doomed to perpetual opposition and permanent denial of a share in power in the Congress majority Provinces and at the Centre where they are in a minority."<sup>12</sup>

The outcome of the Muslim League's hostility to the Indian National Congress was the two-nation theory for which Jinnah and other Muslim leaders carried on an intensive and astute propaganda. When the Congress Ministries resigned, as a protest against India being dragged into the war in 1939 without her consent, the Muslim League celebrated their exit by observing a 'Deliverance Day.' This action of the Muslim League shattered all hopes of a Congress-League reconciliation. Then came the Pakistan Resolution passed at the Lahore session of the Muslim League in March 1940. At the next session at Madras in 1941, the Constitution of the Muslim League was amended incorporating the goal of Pakistan as its creed. The success of the Muslim League in rallying the Muslims under its banner with its new goal was really remarkable and Pakistan came into being in 1947.

As counterblast to the Muslim League, the Hindu Mahasabha came into existence with the avowed object of protecting the rights of the Hindus. Originally, it was a cultural organisation, but the communal

12. Presidential address delivered at the Agra session of the All-India Political Science Conference, *Indian Journal of Political Science*, April-June 1943, p. 393.

policy and programme of the Muslim League dragged it into the political arena and took a militant attitude against the Muslim League. Its objects were to revive military glories of the Hindus with a view to securing the attainment of **Purna Swaraj** and to establish **Hindu Rashtra**. It rejected the Congress policy of non-violence. Savarkar, as President of the Hindu Mahasabha, while explaining in 1933 the aims of the organisation, declared that his Party stood for "the maintenance, protection and promotion of the Hindu race, Hindu culture and Hindu civilisation and the advancement of the glory of the **Hindu Rashtra** and with a view to securing them, the attainment of **Purna Swaraj**, i.e., absolute political independence for Hindustan by legitimate means."

Like the Muslim League and the Hindu Mahasabha there were various other communal parties as those of the Anglo-Indians, the Indian Christians, the Sikhs, and the depressed classes, each wedded to the promotion of the interests of its community without caring for the real welfare of India as a whole. All these parties grew in an abnormal atmosphere and were reactionary in their outlook and programmes. Their activities, in fact, retarded the progress of national forces and the British Government encouraged them both openly and secretly.

The secularisation of politics began with the establishment of a secular State after the Independence. The Constitution abolished communal representation and communal electorates. It also introduced adult suffrage which gave to both men and women, without any qualification, equal right to vote. It was, accordingly, natural for the political parties to assume their real role. Old parties disintegrated and new ones, mostly non-communal in composition, came into existence. A good many of them were all-India organisations.

### ORGANISATION AND PLATFORM OF ALL-INDIA PARTIES

**The Indian National Congress.** The Indian National Congress is the ruling Party at the Centre since the Independence of the country. It reigned supreme in all the States, except for a short spell in Kerala, till the General Elections in 1967. But even now the Indian National Congress is the best organised and the most powerful political Party, though dissensions within the Party have now plagued its existence. The Congress owes its origin to A.O. Hume, a retired Secretary to the Government of India. The object of Hume in organising the Congress was to propagate for social reforms in the country, but the Marquis of Dufferin, the then Viceroy of India, suggested that the new organisation should assume the role of a political party. "He desired that there should be a national body which would perform in India the functions which Her Majesty's Opposition performed in England. As the newspapers were not reliable, he considered it very desirable in the interest of the rulers as well as of the ruled that Indian politician should meet yearly and point out to the Government in what respects the administration was defective and how it could be improved."<sup>13</sup> During the first twenty years of its career the Congress would meet annually and pass resolutions drawing the attention of the Government to public grievances and would request for various political reforms. "It followed," as Dr. Chandrasekharan observed,

13. As cited in C.V. Chandrasekharan's *Political Parties*, p. 56.



"strictly constitutional methods, but from the beginning the ideal was there, implied if not expressed". This is supported by the statement contained in the Manifesto issued by the leaders in March 1888. "It is only this conference will form the germ of a native Parliament and, if properly conducted, will constitute in a few years an assembly fully to the assertion that India is wholly unfit for any reforms of representative institution."

In the first decade of the present century Lord Curzon's policy, particularly the Partition of Bengal, had produced a deep resentment in the country which gave birth to the Swadeshi movement. The Congress became the spearhead of the national movement and since then it strengthened its organisation and intensified its activities to awaken the masses against the evils of the alien rule and win for India her freedom. The Congress, thus, became a national movement, an organisation and a platform, and it remained so till August, 15, 1947, when India became Independent. But with the coming of Independence the political scene was completely changed. The Congress had become the successor to the British authority in India. There was at that time much heart-searching and "stock-taking" in the Congress ranks as to whether the Congress should continue to function when its mission had been fulfilled. Gandhi himself felt that the Congress should dissolve and turn itself into Lok Sewak Sangh because he did not want the child of his toils and the symbol of national unity to become the plaything of politics and, thus, be reduced to the mere position of a party manoeuvring for power. The majority in the Congress, however, as Professor Avasthi says, "declined to commit political 'harakiri' and decided to stand forth as a political party in the usual sense of the term." With this decision disintegration was witnessed in the Congress. The Socialists, who formed the left wing, separated and formed a new party under the leadership of Jyotirish Narayan. The late Sarat Chandra Bose formed another party, the Socialist Republican. A few more members of the Congress Party in the Central Legislature formed the Social Democratic Party under the leadership of Professor K.T. Shah.

When the Congress assumed the role of a political party, it was inevitable that there should be a change in its policy and methods. The message of the Congress at the time of the Jaipur session said, "political freedom having been attained through non-violent action under the leadership of Mahatma Gandhi, the Congress has now to labour for the attainment of social and economic freedom." The new Constitution of the Congress, which was adopted in April 1948, defined the Congress objective as "the well-being and advancement of the people of India and the establishment in India by peaceful and legitimate means of a co-operative commonwealth based on equality of opportunities and of political, economic and social rights and aiming at world peace and fellowship." The objective of a classless and democratic society found expression in the resolution on the socialistic pattern of society adopted at the Avadi session of the Indian National Congress. The resolution on socialistic

14. *Ibid.*

15. Political Parties in India, *The Indian Journal of Political Science*, January-March 1951, p. 8.



pattern of society said, "In order to realise the object of the changes as laid down in Article 1 of the Constitution and to further the object stated in the Preamble and Directive Principles of State Policy of the Constitution of India, planning should take place with a view to the establishment of a socialistic pattern of society where the principal means of production are under social ownership of control, production is progressively speeded up and there is equitable distribution of the national wealth." According to Professor Shriman Narayan, the then General Secretary of the Indian National Congress, there are seven basic principles underlying a socialistic society:<sup>16</sup>

- (1) Full employment and the right to work.
- (2) Maximum production of the national wealth. The economic life of the country should be organised in such a manner that there is an increase in the total production of consumer goods leading to a higher standard of living. Development of small-scale, village and cottage industries, which would be necessary for ensuring full employment, are as essential in this context as large-scale production.
- (3) Attainment of maximum national self-sufficiency.
- (4) Social and economic justice. This involves abolition of untouchability, raising the status of women, rooting out the evils of drink and prostitution, narrowing down the gaping gulf between the rich and the poor, and the abolition of economic inequalities both in the rural and urban areas.
- (5) The use of peaceful, non-violent and democratic methods to achieve the objective of a socialistic society.
- (6) Decentralisation of economic and political power through the establishment of village panchayats and industrial co-operatives.
- (7) Highest priority to the immediate needs and requirements of those who are the poorest and lowliest sections of the population.

These seven principles could be summarised as **Sarvodaya** and are claimed to be in conformity with the teachings of M.K. Gandhi. "We have, however, not tried to use this great noble word," says Professor Shriman Narayan, "lest it may be regarded as a kind of political exploitation of a high ideal. But India is definitely committed to the ideal of **Sarvodaya** in accordance with the teaching of Mahatma Gandhi."<sup>17</sup> The Congress, as such, was not wedded to any particular 'ism'. Jawaharlal Nehru, while moving the resolution on the economic policy in the open session of the Indian National Congress at Amritsar, 1956,<sup>18</sup> declared that India was placing before the world "a new way" for achieving her industrial revolution which was different both from the Anglo-American and Russian methods. "We have finally decided," added Nehru, "to go to-

16. *The Tribune*, Ambala Cantt., June 14, 1955.

17. *Ibid.*

18. *The Tribune*, Ambala Cantt., February 13, 1956, p. 8.

wards the goal of socialism and build a socialist structure rapidly through peaceful means." While explaining "a new way" which India had adopted for achieving her industrial evolution, Nehru said that the method followed by Britain, America, France and Germany was one of achieving an industrial revolution in 100 or 150 years. "These countries had all these years," he added, "followed the method at leisure. The Russian method was different. It achieved its industrial revolution in the course of 20 to 30 years. But in doing that it had to use a lot of compulsion and the government that did it was authoritarian and the people of the Soviet Union had to pay a heavy price for it." But these methods Nehru rejected as obviously impracticable because "none of them suits our country and our present-day circumstances and our present climate." Every country has to find its own path to achieve its industrial and social revolution. India wanted to achieve her industrial revolution in the same rapid way as was done in the Soviet Union, "but we want to do it" emphasised Nehru, "in a democratic and peaceful way."

At Indore in January 1957, the Congress amended its Constitution to say that the object of the Congress was the "establishment in India by peaceful and legitimate means of a Socialist Co-operative Commonwealth." The Congress President clarified that there was no difference between a socialist pattern of society and socialism as such. The amended first Article of the Constitution read, "The object of the Indian National Congress is the well-being and advancement of the people of India and the establishment in India by peaceful and legitimate means of a Socialist Co-operative Commonwealth, based on equality of opportunity and of political, economic and social rights and aiming at world peace and fellowship." It is, however, significant to note that the word "socialist" was for the first time incorporated in the objective Article of the Congress Constitution. "This concretisation of a concept," writes M.V. Rama Rao, "was a stride forward, taken by the Congress for striving for the development of the country and the abolition of social and economic inequalities."

The objects of the Indian National Congress were affirmed in no uncertain terms in the Election Manifesto of 1957. It declared, "The revolution in India can only be completed by an economic as well as a social revolution. These two latter are gradually taking shape in India. But, according to India's own genius and method, they take place peacefully and co-operatively." The Co-operative Commonwealth of India would be based on equality of opportunity and of political, economic and social rights and aiming at world peace and fellowship. Co-operation, the Election Manifesto said, "is the law of life in human communities, and it is in the measure that there is lack of co-operation that troubles and conflicts arise. Therefore the co-operative element should enter into every aspect of human life and, more particularly, in industry and agriculture. In industry, the co-operative principle should lead to industrial democracy with the progressive participation of workers in industry; in rural areas the community should be based on co-operative management of villages." But socialism does not merely signify, the Manifesto further added, "changes in the economic relations of human beings. It involves funda-

19. *Ibid.*

20. *A Short History of the Indian National Congress*, p. 329.

mental changes in the social structure, in ways of thinking and in ways of living. Caste and class have no place in the socialist order that is envisaged by the Congress."

The Nagpur session, held in January, 1959, would ever remain historic, because the Congress gave to the country a new and dynamic agrarian programme based on the principle of co-operation. The resolution on Agrarian Organisational Pattern said, "the future agrarian pattern should be that of co-operative joint farming in which the land will be pooled for joint cultivation, the farmers continuing to retain their property rights and getting a share from the net produce in proportion to their land. Further, those who actually work on the land, whether they own the land or not, will get a share in proportion to the work put in by them on the joint farm. As a first step, prior to setting up joint farming, service co-operatives should be organised and this stage should be completed within a period of three years. Ceilings should be fixed on existing and future holdings and legislation should be completed before the end of 1959. This did not mean ceilings on income. The surplus land should vest in the Panchayats and should be managed through co-operatives consisting of landless labourers."

The Congress was, thus, on the internal front pledged to the abolition of class distinctions and aimed to strive for a classless and casteless democratic society, based upon the dignity of labour as well as on the dignity of individual in every grade of life, through constitutional methods. It no longer believed in direct action and deprecated all those methods, disobedience of laws, strikes, processions, slogans, picketing, hunger-strike, etc., which the Congress so devotedly advocated and practised during its struggle for freedom of the country. "If the attention of the people," the Election Manifesto of 1957 declared, "is diverted into wasteful channels or conflict, then the nation suffers and the rate of our progress is slowed down. It is necessary, therefore, to have industrial peace as well as peace in our educational establishments which are training people to shoulder the burden of the nation. Strikes and lock-outs are peculiarly harmful when the main purpose is to add to production. Where any problems or controversies arise, they should be solved by peaceful and co-operative methods without stopping or slowing down the great machine of production which is so essential to the march of the nation in the next great stage in its journey to a socialist commonwealth."

The sixty-sixth session of the Indian National Congress (1961) emphasised the programme of national integration, Socialism through a mixed economy, vitalization of village life through Panchayati Raj and co-operative organization. The resolution of the Congress Working Committee on the election manifesto, *inter alia*, declared, "In view of the general elections to Parliament and the various State legislatures, which are to be held early in 1962....this manifesto should state clearly Congress aims, policies and programmes....The objective of a socialist society to be realised through democratic and peaceful means....is an objective compatible with the need for rapid social and economic progress in India, maintaining at the same time, the moral and ethical values to which the Congress has always attached importance, and represents the spirit of India's struggle for freedom and is in line with the genius of her people." The only feasible method, the Election Manifesto of 1962 reiterated, "of

advancing towards the achievement of this objective is through planning, so that maximum effort could be diverted to this end." The Third Five-Year Plan, it said, was of special importance because on its success would depend the establishment of a socially balanced and increasingly prosperous and integrated community. The industrial policy resolution of 1956 had stated in clear terms the policy to be pursued in the programmes of industrialisation of the country wherein public and private sectors should function in unison as parts of a single mechanism. There should be no conflict between the two sectors and it was only through the successful and efficient functioning of these two sectors that the industrial programme could be successfully implemented.

The Election Manifesto, then, laid stress on the importance of balanced development of different parts of the country and on extending the benefits of planned development to the more backward regions. It also dealt with the necessity of continued and devoted attention to the training and well-being of the workers, ending of unemployment, and tackling the over-growing population problem through birth-control and family planning. On the side of agriculture, land reforms must be fully implemented in all the States, modern methods and techniques in production should be employed in an increasing measure, service co-operatives should be established throughout the rural areas, and co-operative farming on a voluntary basis should be organised wherever possible.

In foreign policy the Congress stood for world peace and believed that if nations of the world were not to destroy each other, the only principle on which the world community could conduct its affairs was Panch Sheela. Disputes between nations arose because lack of understanding begot suspicion. Panch Sheela should remove sources of such mutual distrust. The Congress was, thus, called upon to make the gift of truth and non-violence to the world. The Amritsar resolution in foreign policy was sponsored by Jawaharlal Nehru and was entitled as the "message of Buddha." It declared that the world had to choose between Buddha and Gandhi and the atom. "Humanity," said Nehru, while speaking on the resolution in the Subjects Committee, "had to choose today between the message of the Buddha and the hydrogen bomb. There was nothing in between to choose from."

"In the year that is just ended," declared the Election Manifesto of 1957, "India and many other countries have celebrated the 2500th year of the passing away of Buddha. The message of this great son of India has again resounded in our ears. In a world torn by hatred and violence, his gentle voice carrying this message of compassion has come to us through the ages. That message was repeated in our own day by Gandhiji. That is the message of India throughout these thousands of years of her history. Whatever activities we may indulge in, whether they are political or economic or social, we have to keep that message ever before us, if we are to remain true to the spirit of our country and to the service of humanity." The Manifesto ended, "with renewed strength firmly based on the goodwill of the people, it is determined to labour for the advancement of the Indian people and for the world peace." Addressing the All-India Congress Committee at its Poona Session on June 5, 1960, Nehru declared that India's policy of non-alignment had proved to be a correct



policy in this "historical crisis" the world was facing today. "In the past", said Nehru, "we have helped a little in smoothening difficulties between other countries and perhaps the history of the world might have been somewhat different if India had not been there during the last few years following her policy of peace and non-alignment". The 1962 Election Manifesto reaffirmed non-alignment policy and friendship with all nations.

The 1967 Election Manifesto of the Indian National Congress reiterated its deliberate choice in favour of an open and democratic society "In proclaiming democracy as our way of life," the Manifesto said, "we emphasise not only its central concept of political equality but also its equalitarian implications in social and economic fields. True to the genius of our movement for political emancipation and in the faith that enduring good to society cannot come through violence, we have decided to bring about through the open and democratic process the social and economic changes our society needs." The Party, thus, adhered to its cherished goal of establishing a democratic socialist society and advocated that the State should play an active and dynamic role in planning, guiding and directing the economic development of the country. In such a society a dynamic and growing public sector was an important tool for social transformation. The Congress, in brief, promised to consolidate and carry forward the achievements of the earlier plans, make up their shortfalls and to prepare the background for a self-reliant economy.

The principal programmes outlined in the Manifesto were:

- (1) Highest priority to all schemes of agricultural and industrial production with a view to promote exports and replace imports.
- (2) Ensure price stability for checking all inflationary factors and avoiding the need for deficit financing.
- (3) Enlarge the income of the rural population and secure proper arrangements to maximise agricultural production.
- (4) Production of fertilizers, insecticides, agricultural implements, pumps, tractors, diesel engines, etc.
- (5) Enlarge the supply of main essential consumption goods.
- (6) Continued growth in metals, machinery, chemicals, mining, power and transport.
- (7) Family planning.
- (8) Additional resources would be provided for social welfare schemes.
- (9) Greater employment and social justice.

On the international policy, the Congress maintained the basic lines of Nehru's policy—peaceful co-existence, non-alignment, non-intervention in internal affairs, opposition to colonisation and devotion to the United Nations. The Manifesto promised to foster African fellowship, to safeguard the Arab World relationship, to maintain Commonwealth link, to value American assistance, and to cherish Soviet friendship.

In the 1967 General Elections the Congress majority in the Lok Sabha



was substantially diminished and it lost majority in a large number of State Assemblies. In Rajasthan it secured 89 seats out of a total of 184 and in Uttar Pradesh 199 out of a total membership of 425. The position in West Bengal, Kerala, Madras and Orissa was still worse. In Kerala it secured only 9 seats, in Madras 50, in Orissa 31, and in West Bengal 127. The Congress now stands discredited at the bar of public opinion. Power has corrupted its leaders and struggle for power has lowered the Congress prestige. Factions are rampant in the Party and the average Congressman is collecting the dividends on his past investments. Siddhartha Sarkar Ray, former Judicial Minister of West Bengal, said in the State Assembly in 1958 that the Congress Party and administration were "helping in building up a morally corrupt and physically weak nation".<sup>21</sup>

Even if the statement of Ray is not to be accepted at its face value, credence and authenticity must be attached to what the Congress veterans have said. Duni Chand Ambalvi, in his article, "Congress and Congress Governments," wrote in 1959, "If I were to narrate all that has happened inside and in the name of the Congress since the advent of freedom it would be a harrowing and distressing story. In the general elections of 1945-46, many Congress notables in the Punjab, acted upon the adage 'make hay while the sun shines'. Some of them who could not or did not go to the Punjab Legislative Assembly made piles of money." He further added, "I know enough of the working of the Congress machinery and that of the Punjab Election Board of which I was a member in 1951-52. Pre-planned designs, duplicity and what not played greater role in the selection of candidates than any consideration of honesty, fair play, and recognition of the claims of deserving candidates."<sup>22</sup> Pyarelal, the former Private Secretary to M.K. Gandhi, wrote, "It has to be admitted that India today is far from realising the picture of what Gandhiji called, 'India of my dreams'. Bribery and corruption are rampant all round, and on all accounts it is far worse than it was under British rule. Favouritism and nepotism and failure of the judiciary to give unadulterated justice to the people in innumerable cases is a distressing fact."<sup>23</sup> C.D. Deshmukh said that it was now recognised that the administrative machinery at all levels was "erratic and inadequate. The public heard of nepotism, high-handedness, gerrymandering, feathering of the nests through progeny and many other sins of commission and omission."<sup>24</sup>

The frenzy exhibited by Congressmen over the reorganization of the States and the language issue was highly ominous. Eminent Congressmen holding positions of responsibility indulging in anti-national acts and threatening national unity was a woeful commentary on events and a precursor of the danger ahead of the Party and the country. The 1960 elections to the Rajya Sabha by State Assemblies revealed that differences among Congress members led in some cases to the defeat of Congress nominees. The 1962, 1964, 1966 and 1968 elections repeated the same story. In the biennial elections to the Legislative Councils in 1968, in Madras, for in-

21. *The Tribune*, Ambala Cantt., March 26, 1959.

22. *The Tribune*, Ambala Cantt., June 2, 1954.

23. *The Tribune*, Ambala Cantt., October 2, 1954.

24. V.S. Srinivasa Sastri Endowments Lecture, Madras University, July 11, 1959. *The Hindustan Times*, New Delhi, July 12, 1959.

employment achieved and economic equality established through large-scale industrialisation with State aid, encouragement of cottage and small-scale industries, and redistribution to ensure to everyone an economic holding, the organisation of society on co-operative lines, labour participation in management, the development of village panchayats and large-scale co-ordinated planning. But the Socialist approach to the socio-economic problems differs from that of the Congress on one vital point. According to the policy statement of the P.S.P. National Executive, large-scale industries must be owned by the community. The Election Manifesto of 1962 clarified this issue. It said, "The party believes that in the interest of planned economic development it is essential to nationalise banks, mines and mineral oils. To accelerate capital formation it is necessary for the State to take over big plantations, and trade, wholesale and foreign, in selected commodities. The Party is opposed to monopolist expansion of a few business houses that grow at the expense of a large number of existing or possible small and medium entrepreneurs. The Party disfavours institutions like Managing Agency system and will take determined steps to break up industrial monopolies."

The 1967 Election Manifesto of the Party emphasised equality and social justice as the sheet anchor of its policies and programmes. The Party, it said, would strive to limit the minimum and maximum incomes to the ratio of 1:10 and take necessary steps to reduce disparities in urban incomes through price and wage policies and administrative credit and fiscal measures. Tapering peaks of poverty created through unearned incomes, the Party pledged to remove through the imposition of capital levy, by introducing ceilings on urban property, by eliminating disparities between the salaries of the Central and State Government employees and by abolishing the privy purses of the former Princes. The Praja Socialist Party's efforts to usher in equality would not be restricted to the economic field alone but would be extended to the social plane as well. It would endeavour to remove various taboos and social inequalities from which women in India suffer, by uplifting the Scheduled Castes, the Scheduled Tribes and the landless labour, by relentless fighting against untouchability and by the eradication of evils from the caste-ridden society.

The Praja Socialist Party believes in a planned economic development. But if economic planning is to be the instrument of ushering in democratic socialist society, the emphasis of planning must primarily be at the base and not the apex. District administration which is too close and has democratic foundations should be the principal unit of economic planning. Under its directions, integrated land reforms will be implemented as time-bound programmes. It will be closely connected with development plans so that there is an effective co-ordination between land reforms and key reorganization. Credit and technical assistance will proceed hand in hand. The Party will lay special emphasis on regional development and in locating State and aided enterprises, the present imbalance between various regions will be corrected and concentration of ownership in agriculture, industry, and commerce will be prevented.\* The nationalised sector will subserve the needs of the public and co-operative producers. While the Party believes in the nationalization of all basic and key industries the phased programme of nationalization will start with those industries where capital tends to accumulate. Even in the nationalized sector,

to avoid the danger of over-centralization and bureaucratization, autonomous corporations with adequate representation to technicians and workers on boards of management will be set up to run the nationalised industries. The problems of planning will be tackled in such a way that the country will move in the direction of a developing and self-governing economy so that there is a gradual disappearance of India's dependence on foreign aid.

The Praja Socialist Party stands for an independent foreign policy. It is opposed to military alliances. The Party will judge international events on the basis of justice and equity and will protect the vital interests of the nation. It aims to preserve and strengthen the United Nations as an instrument of collective security and while developing foreign relations the Party will not lose sight of the fact that in the Afro-Asian world India has a significant role to play in co-operation with other friendly nations. Settlement with China without vacating aggression is not in the national interest and the recovery of territory lost to China and Pakistan will receive the Party's highest priority. The Party extends its wholehearted support to the Tibetan people's struggle for freedom against China's oppression.

The Party aims for self-sufficiency in every branch of weaponry, nuclear as well as conventional, to strengthen India's defence on all fronts. With the growing collusion with China and Pakistan, the threat to India's security having increased manifold the Party considers that the controversy—'Atom for peace or for war'—is irrelevant. What is needed at present is harnessing the atom for peaceful development as well as for the manufacture of nuclear weapons as a deterrent to the aggressors who threaten India's freedom and sovereignty. Kashmir, the Party believes, is an integral part of India and its accession is final and irrevocable.

The Congress regards the Praja Socialist Party point of view too much doctrinaire, dogmatic and vague to be of any practical value. The Praja Socialist Party, on the other hand, regards the Congress as a reactionary and anti-democratic organization as under its rule the "Government has sought to make the administration all-enveloping, has systematically pulverised independent organizations and has not hesitated to disrupt the emerging countervailing forces against bureaucracy and authoritarianism in the infant democracy. The fast expanding administration, which sucks up all power and initiative, itself reeks with corruption, and at the grass roots where the administration impinges on the lives of the common folk it is at once inefficient and oppressive." The 1967 Election Manifesto appealed to the people to give their unequivocal verdict on the performance of the Congress "which has sharpened inequalities, stifled people's liberties, encouraged corruption and has exposed through its weak-kneed policies nation's frontiers to intrusions by hostile neighbours."

Efforts have recently been made to merge the Praja Socialist Party and the Socialist Party. In spite of the best efforts on both the sides there could not be an acceptable agreement and both the Parties stand asunder divided and confused without any certainty of their future. At least this is how an impartial observer will see.

**The Communist Party.** The Communist Party rose in the course of India's struggle for freedom as a result of the efforts of the Indian revolutionaries who drew their inspiration from the Great October Revolution. "The Communist Party of India," reads the Party's Constitution, "is the political party of the Indian working class, its vanguard, its highest form of class organization. It is a voluntary organisation of workers, peasants and of toiling people in general, devoted to the cause of Socialism and Communism." The aim of the Communist Party is the achievement of power by the working people; the establishment of people's democracy led by the working class, based on the alliance of the working class and peasantry, and the realisation of Socialism and Communism. Its programme includes defence of the vital interests of the masses, steady improvement in their living conditions and abolition of social and economic inequalities. "It fights against all obstructionist conceptions and practices such as communalism, caste, untouchability and the denial of equal rights for women. The Communist Party upholds freedom of conscience of the rights of all minorities. It fights for rights and welfare of the people of tribal areas.... Fighting against all separationist and disruptionist trends and movements, the Communist Party struggles for balanced development of all regions, for equality and equal treatment for the people of all linguistic regions as a sure foundation of Indian unity."

The 1967 Election Manifesto outlines the programme for immediate measures. With the implementation of this programme the Communist Party intends to save the country from "the present crisis, stimulate production in industry and agriculture, ensure at least minimum needs of living good life, strengthen and extend democracy and avert the danger of India falling a helpless victim to American neo-colonialism." The broad features of the programme are: total elimination of foreign monopolies, annulment of all collaboration agreements, taking over by the State of all foreign trade, effective measures to curb the monopolists and to break up in particular the 75 monopoly houses exposed in the Monopolies Commission Report, replacement of the Fourth Plan by a People's Plan, nationalisation of banks, mopping up the accumulated wealth of the monopolists and former Princes, overhauling the entire present tax structure, abolition of land revenue to be replaced by a steeply graded tax on agricultural incomes, with exemption for all uneconomic holdings, democratisation and reorganisation of the public sector, assurance of minimum need-based wage, enforcement of effective and far-reaching land reforms, wider power and authority, particularly in economic and financial matters, be given to the State.

The Party believes that in order to ensure rapid and faithful implementation of urgently needed democratic reforms the first step is to clean up and overhaul the State administration. With this end in view the Parliamentary system need be strengthened by abolishing the Emergency Powers of the President and his power to dismiss a State Government so long as the latter enjoyed the confidence of the Legislature. The institution of the Governor will be abolished and the costly and superfluous Upper Houses be substituted by Standing Committees with representatives of all parties. Proportional representation will be introduced in all elections and judiciary separated from the executive. Police administration



shall be reformed and handed over to the local elected organs of the people.

In the struggle for its immediate as well as ultimate objectives, the Communist Party is guided by the philosophy and the fundamental principles of Marxism-Leninism "which only show the toiling masses the correct way to put an end to the domination of exploiting classes and the establishment of a social society. It combats tendencies of revisionism, dogmatism and sectarianism in all their manifestations."

The methods of the C.P.I. to achieve its objects had till yesterday been the familiar agitational and direct strike and sabotage, and they were in conformity with the teachings of Marx and Lenin. Today, the Soviet Communist Party's thesis has undergone a revolutionary change and it is now admitted that a peaceful social change is possible and that where a parliamentary form of government exists the transformation of a capitalistic society into a socialistic community can be achieved without a violent revolution. This is virtually acknowledging the validity of the democratic view, and revising the old Marxian theory of class war and proletarian revolution. Explaining the implications of the political revolution adopted by the Fourth Congress of the C.P.I., held at Palghat, Ajoy Ghosh, then General Secretary of the Party, expressed his Party's agreement with the new Soviet Communist Party's thesis. The Party's Constitution now provides that the Communist Party of India "strives to achieve full democracy and socialism by peaceful means. It considers that by developing a powerful mass movement, by winning a majority in Parliament and by backing it with mass sanctions, the working class and its allies can overcome the resistance of the forces of reaction and ensure that Parliament becomes an instrument of the people's will for effecting fundamental changes in the economic, social and State structure."<sup>28</sup>

The Communist Party stands for foreign policy based on the principles of **Panch Sheela**. It advocates for peace and peaceful co-operation between all countries on the basis of full freedom and equality of all people and nations. It supports the anti-imperialist struggles of the colonial and dependent peoples. It favours, despite the continued hostile attitude of China, to explore all avenues for a peaceful settlement with China either directly or through the good offices of friendly neutral powers and proposes a No-War pact to China. As regards Pakistan the Party's attitude is to safeguard the Tashkent spirit and to work for the further realisation of normal relations between India and Pakistan. Over the issue of Kashmir efforts should be made for a lasting accord with Pakistan by making the existing cease-fire line as the international boundary with mutually agreed adjustments. India should quit the Commonwealth—the link which gives India no advantage whatsoever.

**Communist Party of India (Marxists).** There was a split in the Communist Party of India after Vijayawada Congress of 1961. The split in the Communist movement, according to the Communist Party's Election Manifesto (1967), has seriously affected the mass movement as well as the struggle for forging broad unity of the Left and democratic forces.

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28. Constitution of the Communist Party of India adopted at the Extraordinary Party Congress, Amritsar, April 1958.



The Communist Party of India, the Communist Marxists claim, is a group of Dange revisionists out to pursue their opportunist line of class-collaboration. Taking advantage of the bourgeois chauvinism raised in connection with India-China conflict, the revisionists "joined hands with the bourgeois-landlord government (Congress) to open the country to American penetration, the dire effects of which they are seeing today." The revisionists (Communist Party of India) have neither ideologically nor organisationally any right to call themselves by the old name. The Communist Party of India (Marxists), they claim, is the only party that stands firmly and consistently for Socialism.

The Communist Party of India (Marxists) aims at socialisation of the means of production and this can only be achieved under a proletarian State alone. It is in the proletarian State that exploitation of man by man can be abolished and, thus, help to solve the problems of poverty and impoverishment. The Party firmly believes that the road to socialism can be opened only through the establishment of a State of People's Democracy led by the working people and replacing the present bourgeois-landlord State, led by the big bourgeoisie. This can be achieved only by developing determined mass struggles on the basis of growing unity and consciousness of the people. The Party works determinedly for organising people's struggle for livelihood, democracy and power. It believes and advocates in **bandhs**, **gheraos** and student struggles. The Election Manifesto of the Party said, "The mighty Bengal Bandhs, the Kerala, Bihar and U.P. bandhs have set the pace for the new movement. Millions have participated in these struggles and braved the firing squads of the police to defend their livelihood and liberties. These have been followed by the mighty wave of student struggles which the government seeks to put down by sheer terror. There have been big struggles of the working class, salaried employees and finally the employees of the government.... Never before since independence India witnessed such mighty struggles." The Party, the Manifesto further said, "with its militant and revolutionary tradition calls upon the people to rout the Congress and endorse the Party's electoral programme which alone shows a way out of the present critical situation."

The Party stands for the sovereignty of the people, annulment of the Emergency powers of the President, proportional representation, regional autonomy for tribal areas, and equal rights for all citizens, equality of all languages, widest autonomy of the States comprising Union of India, and abolition of the institution of Governors. On the economic side, the Party stands for taking over of landlords' land and its distribution among agricultural labour and poor peasants gratis, cancellation of debts owed by peasants, agricultural workers and small artisans, equitable distribution of food to the people of urban and rural areas, state trading in foodgrains and entire surplus of the produce of landlords and rich peasants to be compulsorily procured. Effective price control is sought through nationalisation of banks, State trading in foodgrains, etc. Drastic reduction in taxation is proposed and taxation on all necessities of life is to be abolished. The Party proposes reduction in defence expenditure, abolition of land tax, irrigation cess and other cesses and surcharges on uneconomic holdings. The Party will stop all further American aid, impose moratorium on all foreign payments, nationalise all foreign trade and all for-

eign capital in plantations, mining, oil, refineries, industry, shipping and trade.

With relation to internal trade and commerce the Party champions nationalisation of banks, monopoly concerns and other big industry wherever immediately necessary. A people's economic plan of development and reliance will be initiated. Development of public sector with the utmost rapidity will be undertaken and private sector and profits therefrom will be strictly controlled.

In international relations, the Party stands for independent foreign policy based on opposition to imperialism, especially American imperialism, colonialism and neo-colonialism and support to all freedom struggles. It believes and supports the policy of co-existence and friendship with the peace-loving countries and a firm solidarity with Afro-Asian people. Break with British Commonwealth is its avowed object. It firmly believes and will strive for peaceful settlement of dispute with Socialist China and creation of friendly relations with China in the interest of Asian freedom. India and China understanding to be made the basis of a broad front against American imperialism. The Party advocates peaceful settlement of dispute with Pakistan.

**Bhartiya Jan Sangh.** The Bhartiya Jan Sangh came into existence on the eve of the first General Elections under the leadership of late Dr. Shyama Prasad Mukerjee. It is really the organisation of the Rashtriya Swayam Sewak Sangh workers and believes in the ideal of "one country, one culture and one Bhartiya nation". The Jan Sangh did not do well in the first General Elections and could secure only 3 seats in the Lok Sabha and 34 seats in the State Legislatures mainly in Northern India. In the second General Elections it secured 4 seats in the Lok Sabha and 46 in the State Legislatures; 4 in Bombay, 10 in Madhya Pradesh, 9 in Punjab, 6 in Rajasthan and 17 in Uttar Pradesh. But the third and fourth General Elections have raised the stature of the Party and its voice counts both in the Lok Sabha and the State Legislatures. In Madhya Pradesh it now commands 78 Assembly seats, in Rajasthan 22 and U.P. 97. In the Lok Sabha its strength is 12.<sup>29</sup>

Early in 1956, there were abortive attempts to merge the Jan Sangh and the Hindu Mahasabha. It was disclosed by the General Secretary of the Sangh that the merger of the Hindu Mahasabha, Ram Rajya Parishad and the Jan Sangh into a single party would make it possible to throw its doors open for all the citizens of India irrespective of caste and religion. But the talks did not succeed.

At a meeting of the Working Committee of the Sangh held at Poona in October 1956, it was decided to make the demand for "decentralization of political and economic powers through encouragement of small and cottage industries and provision of adequate scope of free enterprise" as the main slogan of the Sangh in the General Elections of 1957. The Working Committee decided to base its election propaganda mainly on economic issues to focus the attention of the electors on the "totalitarian trends inherent in the concentration of economic power in the hands of the States as envisaged in the Second Five-Year Plan."

29. As in April 1968.

The objective of the Bhartiya Jan Sangh is the rebuilding of Bharat on the basis of "Bharatiya Sanskriti" and "maryada" and as a political, social and economic democracy, guaranteeing equality of opportunity and liberty of person to all citizens so as to build up a prosperous, powerful and united nation—progressive, modern and enlightened, able to withstand the aggressive designs of others, and to exert herself in the comity of nations for the establishment of world peace. The main desideratum of the country's economic system, as of its polity, should be the all-round development of the individual. That system is the best which aids man to fulfil his requirements and brings happiness, that is, which promotes all-round welfare. A system which advances his economic good, but impedes his progress in other directions cannot be considered beneficial. The focal point of interest for every economic system should be man.

The Election Manifesto of the Party in 1967 is pledged to strengthen sentiments of national unity and bring about a Unitary State with decentralization of powers to the lowest levels. It will abolish Legislative Councils in the States and overhaul administration so that it is freed of bureaucratic ways of red-tapism and corruption. It promises cheap and speedy justice within the reach of everybody. It will strive to establish economic democracy with equal opportunities for development to all and with no chances of exploitation. Small industries will be the basis of industrial planning and Indianisation of mining, tea plantation, coffee, rubber and such other industries as are in the hands of mainly foreigners. Labour will be a co-sharer in the management and profits of industry. The Party will encourage mixed economy. It will guarantee a minimum standard to all citizens and shall fix a maximum of Rs. 2,000 as expendable monthly income.

The Bhartiya Jan Sangh does not profess the creed of non-alignment. It will follow an independent foreign policy and will enter into bilateral alliances with countries irrespective of their allegiance to the two power blocs, on the basis of reciprocity and mutuality of interests. It is not prepared to have any talks with China and Pakistan unless they agree to vacate aggression. The Party will recognise the Government of Taiwan provided the latter recognises the territorial frontiers of India. It has faith in the ultimate unification of India and Pakistan and will welcome any move to bring the two States closer, provided the move is not prompted by any third party.

**Swatantra Party.** Swatantra Party is ten years old now and during the short span of its political career, it has attained parliamentary status, both at the Centre and in the States. From the beginning the Swatantra Party became the focus of the attention of the political life of the nation. Its promoters predicted a promising career for the Party as they had believed that it could save the country from the "naked totalitarianism" of the Congress. K.M. Munshi, addressing the preparatory convention of the party at Bombay on August 2, 1959, said that "bit by bit we are going towards naked totalitarianism. At one time the slogan of "Co-operative Commonwealth" was coined. It was changed into "Socialist Pattern" which then became "Socialism". Munshi further added that he did not know what the next stage would be. While analysing the reasons for promoting the Swatantra Party, C. Rajagopalachari, its founder, said

that "we feel that the Congress is becoming Communist" and the Congress rulers were "lowering the value of **Dharma** and heightening the value of money and property."

The Swatantra Party came into being in opposition to the Nagpur resolution of the Congress on co-operative-farming which, according to Ratnaswamy Mudaliar, the founder-member of the Party, "provoked people, resulting in the new Party taking shape." The basic impulse of the Party is, thus, economic, not ideological. K.M. Munshi declared at the National Convention of the Party held at Patna on March 21, 1960, that "the common man has been the first victim of the policies of the ruling party. He has been denied the basic needs. He is faced with a perpetual food crisis. The food production is underplanned, underestimated and under-financed. To this sense of uncertainty has been added the ever-present dread of soaring prices..." The reason for this unfortunate situation, Munshi said, was not far to seek. "The leadership of the ruling party was obsessed with one type of development which it considered the panacea for all evils: industrialisation imposed from the top under unicentral planning, direction and control on the Communist pattern." Munshi further said that the nominated super-Government, the Planning Commission, planned, devised, sanctioned and controlled all welfare activities without any responsibility to Parliament. It was the sole judge of grants and appropriations. Legislation even in the States had to be approved by it.

Thus, the Parliamentary Government was circumvented. Power and initiative were concentrated in the hands of the party leadership, a totalitarianism pure and simple. The result was in the words of Munshi, "we left the Congress when the Congress left democracy." People see around them administrative mal-functioning checking the free play of economic endeavour. State-sponsored heavy industries and expanding State-owned sector have slowed down the rate of public efforts to stimulate growth. Ever growing corruption and increasing dependence on the Government are becoming all but universal. The policy of the Party declared that "the people who keenly desired to have good government have watched with resentment the growing maladministration, partisanship and corruption in the country, the manoeuvres and intrigues of those in power, their indifference to grievance, the destruction of social bonds by thoughtless social legislation and the neglect of the religious spirit which inspires selfless conduct... To this sapping of the national moral fibre must be added the present humiliation of submission to foreign occupation of part of our soil."<sup>30</sup>

The Swatantra Party expresses its unshakable faith in democracy and aims to restore the Constitution of India to its 1950 integrity. It would maintain the rule of law in the fullest measure and restore to the people their fundamental rights untrammelled by any kind of **restriction**. It would respect the right of religious freedom; the right to an undisturbed

30. *The Hindustan Times*, New Delhi, August 3, 1959.

31. Speech of K.M. Munshi at the National Convention of the Swatantra Party, Patna on March 21, 1960—*The Hindustan Times*, New Delhi, March 22, 1960.

32. *The Hindustan Times*, New Delhi, March 22, 1960.



family life and property; the right to free economic activity within socially desirable regulations. In pursuit of this the Planning Commission would be reduced to its legitimate function of planning responsive to the wishes of the people. It would not be allowed to dominate the life of the country as an instrument of authoritarian party leadership.

The Party, thus, concedes to the individual the urge of self-expression through economic activities of the people's own choice and they must be given free play within socially desirable regulations. Incentives have to play their legitimate part, uncrippled by heavy taxation, excessive Government interference and cumbrous red tape. People have to feel certain that they would be left to enjoy the fruits of their endeavour. Such measures alone would increase the scope for voluntary activities, provide the citizens with varied avenues for their talents, and thereby strengthen the basis of a democratic society. To put it in the words of C. Rajagopalachari, the Swatantra Party would try to establish the rule of "**Dharma.**" **Dharma**, to him, "is greater than religion. It is common to all religions in India and outside. **Dharma** has nothing to do with any particular religion or God. Every man can ask his conscience what is the right thing to do and that is **Dharma.**" **Dharma** is efficiency, justice, honesty—in fact, everything that should guide a man's conduct. "No Christian, no Muslim or any other religious minority," declared Rajagopalachari, "should be apprehensive when we talk of **Dharma.** When we talk of **Dharma** we talk of conscience of man."

The Swatantra Party regards enlightened self-interest as well as progress towards world unity as the bases of a sound foreign policy. It believes that the concept of non-alignment has lost all meaning after the aggression of China and Pakistan and consequently foreign policy needs to be reviewed and brought into closer relation to the realities of the international situation. Proper defence alliances with reliable powers are not only expedient but legitimate. The Party regards Communist China as the principal menace to freedom in Asia and calls for the building of a system of regional security by the countries of the South and South-East Asia in which it would like to see India play its proper part. In this context the Party supports the Government and the people of South Vietnam and their allies in resisting the aggression and expansionism of the Communist China and its North Vietnamese satellites. The Party stands pledged to a firm and vigilant policy in dealing with Communist China and for active steps to end its aggression at the earliest possible moment. While the Swatantra Party believes that normal and friendly relations between India and Pakistan are required in the interest and security of the entire sub-continent, it is of the view that the Pakistan aggression in 1965 has deprived Pakistan of whatever *locus standi* it might have had in regard to the Kashmir problem. The Party stands for the liberation of Tibet and recognition of Dalai Lama as the Head of the Government of Tibet in exile.

The Party's policy has been developed along three well-defined lines. In agriculture the Party upholds the right of the self-employed peasant-proprietor to own, manage and cultivate his land without let or hindrance by the State. In industry it would limit State intervention to those spheres in which this would assist and supplement and not compete with or extin-



guish private enterprise. Finally, the Party stands for the original Constitution of 1950 and for the maintenance of the guarantees in regard to freedom of trade and employment and to just compensation for any property acquired for public purposes. Realistically speaking, it is a mistake to equate this with *laissez-faire* or with a politically static attitude. But at the same time, to accuse the Congress of a wilful or even accidental diversion of its ideology to Communism is a naked untruth. If the widening sector of State influence in the life of the people in India and as a concomitant to that the expanding sphere of the so erroneously described bureaucracy is to establish Communism, then, Britain too, has become Communist because her commitment to a Welfare State compels her to extend her sphere of activity, controlling and regulating a part of the country's social life. There is, however, much substance in the exposure of the defects in the Congress policies: all-pervading inefficiency, corruption and dishonesty in administration and the blind adulation of Congress leadership.

But the affairs of the Swatantra Party are now in a mess. It has failed to consolidate the gains it made in the 1967 General Elections when it secured 42 seats in the House of the People (Lok Sabha) as against a mere 18 in 1962. Even in the States where the Party had improved its position only two years back it has been losing ground of late. A major Party revolt in Gujarat was followed by unseemly wrangles among the leaders. It suffered serious electoral reverses in Rajasthan, Haryana, Bihar, Uttar Pradesh and Punjab. The Party had cashed in on the anti-Congress mood in the country in 1967.

The Swatantra leaders must recognise that the Party's programme has little appeal to youth or labour. Its public image is that it is a party of rich men which stands for vested interests. Its zealous espousal of the cause of the Princes on the privy purse issue confirmed the common belief. As for anti-statism, the main Swatantra plank, it has lost much of its rationale as some of the leaders of the Party have begun to talk vaguely in terms of a "Gandhian type of socialism." The Swatantra started off as a secular party, giving itself an image clearly differentiated from the Jan Sangh. But even this differentiation is beginning to get smudged. It was reported that N.G. Ranga came to Bhubaneshwar, to preside over the Party's convention in October 1968, after addressing an RSS rally in Nagpur where he identified himself with the ideals of Dr. Hedgewar, the founder of this Hindu volunteer organization. Although the Party had succeeded in keeping the cow out of the Election Manifesto of 1967, its candidates in Gujarat and Rajasthan made a ban on cow slaughter the principal political plank. The conflict within the Party over Kashmir offers another illustration of its difficulties in pursuing a distinctive secular approach. Rajagopalachari and M.R. Masani are not hostile to Sheikh Abdullah. They have, in fact, been trying to build bridges between the Kashmir leader and Indian public opinion, but N.G. Ranga had no time for the Sheikh to attend the All-Party Convention held in Srinagar last year. It was, again, Ranga and his friends in the Party who were keen on a merger with Jan Sangh. The merger idea fell through because the Jan Sangh leaders, barring Balraj Madhok, were against it. Now with the split in the Congress, political alliance with the Congress (Organization), headed by S. Nijalingappa, Jan Sangh and Swatantra is publicly advocated.

## CHAPTER XIII

### POSTSCRIPT

The rapid transformation of the political scene since the Bangalore session of the Indian National Congress (July 1969), especially the bitter power tussle, the internal squabbles in the party, and the running battle between Mrs. Indira Gandhi, the Prime Minister, and Mr. Nijalingappa, the Congress President, raises several issues which have a close bearing on the entire concept of Parliamentary Government in India. Can the Congress, now riven into two, continue to be the most dependable instrument of social change? What is to be the exact relationship between the party and Government, or more specifically, between the ruling party and the Ministry? Again, how long can a Prime Minister whose party no longer commands an absolute majority, remain in office without the active or tacit support of elements whom the Government regards as anti-national and hence unreliable? For the first time there is, for all intents and purposes, a minority Government in office at the Centre.

The organisational wing of the party in power is expected to work in close harmony with, and always be willing to be guided by and support, the ministerial wing. The head of the organisation, the party President, and the Leader of the Parliamentary wing, who is the Prime Minister, should, in theory at any rate, always work hand in hand in order that the party's policies and election programme (which in effect is a pledge to the electorate) are duly implemented. It is the voter who is the final judge, and he gets the opportunity to pronounce his verdict when the country goes to the polls. The polemics indulged in by the old-line, conservative members of the Congress Syndicate on one side, and Mrs. Gandhi on the other, all cover up the basic purpose—control of the party machine. The "unity resolution" of August 25 proved a sham. Both wings flouted it with a vengeance. The truncated Working Committee, which met at the AICC office on Jantar Mantar Road, New Delhi, on November 12, 1969, expelled Mrs. Gandhi from the Congress for indiscipline, but her supporters, who met at her residence soon after, questioned the legality of this apparently vindictive action. The Nijalingappa group accused Mrs. Gandhi of encouraging "a personality cult that is threatening democracy in the organization" and called upon members of the Congress Parliamentary Party to elect a new leader. But their calculations went awry, and a large majority of the Congress Members of Parliament reaffirmed their confidence in Mrs. Gandhi. The other half of the Congress Working Committee (10 members out of 21) which supported her, hit back with a counter charge in a resolution passed the same day stating, *inter alia*, "Democracy and discipline within the Congress Party organisation have been reduced to a mockery by a small coterie equating itself with the entire organisation." After the crucial test of strength in which Mrs. Gandhi triumphed (with a majority of about 220 out of the total Congress

M.Ps. numbering 282 supporting her) she pledged to re-dedicate herself "to rally the people to the cause of socialism and democracy and to rejuvenate the Congress." Later, Mrs. Gandhi's Congress "ousted" Mr. Nijalingappa from Congress Presidentship. These expulsions and counter-expulsions have created a piquant situation.

For over two decades after Independence, the Indian National Congress has governed the country and has dominated Parliament and State Legislatures, the other parties being much too small to offer an effective challenge to it. Because of sheer numbers in Parliament and State Legislatures and the massive support it commanded in the country for two decades after Independence, it experienced no difficulty in taking office. Except on very few occasions when there were some differences of opinion between the Prime Minister, Jawaharlal Nehru, and the Congress President in office at the time, there were no conflicts between the two wings of the Congress. With the disappearance of the dominating personality of Nehru from the scene, differences have been simmering, and the issue has now come to the surface.

Such tussles between the rival wings of the ruling party are, however, not unusual in parliamentary democracies. The battle between Mrs. Gandhi and Mr. Nijalingappa, representing the ministerial wing and the organisational wing respectively, has had the same result as the prolonged debate between Clement Attlee as the Labour Prime Minister of Britain and Harold Laski, then Chairman of the Labour Party. Attlee finally had the upper hand, clinching the issue once for all that in Parliamentary democracies the larger and the more important responsibility is the Prime Minister's. In New Delhi, the sharp differences between Mrs. Gandhi and the Congress President were mostly personal and born of pique and prejudice. They were not ideological because both claimed to be votaries of socialism. Both wings have declared their determination not to retreat a single step from the resolutions passed by the Congress at the Avadi, Bhubaneswar and Bangalore sessions. Whether the rift hastens the process of creating a truly socialist pattern of society remains to be seen.

Throughout the wordy duels with the Congress President after the defeat of N. Sanjiva Reddy in the Presidential contest, Mrs. Gandhi maintained that the discretion of the Prime Minister could not be fettered by the organisational wing in the selection of Ministers and other matters which fall exclusively within her jurisdiction. In this she has the British and Australian practice in her favour. R.T. Mackenzie, in his classic book "**British Political Parties**", points out that the primary function of the mass political organisations, Conservative and Labour, is to sustain two competing teams of parliamentary leaders between whom the electorate as a whole may periodically choose. When the electorate has made its choice, the leaders of the successful team don the garments of authority which are provided under the cabinet system and they retain this authority so long as they retain the confidence of their followers in Parliament (and of course the electorate). Most Governments at one time or other find it advisable to make concessions on policy issues to the clearly expressed views of their followers outside Parliament. But they make such conces-

sions much more frequently to their followers in Parliament on whose day-to-day support in the division lobbies they have to depend.

The rift in the Congress Party is now formal and complete and the country witnesses the strange, unprecedented spectacle of the same party forming the Government as well as the official Opposition. Polarisation of forces has not yet taken place in the country as a whole, but the split in the Congress, though a deplorable development from the ethical standpoint, has had one major result which has great significance for students of Comparative Governments. For the first time since the country gained Independence, the Indian Parliament has an officially recognised Leader of the Opposition. Till now, no opposition group had sufficient strength to claim the status of the Opposition. After the 1967 General Election, the largest group on the Opposition benches in the Lok Sabha (House of the People) was the Swatantra Party with a strength of 42. Following the rift in the Congress Parliamentary Party, Mrs. Gandhi's supporters numbering about 210 constitute the Government with this group bearing the name Congress (Government); the Syndicate wing known as the Congress (Organisation) forms the Opposition and is recognised by the Speaker as such. This is not a development to be passed over as merely a temporary phase of the internal life-and-death struggle of the Congress itself. The split appears to be permanent, with about 75 per cent Congress Members of Parliament behind Mrs. Gandhi.

The emergence of the Leader of the Opposition in Parliament will probably be an important landmark in the history of Parliamentary institutions in India. In the British Parliamentary structure the Leader of the Opposition as the shadow Prime Minister has a very important role to play. By virtue of his position and importance as an alternative Prime Minister, he has an official status and a regular salary and he ranks high in the political hierarchy.

A regular Leader of the Opposition in Parliament is expected to offer his fullest co-operation to the Government of the day, irrespective of its political complexion, in order that the business before the House is expeditiously disposed of in the national interest. Opposition for the sake of opposition is a regrettable feature of Legislatures in some developing countries. Constructive opposition is what is expected from a responsible opposition, and this is what the officially recognised Leader of the Opposition is paid for out of tax-payer's money.

The requisite standard of Parliamentary Opposition may take some time to develop in India. Though the Congress (Organisation) is obsessed with political and personal prejudices against Mrs. Gandhi, it should be the endeavour of both Congress groups in Parliament to evolve healthy conventions so that the Parliamentary system in the country may be further strengthened. The emergence of a responsible and cohesive Opposition in the Indian Parliament would therefore be a welcome step for the smooth working of democracy. A viable democratic alternative has been lacking in this country since Independence and anything that tends to promote a well-defined two-party system and gradual elimination of small, politically ineffective groups, should be welcomed from the political and constitutional standpoints. The fact that vital changes have taken place



in the ruling party peacefully, without the country feeling the tremor, is admittedly a tribute to Indian democracy.

With the formal split in the Congress, one-party rule in the country ends. To the extent that this would tend to curb dictatorial tendencies born of a massive majority behind the Prime Minister, it would be a salutary development on the whole. A huge, unshakable majority at times leads to complacency, inaction and general lethargy on the part of the Ministry. With the possibility of effective challenges from the Opposition to be faced at every crucial step, the Government would have to remain constantly on its toes. What is more significant from the voter's point of view, the party in power has to justify its existence by a creditable performance during the time span allotted to it. If it does not push through its programme for social welfare and fails to carry out the Directive Principles of State Policy, it will be answerable to the electorate in the next general election and may be ousted by another party which pledges better performance.

An unwelcome sequel of the split in the nation's major political party is the relative instability in the administration. Stability is a vital factor in politics. Political permutations and combinations, following the shifting alliances between political parties in a legislature, merely lead to confusion, endless compromises in governmental policies and watering down of ideologies to keep the flock together and ensure the support of some other groups. When no single party commands a majority on its own, it has to depend for political survival on splinter groups and this dependence makes for more and more political horsetrading—an evil that makes nonsense of a healthy democratic set-up.

Mrs. Gandhi established her leadership when Parliament assembled for its winter session on November 17, 1969. The voting on the Adjournment Motion on India's participation in the Rabat Islamic Summit was 306 votes against and 140 in favour, giving Mrs. Gandhi's Government a safe majority of 166. Voting on other crucial issues may not disclose such solid support behind the Prime Minister, but it is clear that for many months to come Mrs. Gandhi will continue to be the only member of the Congress to have a majority behind her, though it may at times be constituted of diverse elements. Her total backing may, therefore, vary, depending upon the nature of the issue and the alignment of the opposition groups which are bound to determine their stand on each measure separately to suit their poll programmes and other public commitments.

In another respect, too, Parliament's winter session marked a watershed in the evolution of Parliamentary democracy in India. Apart from the fact that Parliament had, for the first time, a recognised 60-strong Opposition (now 65), there is the notable fact that at the Centre there is now a Government that has lost its absolute majority. For the present, there is no threat to Mrs. Gandhi's Government because of the support assured by the DMK, the majority of Independents and some Socialists. But how long this support lasts remains to be seen. There are signs already of discontent and frustration among the radicals who expected an early peaceful revolution.

The right of dissolution of Parliament, which every Prime Minister



possesses, is Mrs. Gandhi's trump card. Almost every Member of Parliament inwardly fears a dissolution because of the high expenses of fighting an election and the marked uncertainty of the poll results in view of the multiplicity of candidates resulting from the split in almost all parties. It is clear, however, that the Prime Minister would not be making the right use of the weapon of dissolution if an alternative Government were possible. There is really no moral justification for making the nation pay for what is essentially the Congress Party's domestic quarrel.

The Ahmedabad and Bombay sessions of the rival Congress factions (held in the third and fourth weeks of December, 1969, respectively) have cleared the decks for them to function as separate entities and have thus formalised the split. At the plenary sessions the pent-up anger against each other was given free rein. The present crisis in the party was for months made out to be the result of conflict of ideologies between the progressives and reactionaries, between dynamism and *status quo*. But the resolutions of the two Congress sessions show that even though the break appears to be permanent, there are hardly any ideological differences between the two factions now. At the core is the personality conflict, the ideology merely providing a facade to the crisis. Specific doses of socialism have been adopted as a creed even by the Syndicate Congress. Between the Bangalore session, where the split began, and the two sessions at Ahmedabad and Bombay where the split was formalised, the Old Congress has moved to the left. Mrs. Gandhi, on the other hand, after swerving sharply to the left in the immediate post-Bangalore period and raising visions of revolutionary changes, has returned hastily to the starting point.

The net result is that both Congress parties now occupy almost the same ideological ground left of the Centre. At Ahmedabad the leaders of the Old Congress spent a great deal of time trying to prove that Mrs. Gandhi was the root of all evil, but personal invectives were happily absent from the Bombay session. The Ruling Congress leaders have abandoned some of their ultra-radical postures to conform to the dictates of reality. The great economic package eagerly looked forward to by large sections of the people was reduced at Bombay to a few specific items, with the emphasis shifting from high-sounding slogans to implementation. Bringing her over-enthusiastic followers away from the heady world of slogans to solid earth was a tough task for Mrs. Gandhi, but appropriately enough, she disciplined the 'Young Turks' in good time.

The relative strength as shown by the Ahmedabad and Bombay sessions indicates that neither faction can by itself deliver the goods or constitute a stable Ministry at the Centre. The split, therefore, implies a period of uncertainty during the Seventies. That both parties fully recognise the implications of the split is clear from the moves and counter-moves for forming party alliances with like-minded groups. Old foes have overnight become friends and allies working for a common cause, and they are being avidly wooed. The inevitable result will be a period of coalitions. Whether the new re-alignment of political forces will work effectively is however anybody's guess.

In the course of a few months the political platforms projected by the various parties have acquired a striking similarity. The Congress

split has, thus, done some good to the political set-up—all-round radicalisation of politics and facilitating the polarisation of forces. Even Morarji Desai now believes that it is right and proper for the Congress to forge alliances with parties such as the Jan Sangh and Swatantra with whom, until recently, he sharply disagreed. To the extent that the new trend would promote electoral understandings and United Fronts, it is welcome. Splinter groups and multiple parties hamper the smooth working of democracy and lead to ineffective governments. Fewer and larger parties would therefore be desirable.

Some observers believe that dissolution of Parliament and fresh elections are inevitable during 1970, though Mrs. Gandhi has denied any intention to appeal to the electorate for the final verdict. Even if early elections are held, a clear picture of the political spectrum is unlikely to emerge just yet, because of the political confusion and the absence of distinct identities from which the voter can choose. By mid-seventies, perhaps, the mist would clear and the country would then know who can deliver the goods and who cannot.





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